IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 90,237

4th DCA Case No. 96-3641

Florida Parole Commission,
Petitioner,

v.

Mark Cooper,
Respondent.

ON CERTIFICATION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent, Mark Copper,[1] was the petitioner in the Circuit Court of the 17th Judicial Circuit, Criminal Division, Broward County, Florida and the appellant in the Fourth District Court of Appeal. The petitioner was the respondent in the trial court and the appellee in the district court. The parties will be referred to as they appear before this Honorable Court.

References to the record on appeal will be designated by the symbol "R." References to petitioner's appendix will be designated by the symbol "A." References to the petitioner's initial brief will be designated by the symbol "IB." References to the respondent's appendix will be designated by the symbol "RA."

[1] The respondent moves to strike the petitioner's reference to unsubstantiated aliases in its preliminary statement. These "aliases" have no relevance to this issues presented. These allegations, unwarranted and undocumented, are nothing more than a veiled attempt to prejudice the court.

ISSUE ON APPEAL

WHERE AN OFFENDER HAS BEEN CONVICTED OF AN OFFENSE WHICH DOES NOT QUALIFY FOR CONDITIONAL RELEASE PURSUANT TO FLORIDA STATUTE 947.1405, AND IS LATER CONVICTED OF OFFENSES WHICH QUALIFY FOR CONDITIONAL RELEASE SUPERVISION, AND IS CONCURRENTLY SENTENCED FOR ALL OFFENSES, DOES THE EXPIRATION OF SENTENCE FOR THE QUALIFIED OFFENSES, PRIOR TO THE OFFENDER'S RELEASE, PRECLUDE THE APPLICATION OF SECTION 947.1405 TO THE OFFENDER'S RELEASE FOR THE NON-QUALIFYING OFFENSES?

STATEMENT OF THE CASE AND FACTS

The respondent accepts the Statement of the Case and Facts set forth in the petitioner's initial brief, with the following additions and exceptions:

The respondent was convicted of grand theft in Broward County Circuit Case No 93-16779CF10A on December 21, 1993.[2] (R 71-75)[3] He was adjudicated and placed on five years probation. The respondent violated his probation and on September 1, 1996, was sentenced to four years Florida State Prison. (R 77-84) On that date, the respondent also plead to strong armed robbery, battery on a law enforcement officer and resisting arrest with violence in Broward County Circuit Case No. 94-16630CF10A. The respondent was sentenced in that case to twenty months, with credit for 337 days. (R 88-99) The trial court ordered concurrent the sentences imposed in case no. 93-16779CF10A and 94-16630CF10A.

The respondent was released from prison on June 1, 1996. The sentence imposed in case no. 94-16630CF10A had expired with credit awarded for time served only. The conditional release certificate is dated twelve days after the respondent's release. (RA1)

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[2] The petitioner alleges that the respondent was placed on controlled release on September 7, 1993 after serving eleven months of a five year sentence. The respondent advises that the order of controlled release was vacated, which explains why his controlled release was not violated when he was convicted of grand theft in December, 1993.

[3] The citations to the record on appeal are taken from the petitioner's initial brief. Undersigned counsel has not received a copy of the record.

SUMMARY OF ARGUMENT

The district court correctly held that the respondent was not subject to conditional release for his category 6 crime. The respondent's sentences were distinct for purposes of eligibility for conditional release. The respondent's twenty month sentence for strong arm robbery, battery on a law enforcement officer and resisting arrest with violence had expired. The respondent served day for day the entire sentences. The only remaining sentence was imposed for the offense of grand theft. Grand theft is a category 6 crime and does not qualify for conditional release.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD INELIGIBLE FOR CONDITIONAL RELEASE THE RESPONDENT'S SENTENCE FOR GRAND THEFT.

Florida Statute 947.1405(2) (Supp. 1992), states, in pertinent part:

> Any inmate who is convicted of a crime committed on or after October 1, 1988, which crime is contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure, and who has served at least one prior felony commitment at a state or federal correctional institution or is sentenced as a habitual or violent offender pursuant to s. 775.084 shall, upon reaching the tentative release date or provisional release date, whichever is earlier, as established by the Department of Corrections, be released under supervision subject to specified terms and conditions[.]

The application of this statute to the respondent's sentences is the issue before this Court.

The petitioner concedes that grand theft, a category 6 offense, "standing alone, is not subject to conditional release." (IB at 24).[4] The respondent's sentences for strong armed robbery, battery on a law enforcement officer and resisting arrest without violence, all subject to conditional release, expired before the respondent was released on conditional release. The respondent served those sentences day for day. Those sentences did not expire due to any gain time.

