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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 7 1997
CLERK, SUPREME COURT
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Chief Deputy Clerk

FLORIDA PAROLE COMMISSION,

Petitioner,

vs. Case No. 90,237

MARK COOPER,
DC # 634429

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Certification from the District Court of Appeal,
Fourth District of Florida

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PRELIMINARY STATEMENT

The Appellant below, Mark Cooper, a/k/a Mark Martin, a/k/a Mark Johnson, a/k/a Malcolm Martin, a/k/a Craig Cooper, a/k/a Red Cooper, a/k/a Roger Coswell, a/k/a Mark Courathes, a/k/a Martin Malcolm, a/k/a Christopher Steegal, will be referred to as "Respondent" in this brief. Appellee below, Florida Parole Commission, will be referred to either as "Petitioner" or "the Commission." References to the record on appeal below will be designated "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND THE FACTS

The Respondent has a very lengthy criminal history which spans over the last eighteen years. He is currently incarcerated under Florida inmate #634429.

On January 18, 1990, Respondent was convicted of Sale or Purchase of Cocaine in Broward County Case Number 89-2438 and was sentenced to a term of one year and one day in state prison. (R 46-50)

On July **19,** 1990, Respondent was convicted of Grand Theft of a Motor Vehicle in Broward County Case Number 89-18667 and was sentenced to a term of four years in state prison. (R 52-56)

On October 5, 1992, Respondent violated his probation previously imposed in Broward County Case Number 91-6533 and was convicted of Burglary of an Unoccupied Structure and was sentenced to five years in state prison. (R 58-65)

On September 7, 1993, after only serving eleven months incarceration, Respondent was released from prison to Control Release supervision due to overcrowding. This Control Release supervision was to run to its termination date of October 4, 1996. (R 67-69)

On December 21, 1993, Respondent was convicted of Grand Theft in Broward County Case Number 93-16779 and was sentenced to a term of five years probation. (R 71-75)

On September 1, 1995, Respondent was found in violation of probation in Case Number 93-16779. His probation was revoked and he was sentenced to four years in state prison. (R 77-84)

Also, on September 1, 1995, Respondent was convicted of (1) Strong Arm Robbery, (2) Battery on a Law Enforcement Officer, and (3) Resisting Arrest With Violence in Broward County Case Number 94-16630. He was sentenced to a term of twenty months in state prison as to each count. (R 86-99)

On June 1, 1996, just ten months after Respondent's reincarceration, he was released from prison to Conditional Release supervision. This Conditional Release supervision was to run to its termination date of December 8, 1997. (R 101-103)

On June 2, 1996, one day after his release, Respondent was arrested for Resisting a Merchant and Disorderly Conduct in Broward County. Respondent pled guilty and was adjudicated guilty on June 3, 1996, of (1) Resisting Merchant, and (2) Disorderly Conduct in Broward

County Case Number 96-13505. He was sentenced to time served and a fine and court costs on both counts. (R 106)

The Florida Parole Commission issued a warrant for Respondent's arrest for violation of conditions of his Conditional Release on July 17, 1996. The warrant alleged that Respondent had violated his conditions of supervision by unlawfully resisting a merchant. (R 108-109)

On August 27, 1996, a Parole Commission Hearing Examiner conducted Respondent's Conditional Release violation hearing at the Broward County Jail. The Hearing Examiner made the factual finding that Respondent had violated his Conditional Release supervision based on the new criminal convictions and recommended that his Conditional Release be revoked. (R 111-116)

On September 24, 1996, the Respondent filed an "Emergency Petition for Writ of Habeas Corpus" in the Circuit Court of the Seventeenth judicial Circuit, in and for Broward County, Florida, Case No. 93-16779CF1 OA (R 19-22). On October 2, 1996, the Circuit Court issued an order to show cause directing the Commission to respond to the allegations of the Petition. On October 7, 1996, the Commission

served its Response (R 37-116), and the Respondent filed his reply on or about October 14, 1996 (R).

