

FILED

SID J. WHITE

NOV 21 1988

JOHN SCOTT THOMAS,

Petitioner,

v.

RICHARD L. DUGGER,  
as Department of Corrections  
State of Florida, and DEPARTMENT  
OF CORRECTIONS, State of Florida,

Respondents.

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

Case No.  
Original Proceeding

73347

PETITION FOR WRIT OF HABEAS CORPUS

PETITIONER, JOHN SCOTT THOMAS, by and through undersigned counsel alleges:

1. Jurisdiction. Jurisdiction vests in the Supreme Court of Florida pursuant to Article V, Section 3(b)(9), Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure and Section 79.01, Florida Statutes (1987). Van Tassel v. Coffman, 486 So.2d 528 (Fla. 1986); Lowry v. Florida Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985).

2. The Basic Facts Upon Which Petitioner Seeks Relief. JOHN SCOTT THOMAS, a Florida state prisoner, Inmate No. 101557, is incarcerated at the Orlando Correctional Center, Orlando, Florida.

3. Respondent, Hon. Richard L. Dugger, as Secretary, Department of Corrections, State of Florida, is the custodian of the person of Petitioner.

4. The Department of Corrections (DOC) is an agency of the State of Florida with headquarters at 1309 Winewood Boulevard, Tallahassee, Leon County, Florida.

5. All actions of Respondents described below occurred in Tallahassee, Leon County, Florida unless otherwise indicated.

6. Petitioner is presently serving three concurrent sentences of five and one-half (5½) years for the offenses of robbery [with a firearm] in Case No. 85-5397-CF and imposed by the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida imposed on 18 February 1986.

7. The sentence also includes a minimum mandatory sentence of three years imposed pursuant to Section 775.087(2), Florida Statutes.

8. Prior to the pertinent and operative times herein, the Department of Corrections adopted the policy of denying statutory basic<sup>1</sup> and incentive gaintime<sup>2</sup> credit on Petitioner's aggregated sentence of five and one-half (5½) years, prior to expiration of the statutory three (3) year minimum mandatory. During the service of the first three (3) years of his sentence, Petitioner's gaintime **has** been placed in a "void" status rather than being accrued for future credit to the end of the aggregated five and one-half (5½) year sentence.

9. The sentence is therefore being served piecemeal. Petitioner is being forced to serve two separate sentences, a three (3) year calendar sentence and a separate two and one-half (2½) year sentence upon which he duly receives gaintime credit.

10. It is the position of Petitioner that the Legislative intent<sup>3</sup> was that Petitioner serve an aggregated five and one-half (5½) year sentence with no gaintime deductions for the first three (3) years. It is further the position of Petitioner that the Legislative intent was that Petitioner, and all others similarly situated, serve a single sentence with gaintime credit being applied to and deducted from the end of the sentence leaving a single uninterrupted sentence of no less than three (3) years.

11. Petitioner is being illegally restrained by the DOC due to the "voiding" of his gaintime by the DOC **as** described above. If the gaintime he **has** earned during service of the minimum mandatory were credited on the aggregated sentence of five and one-half (5½) years, he would be entitled to immediate release.

12. Venue. Venue in a habeas corpus proceeding may lie in the county where an inmate, such as petitioner, is illegally incarcerated, Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969). However, time consuming

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Rule 33.11.0045(1), Florida Administrative Code.

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Rule 33.0065(1), Florida Administrative Code.

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Legislative History - Section 9, Chapter 74-383; Section 1, Chapter 75-7; Section 3, Chapter 75-298; Section 2, Chapter 75-76; Section 51, Chapter 83-215.

litigation in a multitude of counties may be avoided if the Supreme Court of Florida acts swiftly and decisively. See State ex rel Scaldeferri v. Sandstrom, 285 So.2d 409 (Fla. 1973).

RELIEF SOUGHT

WHEREFORE Petitioner prays the Supreme Court of Florida to:

1. Issue the writ of habeas corpus.
2. Order Respondents to show cause why Petitioner should not be immediately released from prison.
3. Release the Petitioner on his own recognizance or on bail pending resolution of the issues in this case.
4. Grant Petitioner such other relief as is deemed appropriate in the premises.

ARGUMENT AND CITATIONS

It is the position of Petitioner that if accrued gaintime were credited to the end of the sentence as prayed, Section 944.275(2), Florida Statutes, the statutory mandate of serving the designated calendar three (3) year sentence, would not be defeated. The net effect of the relief requested is to allow gaintime credit to be accrued during service of the minimum mandatory sentence. This credit should be applied to aggregated total sentence which would reduce the total sentence without affecting the minimum mandatory. The credit for gaintime on the aggregated sentence, when it exceeds the minimum mandatory, significantly reduces the length of time Petitioner, and others similarly situated, would otherwise be required to serve, and in this case due to the expiration of his three (3) year minimum mandatory, would entitle Petitioner to immediate release.

The DOC policy is to the effect that an inmate serving aggregated sentences exceeding the statutory minimum mandatory is eligible for no gaintime credit unless and until the inmate has expired the minimum mandatory. Using Petitioner's sentence structure as an example, until he expired his minimum mandatory sentence (81-2306), Petitioner was not eligible for any gaintime credit. Petitioner does not seek a reduction of the statutory minimum sentence, only gaintime credit earned during service of that minimum mandatory.