The sentences imposed in case nos. 93-16779CF10A and 94-16330CF10A are distinct sentences for purposes of determining eligibility for conditional release. In Westlund v. Florida Parole Commission, 637 So. 2d 52 (Fla. 1st DCA 1994), the parole commission calculated the

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[4] Respondent concedes that strong armed robbery, battery on a law enforcement officer and resisting arrest with violence are subject to conditional release.

last date of the defendant's conditional release using non-qualifying offenses.[5] The offenses were non-qualifying because they were committed prior to October 1, 1988. Id. at 54-55. The court held:

> Appellant received five separate sentences for five separate offenses. These five sentences were to be served concurrently, but they nevertheless remain distinct sentences. The Act unequivocally applies to "any inmate who is convicted of a [covered] crime committed on or after October 1, 1988, ..." (emphasis added). Sec. 947.1405(2), Fla.Stat. (1991) Appellant's last date of conditional release supervision may lawfully be calculated with reference only to sentences imposed for offenses committed on or after October 1, 1988. Sentences imposed on account of the drug-related offenses Westlund committed February 3, 1988, cannot be the basis for determining his last date of conditional release supervision under the Act.

Id. (emphasis in original) The district court reversed the circuit court's denial of mandamus and directed the parole commission to recalculate the defendant's last date of conditional release based only on the qualifying offenses. Id.

The petitioner seeks to distinguish Westlund claiming that it applies only to cases involving pre October 1, 1988 and post October 1, 1988 offenses. This is a false distinction. Westlund stands for the proposition that the parole commission cannot calculate conditional release supervision using non-qualifying offenses. Offenses are non-qualifying either because they were committed before October 1, 1988 or because they are not "covered" crimes - category 1 through 4 crimes. Section 947.1405 applies only to offenses contained in categories 1 through 4 of the sentencing guidelines. It does not apply to category 6 offenses.

The petitioner states that it determined the respondent's "maximum supervision date" using the "overall term of concurrent sentences, including the longer grand theft sentence." (IB at

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[5] The statute litigated in Westlund is identical to the statute at bar.

24) The petitioner claims that "[W]hen Respondent violated his conditional release, his gain-time was forfeited as to all sentences in the overall collection of concurrent sentences pursuant to section 944.28(1), Florida Statutes." (IB at 24) The petitioner ignores the fact that the respondent's sentences on the qualifying offenses expired **without receipt of any gain time**. The respondent served those sentences day for day. There was no gain time to forfeit on the qualifying offenses.

SECTION 947.1405(2), FLORIDA STATUTES, IS CLEAR AND UNAMBIGUOUS

The petitioner argues that the district court's decision was incorrect because it "misapprehended the clearly expressed legislative intent inherent in Section 947.1405(2), Florida Statutes (Supp. 1992)." (IB at 28) In support of this argument, the petitioner carefully plucks language from the statute. The petitioner quotes:

> The statute, on its face, stated in pertinent part that "**any inmate who is convicted of a crime committed on or after October 1, 1988...**" who is convicted of certain offenses or is sentenced as a habitual or violent habitual offender and who has served one or more prior felony commitments" **... shall, upon reaching the tentative release date established by the Department of Corrections, be released under supervision subject to specified terms and conditions.**"

(IB at 28-29) (emphasis in original). Conversely, the statute does not apply to any inmate who is convicted of a crime committed on or after October 1, 1988 *or* who is convicted of certain crimes *or* is sentenced as a habitual offender. The statute applies to any inmate convicted of a crime committed on or after October 1, 1988, **"which crime is contained in category 1, category 2, category 3 or category 4"** of the sentencing guidelines.

In Zopf v. Singletary, 686 So. 2d 680 (Fla. 1st DCA 1997), the department of corrections classified as ineligible for basic gain time an inmate convicted of attempted sexual battery.

Florida Statute 794.011(7) provides that a person convicted of committing a sexual battery on or after October 1, 1992, is not eligible for basic gain time. Id. at 681. The district court found clear the statutory language and held that the statute did not apply to those convicted of attempted sexual battery:

> If the legislature had intended for the provisions of that subsection to apply also to those persons, like the appellant, who were convicted of attempted sexual battery, then it would have been a simple matter to state it plainly in the statute. Where a statute specifically enumerates those persons to be covered, ordinarily the statute will be construed as excluding from its operation all those other persons not expressly mentioned.

Id. at 681-682. Likewise, the legislature's decision to specifically enumerate category 1 through 4 offenses as qualified for conditional release supervision excludes non-enumerated offenses from conditional release supervision.

The petitioner asserts that the statute establishes qualifying offenses as a condition precedent to conditional release supervision, but does not expunge that classification once the sentence for the qualifying offense has expired. (IB at 29) However, the statute does not state that conditional release supervision applies to concurrent non-qualifying offenses or that one is subject to conditional release despite the expiration of the sentence for a qualifying offense. Petitioner further argues that an inmate qualifies for conditional release because of her or his "criminal history." (IB at 30) Again, there is no indication that an inmate with a prior imprisonment would qualify for conditional release but for the nature of the offense for which she or he is currently incarcerated. The statute simply does not say what the petitioner wishes it said.