On October 23, 1996, the Circuit Court entered an "Order Denying Defendant's Emergency Petition for Writ of Habeas Corpus", which stated as follows:

> THIS CAUSE having come before the Court upon Petitioner's Emergency Motion for Writ of Habeas Corpus and the Court's Order to Show Cause, and the Court having considered same, the Responses of both the Department of Corrections and the Florida Parole Commission (FPC), ,and the Petitioner's Reply thereto, all attached exhibits which are incorporated herein, and being fully advised in the premises, hereby finds and decides as follows:
>
> The history of the cases underpinning Petitioner's claims are as follows: On January 18, 1990, the Petitioner was convicted of Sale/Purchase of Cocaine and sentenced to one year and one day in Florida State Prison (FSP) (FPC's Exhibit A). Next, on July 19, 1990, the Petitioner was convicted of Grand Theft of a Motor Vehicle, for which he received a term of four years in FSP (FPC's Exhibit B). Thereafter, on October 5, 1992, Petitioner violated his probation imposed in Case No. 91-6533, was convicted of Burglary of an Unoccupied Structure, and sentenced to five years in FSP (FPC's Exhibit C).
>
> Within a year, on September 7, 1993, Petitioner was released from prison on Control Release, which was to run until its termination date of October 4, 1996 (FPC's Exhibit D). However, on December 21, 1993, the Petitioner was convicted of Grand Theft in Case No. 93-16779, and received a sentence of five years probation (FPC's Exhibit E). Subsequently, on September I, 1995, the Court determined

that the Petitioner had violated the terms of that probationary sentence. As a result, the Court revoked his probation, and sentenced him to four years in FSP (FPC's Exhibit F).

At the same time, in Case No. 94-16630, Petitioner was convicted of the offenses constituting the violation of his probation, which were Strong-arm Robbery, Battery on a Law Enforcement Officer, and Resisting Arrest With Violence. The Court sentenced Petitioner to a term of twenty months FSP on each count (FPC's Exhibit G).

Consequently, on June 1, 1996, Petitioner was placed on Conditional Release supervision, which was to terminate on December 8, 1997 (see FPC's Exhibit H). One day later, Petitioner was arrested for Resisting a Merchant and Disorderly Conduct. **He pled guilty** to both charges, and was sentenced to time served, a fine and court costs on both counts (FPC's Exhibit I). This last offense led to a warrant being issued by FPC on July 17, 1996, for Conditional Release violations. At the ensuing August 27, 1996 Conditional Release Violation Hearing, the FPC Examiner found that Petitioner had violated his Conditional Release based upon these new criminal convictions (FPC's Exhibit K). Although the Examiner recommended that Petitioner's Conditional Release be revoked, the case has not yet been presented to the FPC for a final determination.

Now, Petitioner alleges that he should be released from custody because: (1) initially, he was statutorily ineligible to be granted Conditional Release, and (2) there was insufficient evidence to support the revocation of his Conditional Release. The Court finds that both arguments are entirely without merit, based upon controlling authority and the FPC's Response (Court's Exhibit "I").

First, according to Section 947.1405(2), Florida Statutes (Supp. 1992) (Court's Exhibit "II"),

> [a]ny 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 . . . , Florida Rules of Criminal Procedure, and who has served at least one prior felony commitment at a state . . . correctional, institution [or] [i]s sentenced as a habitual or violent habitual offender . . . 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 Court agrees that the 1993 crime of which Petitioner was convicted (Case No. 93-16779CF10A, Grand Theft), was a category 6 offense (Court's Exhibit "III"). The sentence imposed for that crime, **standing alone,** would not have allowed Petitioner to have been released from prison under the Conditional Release Act in force at that time, *supra*.

However, the sentence imposed for the 1994 crimes of which Petitioner was convicted (Case No. 94-16630CF10A, Count I, Strong-arm Robbery; Count II, Battery on a Law Enforcement Officer; and Count III, Resisting Arrest With Violence) was ordered to run concurrently with the 1993 sentence (FPC's Exhibit G). It is clear that Counts I and II of the 1994 case fall squarely within categories 3 and 4 respectively, of the 1994 version of Rule 3.701, Florida Rules of Criminal Procedure (Court's Exhibit "IV"). Therefore, it was both appropriate and fortuitous for the Petitioner to be granted Conditional Release according to the 1994 revision of the Conditional Release statute (Court's Exhibit "V").

As a result, Petitioner's contention that Conditional Release was inapplicable because **both** crimes do not fall into categories 1 through 4, must fail. It would be unreasonable to construe the legislative intent of the Conditional Release Act to mean that if a prisoner is released on one sentence which fits within the Conditional Release Statute, it must either be the **only** sentence in place, or **else all concurrent sentences** must fall into categories 1 through 4. Hence, it was legally correct for Petitioner to be granted Conditional Release under the prevailing law for each offense.