Section 775.087(2), Florida Statutes, under which Petitioner Thomas was sentenced, provides in part that persons who commit certain crimes and in the process use a firearm, shall be sentenced to a minimum

term of imprisonment of 3 calendar years notwithstanding the provisions of Section 948.01, adjudication of guilt **or** imposition of sentence shall not be suspended, deferred, **or** withheld, nor shall the defendant be eligible for parole **or** statutory gaintime under Section 944.275, prior to serving such minimum sentence. The statute makes no mention of the voiding of gaintime.

The DOC has adopted two regulations, Rules 33-11.045 and 33-11.0065, Florida Administrative Code. The "basic gaintime" regulation, Rule 33-11.0045(1), Florida Administrative Code provides in pertinent language:

No inmate committed to a minimum mandatory sentence for use of a firearm during the commission of a felony in accordance with Section 775.087, Florida Statutes, whose offense occurred on **or** after October 1, 1976 shall **be** eligible for any basic gaintime for the mandatory portion **of** the sentence.

Rule 33-11.0065, Florida Administrative Code, incentive gaintime provides in pertinent part:

(1) Ineligibility. No inmate committed to a mandatory minimum sentence for a firearm violation in accordance with Section 775.087, F. S., whose offense occurred on **or** after August 12, 1983, shall **be** eligible for any incentive gaintime award until completion of the mandatory portion of the sentence.

It is the position of Petitioner that **it** was the intent of the Legislature in enacting Section 775.087(2), Florida Statutes, that each person so convicted would serve a minimum three (3) year calendar term **of** incarceration. Nowhere in the Legislative history of the House **or** Senate Bills and respective debates <sup>\*</sup> is there any indication that the Legislature intended to deny accrual of gaintime credit during the minimum mandatory period. It was the intent of the Legislature that only the minimum statutory period not be reduced by gaintime award. The primary cases out of the District Court of Appeal, First Appellate District **of** Florida, are distinguishable.

Department of Corrections v. Powell, 504 So.2d 1250 (Fla. 1st DCA, 1986), held the above regulations and later amendments to Sections 775.087(2) and 944.27, Florida Statutes, banned the application of

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\*

which have been reviewed by Petitioner.

incentive ~~or~~ basic gaintime prior to the expiration of the mandatory minimum sentence. In the **words** of the court:

Consequently, the Department acted within its delegated legislative authority in enacting Rule 33-11.0065 and in following that rule, as well as the pertinent statutes, in denying appellees credit for incentive gaintime to be applied against their mandatory minimum sentences. (emphasis added).

Petitioner, THOMAS, is not asking for application of credit against the minimum mandatory.

He is asking for accrual of gain credit during the mandatory period to be applied against that unexpired portion of the sentence which exceeds the minimum mandatory sentence.

Accordingly, the case is ~~more~~ akin to Curry v. Department of Corrections, 423 So.2d 584 (Fla. 1st DCA 1982). Appellant Curry contended that Section 775.087(2), Florida Statutes, did not prohibit a prisoner from accruing statutory gaintime during the statutory minimum mandatory sentence. He was asking for credit for statutory and work gaintime accrued during that period of time. The District Court of Appeal, interpreted Section 775.087(2)(b), Florida Statutes, to mean that the statutory gaintime provisions do not apply until the minimum mandatory sentence has been served. Because the minimum mandatory gun law draws no distinction between the earning and accrual of gaintime, the Court declined to recognize "an exception to the mandatory gun law gaintime prohibition." Curry v. Department of Corrections, supra, 423 So.2d at 585. The District Court of Appeals affirmed in part and reversed and remanded in part on other issues. Apparently, for that reason, the issue has never been squarely presented to the Supreme Court of the State of Florida.

Petitioner Thomas received a 66 month sentence. ~~Were~~ he allowed basic statutory gaintime, that sentence would be reduced to 44 months. ~~Were~~ incentive gaintime which accrued during the service of the three (3) year minimum mandatory applied, after expiration of the minimum mandatory portion of the sentence, to the aggregated five and one-half (5½) year sentence, Petitioner would be entitled to immediate release. It is respectfully submitted that the procedures adopted by the DOC have, in effect, resulted in not only violating the Legislative intent and history of Section 775.087(2), Florida Statutes, but have also resulted in the unconstitutional service of a piecemeal sentence. "he practice and

procedure is in apparent disregard of the oft-repeated holding that a prisoner is entitled to pay his debt to society in one stretch and not bits and pieces. Segal v. Wainwright, 304 So.2d 446, 448 (Fla. 1974), citing Adams v. Wainwright, 275 So.2d 235 (Fla. 1973) and Brumit v. Wainwright, 290 So.2d 39 (Fla. 1973).

Petitioner therefore prays for issuance of the Great Writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General  
The Capitol, Tallahassee, Florida 32301

by hand/~~mail~~ this 21st day of November, 1988, and

Office of the General Counsel  
Department of Corrections  
1311 Winewood Boulevard, Building 6, Room 331,  
Tallahassee, Florida 32302

by ~~hand~~/mail this 21st day of November, 1988.

Respectfully submitted,



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RAHhh17b

xc: John Scott Thomas