IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,508

DAVID TAL-MASON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner was the Appellee in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the Appellant and the prosecution, respectively, in the lower courts. In this Brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the Appellate court's opinion.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent submits that Petitioner's statement of the Case and Facts to the extent that it is an accurate, non-argumentative recitation of proceedings in the trial court are true. However, Appellee asserts the Statement of the Case and Facts must be striken for the following reasons:

Florida Rule of Appellate Procedure 9.120 provides that a petitioner's brief on jurisdiction shall be "limited solely to the issue of the Supreme Court's jurisdiction." The Fourth District's holding sub judice was very specific upholding the constitutionality of §921.161 and its non-applicability to pre-sentence confinement in state hospitals and rehabilitation centers following this Court's opinion in Pennington v. State,

398 So.2d 815 (Fla. 1981), without reciting any facts of the case. See Appendix A, reported as State v. Tal-Mason, 492 So.2d 1179 (Fla. 4th DCA 1986). As it was stated by this Court in discussing the Court's jurisdictional powers granted by Article V, Section 3(b)(3) of the Florida Constitution:

> [T]he language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of Appeal. [Emphasis in original.] Jenkins v. State, 385 So.2d 1356,1359 (Fla. 1980).

Thus, Respondent would point out that although Petitioner may seek discretionary review of the Fourth District's Opinion which "expressly declares valid" §921.161(1) Fla. Stat.(1983), [Article V, §3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(2)(A)(i)], Petitioner may not look to the facts of the case as they appear from Judge Anstead's concurring opinion, or the record proper to support his Application for Discretionary Review. See, Jenkins v. State, supra; Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369(Fla. 1980); Reeves v. State, 485 So.2d 829 (Fla. 1986).

SUMMARY OF ARGUMENT

The same claim of denial of equal protection with reference to §921.161, Florida Statutes, as raised sub judice, was raised by the petitioner in Pennington v. State, 398 So.2d 815 (Fla. 1981). This Court there held that state hospitals are not jails, but treatment centers, with no incarceration or

punishment purpose. The Court then specifically declined to extend the statute's plain language to grant credit for time spent in a state hospital before sentence. The Fourth District Court of Appeal following Pennington, declared §921.161 to be contitutionally valid. Petitioner now seeks discretionary review of that decision under Art.V,§3(b)(3), Fla. Const.. Respondent submits that this Court having decided the issue in Pennington v. State, supra, should not have to revisit the matter again. Respondent, respectfully, urges this Court to decline accepting jurisdiction in this case.

REASON FOR DENYING THE WRIT

THE FOURTH DISTRICT COURT PROPERLY FOUND §921.161 FLA. STAT. VALID FOLLOWING THIS COURT'S MANDATE IN PENNINGTON V. STATE, 398 So.2d 815 (Fla. 1981).
[Restated]

As stated earlier, a Petitioner's brief on jurisdiction shall be "limited solely to the issue of the Supreme Court's jurisdiction." Fla.R.App.P. 9.120(d). Petitioner in his brief sets out two issues, and appears to be arguing the merits, rather than limiting itself to the jurisdictional question. This is an improper function of a jurisdictional brief, requiring the brief to be stricken.

Petitioner herein seeks discretionary review of the Fourth District Court of Appeal's opinion of August 20, 1986, pursuant to Art. V, §3(b)(3) Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(i). However, since the Fourth District Court

found §921.161 Fla.Stat. to be constitutional following the mandate of this Court in Pennington v. State, supra, there is no need for this Court to accept jurisdiction in this case.

Section 921.161(1) Florida Statutes, in pertinent part provides:

> A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentece shall allow a defendant credit for all of the time he spent in the county jail before sentence.

Chapter 916, Florida Statutes, provides for the procedures to be followed in determining competency and commitment for the purpose of treatment of mentally deficient and mentally ill defendants. The purpose of this Chapter is not to punish people like Petitioner who raise a claim of insanity, but to prevent an insane person from being tried or imprisoned for a crime when insanity lies behind what otherwise would be criminality. Once a defendant is found incompetent to stand trial, he is committed for the sole purpose of treatment; thus protecting both the safety of the public and the interests of the individual.