Inevitably, Petitioner's claim of ineligibility is totally self-defeating under the reasoning of Lincoln v. Florida Parole Com'n, 643 So. 2d 668 (Fla. 1 st DCA 1994). As the First DCA so eloquently stated: "[Petitioner's] argument contains the seeds of its own . . . destruction , , . **If he was ineligible for conditional release, . . . then he had no entitlement to release on any basis at any time prior to the expiration of the full term of his sentence, and has, therefore, no right to discharge by writ of habeas corpus before then."** Id. (Emphasis added). Consequently, the Court cannot grant relief based upon Petitioner's first argument.

Second, Petitioner's claim that there is insufficient evidence to support the revocation of Conditional Release is incorrect. Although the Petitioner states that he pled *nolo* contendere to the charges of Resisting a Merchant and Disorderly Conduct, the record actually reflects that he **pled guilty** to both charges (FPC's Exhibit K). In addition, prevailing authority on this issue confirms that the Petitioner may have his Conditional Release supervision revoked solely on a certified copy of a judgment of conviction Stevens v. State, 409 So. 2d 1051 (Fla. 1982). However, that issue is not ripe for adjudication at this time, as there has been no final determination concerning the revocation.

Finally, the Court finds that it must discuss the plea colloquy of September 1, 1995 (Court's Exhibit "VI") in conjunction with the instant motion. During that hearing, the Court patently expressed its concern with the Petitioner's prolonged and continuing litigation on both the 1993 and 1994 cases. The Court offered, and the Petitioner agreed to be adjudged guilty on the offense through his plea of *nolo* contendere (Court's Exhibit "VI"). He was sentenced to four years FSP on the violation of probation, and twenty months for the substantive charges which formed the violation. In return, the Petitioner **unequivocally stated** that he would not take any appeals in reference to either case, nor would he attack nor attempt to attack the judgments collaterally at a later time (see pp. 8, 1 O-l 2, 14-16 Court's Exhibit "VI"). Thus, after due consideration of all legal authority and record evidence, the Court soundly rejects both of Petitioner's arguments.

Accordingly, based on the foregoing, it is

ORDERED AND ADJUDGED that the Emergency Petition for Writ of Habeas Corpus is hereby DENIED with prejudice.

(R 31-36)

On or about October 26, 1996, Respondent filed an "Emergency Notice of Appeal" in the Circuit Court (R). At the same time Respondent filed a "Request and Motion to Expidite" (sic.) in the Circuit Court (R).

On November 5, 1996, the District Court of Appeal, Fourth District of Florida, granted Respondent's motion to expedite (R). On

November 13, 1996, the Parole Commission filed a Notice of Appearance and Motion to Reconsider the Court's November 5, 1996, Order (R). On November 20, 1996, the appellate court granted the Commission's Motion, vacated its 11/5/96 Order, and denied Respondent's motion to expedite (R).

In December of 1996, Respondent filed an undated "Initial Brief" with attachments (R), and on December 27, 1996, the Commission filed a Motion to Strike Appellant's Initial Brief (R). On December 31, 1996, Respondent filed a "Partial Response to Parole Commission's Motion to Strike Appellant's Initial Brief" (R), and on January 6, 1997, Respondent filed a "Concluding Response to the Parole Commission's Motion to Strike the Appellant's Initial Brief" (R). On January 22, 1997, the appellate court denied the Commission's Motion to Strike (R).

The Parole Commission filed its Answer brief on January 28, 1997 (R), and on February 5, 1997, Respondent filed a "Motion for Court to Summarily Render Judgement Pursuant to Fla. R. App. P 9.300(a) & (c)" (R). On February 11, 1997, Respondent filed his Reply Brief (R).

Late in the afternoon of March 6, 1997, the Fourth District issued the following Order:

> ORDERED that the October 25, 1996 order denying the emergency petition for writ of habeas corpus is hereby reversed with direction to the circuit court to grant the petition and discharge the petitioner from custody without further delay. Westlund v. Florida Parole Com'n, 637 So.2d 52, 54 (Fla. 1 st DCA 1994). Opinion to follow.

(R).