The petitioner acknowledges that, if a statute is clear and unambiguous, legislative intent

must be derived from the words employed by the legislature without recourse to rules of statutory construction. Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993) (IB at 30) Moreover, in Hanzelik v. Grottoli & Hudon Investment of America, Inc., 687 So. 2d 1363, 1365 (Fla. 4th DCA 1997), the district court stated:

> The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed so that the act can be read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms... Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free of ambiguity.

See also, Zopf v. Singletary, 686 So. 2d 680, 681 (Fla. 1st DCA 1996) (where statute is clear, court lacks power to go outside statute in search of excuses to give a different meaning to the words of a statute.) Neither a court nor the petitioner can attribute its interpretation to an otherwise unambiguous statute.

Despite its assertion that the legislative intent is clearly expressed, the petitioner seeks to clarify the Legislature's intent with the Florida House of Representatives Final Staff Analysis & Economic Impact Statement for House Bill 1574. The petitioner's reliance on the staff analysis is inappropriate in light of the unambiguous wording of the statute. Moreover, the staff report does not address the issue at bar: whether conditional release supervision applies to concurrent, non-qualifying offenses when the sentence for qualifying offense expires before an inmate's release. In addition, the staff report does not clarify the legislative intent regarding the instant facts. The respondent completed with credit only for time served his sentences for strong armed robbery, battery on a law enforcement officer and resisting arrest with violence. The respondent

was not released early due to gain time and does not fall within the class of individuals targeted in the staff report.

The petitioner also asks this Court to take judicial notice of Senate Bill 310. The petitioner argues that the bill merely clarifies the Legislature's intent that section 947.1405 applies to non-qualifying offenses.

First, the respondent requests this Court to strike the two pages following the bill in petitioner's appendix C. The two pages are entitled "The Amendment to the Conditional Release Program Act is Designed to Clarify the Original Legislative Intent and Does Not Violate Ex Post Fact Proscriptions." The "document" is not further identified, does not identify the author, and is not part of the bill. The "document" is not subject to judicial notice and is not properly before this Court.

Second, the petitioner is again trying to clarify the plain, unambiguous language of the statute. This Court is constrained to look at the plain meaning of the language employed by the Legislature. The statute is not ambiguous. Moreover, while it is true that amendments to a statute enacted after controversies arise regarding the legislative intent may be considered as a legislative interpretation of the original law rather than as a substantive change, the petitioner has failed to establish that the bill was enacted as a response to controversies regarding the legislative intent. The Senate Staff Analysis and Economic Impact Statement dated March 17, 1997, discusses in detail the effects of this Court's recent decision in Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996) and the United States Supreme Court's decision in Lynce v. Mathis, __ U.S. __, 117 S.Ct 891, 137 L.Ed.2d 63 (1997). (RA 2) Both cases resulted in the release of persons convicted of primarily category 1 through 4 offenses. The section of the staff analysis entitled

"Effect of Proposed Changes," states, in pertinent part:

> CS/SB 310 would provide a means by which the state could proactively supervise a large amount of the offenders who were released at an accelerated rate as a result of the recent Court rulings in *Lynce v. Mathis* and *Gwong v. Singletary*. Many of the inmates who were released under these decisions will be subject to conditional release or probation supervision upon their release. Therefore, such offenders would be subject to the intensive supervision required by this CS.

In light of this analysis, it is not clear whether the bill is a legislative interpretation of the original law or a substantive change designed to extend the reach of the statute to encompass more of the inmates released pursuant to the *Lynce* and *Gwong* cases. This uncertainty illustrates why a court should limit its analysis of legislative intent to the plain meaning of a statute if at all possible. The statute at bar is clear and unambiguous. This Court's interpretation should focus on the language employed by the Legislature.

THE DISTRICT COURT CORRECTLY HELD THAT THE RESPONDENT'S GRAND THEFT SENTENCE HAD BEEN EXTINGUISHED UPON RESPONDENT'S RELEASE

The petitioner argues that the district court erred in holding that the respondent's remaining grand theft sentence was extinguished when he was released due to his gain time award. (IB at 34) The petitioner relies on Lincoln v. Florida Parole Commission, 643 So. 2d 668 (Fla. 1st DCA 1994). Again the petitioner bases its argument on carefully extracted statutory language. A close reading of Lincoln supports the district court's decision.

In Lincoln, the appellant challenged the denial of habeas corpus relief. The district court held that the appellant had correctly been placed on conditional release after he was early released from prison due to incentive gain time. Id. at 669. The court found that the appellant's habitual offender sentence was subject to conditional release.