The prosecution against a defendant committed for treatment under §916.13, Fla.Stat. is suspended during the time he is under the care of the Department of Health and Rehabilitative Services. Dalton v. State, 362 So.2d 457,458 (Fla. 4th DCA 1978). The charges against any defendant adjudicated incompetent to stand trial due to mental retardation shall be dismissed, unless the trial court finds competent

substantial evidence that it is foreseeable the accused could become competent to stand trial. §916.145, Fla.Stat.; see also, Vasquez v. State, 11 FLW 548 (Fla. Case No. 67,659, October 30, 1936).

It is precisely the purpose of Chapter 916, Florida Statutes, and the suspension of criminal prosecution during commitment under Chapter 916 of the Florida Statutes that sets apart Petitioner, and similarly situated individuals, from all other criminal defendants kept in jail awaiting trial, or individuals sentenced and committed under the Mentally Disordered Sex Offender Statute Chapter 917, Fla. Stat. (1985).

Respondent points out that under statutory construction rules, §917.014 Florida Statutes, on which Petitioner relies for his equal protection claim, must be read in pari materia with the rest of Chapter 917. Specifically, §917.012(2) provides that the MDSO Statute applies to "offenders who have been sentenced for the commission of a crime involving a sex offense, who are not psychotic, and who suffer from a psychosexual disorder, but are competent and amendable to treatment." A review of Chapter 917, clearly shows that the Legislature through Chapter 917 decided that for different reasons, convicted mentally disordered sex offenders deserve special treatment.

Under Chapter 916, the State has a statutory obligation to provide care and treatment of persons who have been found incompetent to stand trial, in a facility set aside to provide psychiatric care. The Chapter does not promote any interest in

punishment, but only in the treatment of the person directed towards achieving competency to stand trial. That the mental wards of Florida State Hospital houses sexually dangerous persons, persons found to be incompetent to stand trial, as well as other prisoners who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish.

Petitioner's claim of denial of equal protection was addressed by this Court in Pennington v. State, supra, where it was held:

> [T]hose in jail and those in rehabilitative centers or state hospitals constitute two different classes of persons and that "there is no constitutional infirmity in reasonable classifications and in the treatment of different classifications different. [Citations omitted.]"...[thus] rehabilitation center time served need not be credited under equal protection mandates.
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> * * *
>
> Halfway houses, rehabilitative centers, and state hospitals are not jails. Their purpose is structured rehabilitation and treatment, not incarceration. Id. at 816.

This Court then declines to extend §921.161(1)'s plain language to require that credit be given in other circumstances than time spent in county jails. Id. 817.

Section 921.161, Florida Statutes, having been found to be valid in Pennington v. State, supra, by this Court, there is no need for this Court to revisit the issue. Respondent respectfully requests this Honorable Court to decline taking jurisdiction in this case.

CONCLUSION

Chapter 916 and Chapter 917 protect very different state interests. Section 917.014 was enacted under the general scheme of Chapter 917 to enhance the MDSO's specific legislative intent. Excluding persons declared incompetent to stand trial under §916.13 from the protection of §921.161 does not make §921.161 unconstitutional under an equal protection claim. Courts are required to interpret two apparently conflicting statutes in such a way that both remain in force. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla.1980). Section 917.014, Florida Statutes and Section 921.161(1), Florida Statutes, when view under their respective legislative intent can easily be construed to allow both to remain effective as both are constitutionally valid.

In 1980, Article V was amended to limit the supreme court's mandatory review of district court of appeal decisions to those declaring invalid a state statute or provision of the state constitution, and providing for discretionary review when a district court decision declares valid a state statute. This amendment was necessary due to the staggering number of cases reaching the Florida Supreme Court. The amendment thus turned the district courts of appeal into the courts with final appellate jurisdiction in most cases, thus freeing the Supreme Court to discharge its judicial policy-making function of clarifying the law and promulgating new rules of law. See Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983).

The Fourth District in the instant case reviewed the constitutionality of §921.161, and applying this Court's mandate in Pennington v. State, supra, to the facts of this case, found same to be constitutionally valid. The Fourth District having exercised its "error-correcting function" as the court of final appellate jurisdiction, this Court should not have to revisit the matter further.

WHEREFORE, Respondent respectfully requests this Honorable Court decline to accept discretionary jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by United States Mail to: JEFFREY M. LEUKEL, ESQUIRE, Counsel for Petitioner, Florida Institutional Legal Services, Inc., 2614 S.W. 34th Street, Gainesville, Florida 32608, on this 14th day of November, 1986.

Georgina Jimenez-Orosa

Of Counsel