On the morning of March 7, 1997, the Circuit Court issued an Order immediately releasing the Respondent from custody (R). At noon on March 7, 1997, the Parole Commission filed an Emergency Motion for Stay in the fourth District, stating inter *alia* that:

> 1. On March 6, 1997, this Court issued an Order in the above styled cause directing the circuit court to grant Appellant immediate habeas corpus relief and discharge him from custody forthwith. This Court's order states that the opinion upon which this Order is based will "follow" (Exhibit A).
>
> 2. The issue in this case regarding prison inmates' eligibility for conditional release pursuant to Section 947.1405, F. S., is of immense public importance and scope in that it affects a large class of prison inmates convicted of the most serious and violent offenses under

the Sentencing Guidelines whom the Florida Legislature has determined require further supervision upon their release from prison for the protection of the citizens of this State.

3. The Appellant has been convicted of many serious offenses in this State including but not limited to Sale and Purchase of Cocaine, Grand Theft of a Motor Vehicle, Burglary, Strong Arm Robbery, Resisting Arrest With Violence, and Battery on a Law Enforcement Officer. He has violated supervised release and court-ordered probation every time he has been placed on such. For these reasons alone, Appellant should not be released until the Appellee has had an opportunity to review this Court's imminent opinion and respond thereto if appropriate by motion for rehearing.

4. The important and very serious nature and implications of this Court's ruling, equity, fairness, and the protection of the public all demand that this Court's Order discharging the Appellant be stayed pending receipt of this Court's opinion setting forth the legal basis for the decision in this case. The far-reaching implications of this Court's forthcoming decision will likely require the Parole Commission to move for rehearing and/or certification of the question as one of great public importance. The interests of justice and fair play require that execution of this Court's March 6, 1997, Order be stayed.

(R).

On the afternoon of March 7, 1997, the Fourth District issued an Order granting the Commission's Emergency Motion for Stay (R).

On March 10, 1997, Respondent filed an "Emergency Motion to Strike Parole Commission's Emergency Motion for Stay, And For Court To Order All Parties In Contempt (R).

On March 13, 1997, the Fourth District issued its Opinion in this case, finding that Respondent was ineligible for conditional release supervision on the date he was released from prison because the qualifying component of his concurrent sentences had expired, and the remaining concurrently-imposed sentence was not a conditional release eligible sentence, relying on Westlund v. Florida Parole Commission, 637 So.2d 52 (Fla. 1st DCA 1994). (R). Also on March 13, 1997, the Fourth District issued an Order stating: "(a)ny motion for rehearing shall be filed by Noon on March 17, 1997, in light of the stay entered on March 7, 1997. Response is due by Noon on March 19, 1997." (R).

On March 15, 1997, the Florida Department of Corrections filed a Motion for Rehearing/Clarification to Correct Mistaken References (R), and on March 14, 1997, the Florida Parole Commission filed its Motion

for Rehearing, Rehearing En Banc, and/or Certification, seeking inter *alia* certification of the following question as one of great public importance:

> Where an offender has been convicted of offenses contained in sentencing guidelines categories 1 through 4 which are subject to conditional release supervision pursuant to Section 947.1405, F.S., and has also been convicted of offenses not contained in categories 1 through 4, but has been sentenced concurrently as to both, does the offender's conditional release status remain as to the non category 1 through 4 sentences when the offender's category 1 through 4 sentences expire?

(R). On March 17, 1997, Respondent filed a "Response To Any Motion For Rehearing Filed By The Florida Parole Commission" (R).

On March 21, 1997, the Fourth District issued its Opinion On Motion For Rehearing, Clarification **And Certification. The court** corrected factual mistakes in its original opinion but did not recede from its earlier ruling. The court did, however, certify the following as a question of great public importance:

> WHEN AN INMATE WHO IS SERVING CONCURRENT SENTENCES IS RELEASED AFTER ACCRUING SUFFICIENT GAIN TIME AND HIS RELEASE ON ONE OR MORE OF

> THOSE SENTENCES IS CONDITIONAL UNDER SECTION 947.1405, FLORIDA STATUTES, IS HIS RELEASE STATUS REVOKED AS TO ALL THE CONCURRENT SENTENCES, INCLUDING THE SENTENCES IMPOSED FOR OFFENSES THAT DID NOT QUALIFY FOR CONDITIONAL RELEASE?

(R).

On March 28, 1997, Petitioner Florida Parole Commission filed its Notice to invoke this Court's discretionary jurisdiction (R). Also on March 28, 1997, the Commission filed a Motion for Stay Pending Review in this Court.