The petitioner infers that **all** early released inmates are subject to post release supervision. The petitioner quotes a portion of Florida Statute 944.291(1) which states:

> Notwithstanding any provision of law to the contrary, a prisoner who has served his term or terms, less allowable gain-time deductions as provided by law, or who has attained his provisional release date shall, upon release, be placed under further supervision and control of the department.

However, the petitioner omits the rest of the section, which was noted by the Lincoln court. The court recognized that section 944.291(1), provides that "[A]ny released prisoner who is not under further supervision and control of the department or who is not subject to any statute relating to parole shall be eligible, on a voluntary basis, for any assistance available to him through any parole or probation office under the department." Id.[6] This language confirms that not all early released inmates are subject to supervision. Thus, when the department early releases via accrued gain time an inmate, and the early released sentence is not subject to conditional release, the sentence is extinguished. This conclusion is in keeping with this Court's decision in Huering v. State, 559 So. 2d 207 (Fla. 1990) Sub judice, the district court correctly found that, because the respondent's sentence for grand theft did not qualify for conditional release, the sentence was extinguished.

The petitioner further argues that the "Legislature has determined that an inmate's status as a violent offender meriting further supervision does not magically disappear once he reaches the maximum sentence date on his violent category 1-4 sentences. " (IB at 33) Certainly the petitioner is not suggesting that an individual qualified for conditional release supervision is forever qualified for conditional release supervision on subsequent and unrelated incarcerations.

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[6] Subsection (2) of the statute identifies those inmates subject to conditional release.

APPLICATION OF SECTION 947.1405 TO THE RESPONDENT'S GRAND THEFT CONVICTION VIOLATES EX POST FACTO PROSCRIPTIONS

The respondent was adjudicated guilty of grand theft on December 21, 1993 and placed on five years probation. The respondent violated that probation and was sentenced on September 1, 1995 to four years prison. On that date, the respondent was adjudicated guilty of strong armed robbery, battery on a law enforcement officer and resisting arrest with violence and sentenced to twenty months in prison, with credit for 337 days time served. The trial court ordered all sentences to run concurrently.

At the time the respondent was convicted of grand theft, he was not subject to conditional release supervision. Consequently, the respondent was entitled to have that sentence extinguished should he be sentenced to prison and early released with gain time. Heuring v. State, 559 So. 2d 207 (Fla. 1990) The respondent was not convicted of a qualifying offense until almost two years after his conviction for grand theft. The petitioner claims that section 947.1405(2), Florida Statutes, (Supp. 1992) authorizes the parole commission to attach to an offense adjudicated prior to the commission of a qualifying offense, conditional release supervision requirements, which, if violated, resurrect an extinguished sentence.

In Lynce v. Mathis, __ U.S. __, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), the United States Supreme Court struck down as a violation of ex post facto proscriptions a Florida statute which retroactively canceled provisional credits. The Court held that a law which violates ex post facto applies retroactively and "disadvantages" offenders affected by it. 117 S.Ct 891, 896. The Court further held that a statute which lengthens the period that someone must spend in prison

disadvantages an offender. Id.

Application of section 947.1405, Florida Statutes (Supp. 1992), to the respondent's conviction for grand theft violates ex post facto prohibitions. The respondent was convicted of grand theft almost two years before he was convicted of his qualifying offenses. Thus, the statute is retroactively applied. In addition, the application of section 947.1405 has certainly disadvantaged the respondent and resulted in a longer period of incarceration. But for application of the statute to respondent's grand theft conviction, the respondent's sentence for grand theft would have been extinguished upon his release from prison on June 1, 1996. Instead, the respondent was arrested for violating conditional release on July 26, 1996 and remains incarcerated.

The respondent's detention is unlawful and the district court's decision to grant habeas relief should be immediately affirmed.

CONCLUSION

The argument presented above support the district court's decision. The respondent respectfully requests this Honorable Court to affirm the district court and order the respondent's immediate release.

Respectfully submitted,

ALAN H. SCHREIBER
Public Defender
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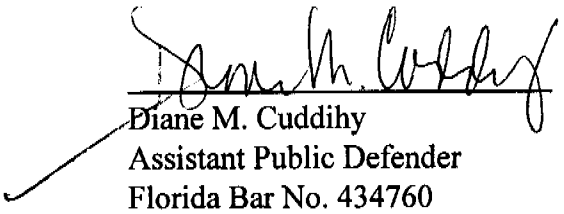

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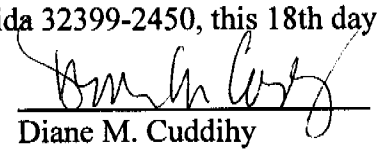
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to Bradley Bischoff, Assistant General Counsel, Florida Parole Commission, 2601 Blair Stone Road, Bldg. C, Room 219, Tallahassee, Florida 32399-2450, this 18th day of June, 1997.



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