On March 31, 1997, Respondent filed a "Motion to Expidite" (sic.) and a "Motion To Lift Stay Of Order Granting Habeas Corpus And Release Petitioner Pending Further Review " in this Court. On April 2, 1997, Respondent filed a "Motion To Expidite In Consideration of, The Stay Ordered By The Fourth District Court Expired On March 31, 1997" (sic.) and "Suppliment To Petitioner's Motion To Lift Stay in Response To Parole Commission's Motion To Continue Stay" (sic.).

On April 7, 1997, this Court issued its "Order Postponing Decision on Jurisdiction and Briefing Schedule" which ordered that the

Commission's Brief on the Merits be served on or before May 2, 1997. This Order was never served on the Parole Commission.

On April 11, 1997, this Court granted the Commission's motion for stay of proceedings in the lower courts and granted Respondent's motion to expedite.

On April 16, 1997, Respondent filed an "Emergency Motion For Rehearing On Petitioner's Emergency Motion For Writ of Habeas Corpus", and on April 28, 1997, this Court denied the Motion.

On April 24, 1997, Respondent filed a "Motion To Lift Stay Order Granting Habeas Corpus And Release Petitioner Pending Further Review" in this Court.

On April 28, 1997, Respondent filed an "Emergency Motion For Release On Bail/Bond, Pursuant To Fla. R. Cr. P. 3.820(b)" in Broward County Circuit Court, a copy of which was received by the Parole Commission on May 2, 1997. Attached to this Motion was a copy of this Court's "Order Postponing Decision on Jurisdiction and Briefing Schedule", of which Petitioner was not previously aware.

On May 2, 1997, the Parole Commission filed a Motion for Extension of Time seeking a five (5) day extension of time in which to

file its Brief on the Merits in light of the fact that the Commission never received this Court's 4/7/97 Briefing Schedule and only became aware of its existence on May 2, 1997.

Also on May 2, 1997, on the last day of the 1997 legislative session, the Florida Legislature enacted into law CS for CS for Senate Bill 310, (attached hereto as Appendix C) which amended Section 947.1405(2)(c), Florida Statutes, to include the following language:

> Such (Conditional Release) supervision shall be applicable to all sentences within the overall term of sentences if the inmate's Overall term of sentences includes one or more conditional release eligible sentences as provided herein.

STATEMENT OF THE ISSUE

WHERE AN OFFENDER HAS BEEN CONVICTED OF OFFENSES CONTAINED IN SENTENCING GUIDELINES CATEGORIES 1 THROUGH 4 WHICH ARE SUBJECT TO CONDITIONAL RELEASE SUPERVISION PURSUANT TO SECTION 947.1405, F.S., AND HAS ALSO BEEN CONVICTED OF OFFENSES NOT CONTAINED IN CATEGORIES 1 THROUGH 4, BUT HAS BEEN SENTENCED CONCURRENTLY AS TO BOTH, DOES THE OFFENDER'S CONDITIONAL RELEASE STATUS REMAIN AS TO THE NON CATEGORY 1 THROUGH 4 SENTENCES WHEN THE OFFENDER'S CATEGORY 1 THROUGH 4 SENTENCES EXPIRE?

SUMMARY OF THE ARGUMENT

Whereas the Florida Legislature has amended the statute in question in this case, Section 947.1405(2), Florida Statutes, and has expressly clarified its intent as to what the statute has always meant, the question certified by the lower court must be answered in the affirmative. Respondent Cooper was properly placed on (and revoked from) Conditional Release supervision as to his overall bundle of concurrent sentences even though one of the sentences, standing alone, would not have been conditional release eligible. Lowry v. Parole and Probation Commission, **473** So.2d 1248 (Fla. 1985).

Based on this legislative clarification of intent, it is clear that Respondent Cooper's Conditional Release supervision extended to all sentences within his bundle or overall term of concurrent sentences, including his longer Grand Theft sentence. This is so because the Legislature has determined that an inmate's status as a violent offender meriting supervision upon release does not magically disappear once he reaches the maximum sentence date on his violent sentencing guidelines category **1-4** sentences. The Legislature's concern is with the protection of the public from offenders who have proven by their

violent criminal conduct and repeated actions that they pose a danger to the public.

Now that the Legislature has clarified that the Commission's longstanding interpretation of 947.1405(2), as applied to the Respondent, is and always has been the correct interpretation, this Court must answer the certified question in the affirmative and reverse the judgment of the District Court herein.

ARGUMENT

ISSUE:

The District Court of Appeal, Fourth District of Florida, certified the following question as one of great public importance:

> WHEN AN INMATE WHO IS SERVING CONCURRENT SENTENCES IS RELEASED AFTER ACCRUING SUFFICIENT GAIN TIME AND HIS RELEASE ON ONE OR MORE OF THOSE SENTENCES IS CONDITIONAL UNDER SECTION 947.1405, FLORIDA STATUTES, IS HIS RELEASE STATUS REVOKED AS TO ALL THE CONCURRENT SENTENCES, INCLUDING THE SENTENCES IMPOSED FOR OFFENSES THAT DID NOT QUALIFY FOR CONDITIONAL RELEASE?

Petitioner Florida Parole Commission originally sought certification of the following question, and submits that this question more accurately reflects the issue before this Court:

> WHERE AN OFFENDER HAS BEEN CONVICTED OF OFFENSES CONTAINED IN SENTENCING GUIDELINES CATEGORIES 1 THROUGH 4 WHICH ARE SUBJECT TO CONDITIONAL RELEASE SUPERVISION PURSUANT TO SECTION 947.1405, F.S., AND HAS ALSO BEEN CONVICTED OF OFFENSES NOT CONTAINED IN CATEGORIES 1 THROUGH 4, BUT HAS BEEN SENTENCED CONCURRENTLY AS TO BOTH, DOES THE OFFENDER'S CONDITIONAL RELEASE STATUS REMAIN AS TO THE NON

CATEGORY 1 THROUGH 4 SENTENCES WHEN THE OFFENDER'S CATEGORY 1 THROUGH 4 SENTENCES EXPIRE?

Both questions must be answered in the affirmative.

The instant case presents an issue solely involving the statutory interpretation of Section 947.1405(2) (Supp. 1992), Florida Statutes, which stated in pertinent part that:

> (2) 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 habitual 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 including payment of the cost of supervision pursuant to s. 948.09...

(Emphasis supplied)

The Conditional Release Program is administered by the Parole Commission, and although it is a supervised early release program, placement thereon is automatic, as opposed to probation and

community control, which are court-imposed sanctions in lieu of incarceration. See, Chapter 948, Florida Statutes. Placement on conditional release supervision is ". ..freedom subject to supervision as if on parole." Haliburton v. State, 561 So.2d 248 (Fla. 1990). Prior to the 1988 enactment of Section 947.1405, prison inmates "expired" their sentences upon early release resulting from accumulated gain-time. Now, pursuant to Section 947.1405, when an offender commits a crime contained within categories 1 through 4 of the Sentencing Guidelines ("violent crimes"), and has a prior commitment to prison, the offender is placed on Conditional Release supervision under terms and conditions established by the Parole Commission, the length of which shall not exceed the maximum penalty imposed by the sentencing court.

In the instant case, On September 1, 1995, Respondent Cooper's probation was revoked and he was adjudicated guilty of Grand Theft in case no. 93-16779 and was sentenced to four years in state prison (R 77-84). Also on September 1, 1995, Respondent was convicted of Strong Arm Robbery, Battery on a Law Enforcement Officer, and Resisting Arrest With Violence in case no. 94-16630 and was sentenced to 1 year and 8 months in state prison, concurrent as to all counts and

concurrent with the Grand Theft sentence (R 86-99). All three offenses in case no. 94-16630 were violent offenses contained in categories 1 through 4 of the sentencing guidelines (See Rules 3.701 and 3.988, Fla. R. Crim. P.), subjecting Respondent to Conditional Release supervision as to these offenses.[1] The Grand Theft offense, however, is a category 6 nonviolent offense and, standing alone, is not subject to Conditional Release.

On June 1, 1996, the Parole Commission placed Respondent on Conditional Release supervision following his release from prison, subject to conditions of supervision until December 8, 1997 (R 101-103). This maximum supervision date applied to the overall term of concurrent sentences, including the longer Grand Theft sentence. When 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.

Respondent argued in his application for habeas corpus relief in circuit court that because the Grand Theft sentence was not based on a sentencing guidelines category 1-4 offense, that he could only have

[1] The parties agree that Cooper was otherwise qualified for conditional release supervision as to his violent offenses.

been placed on supervision as to the remaining sentences in case no. 94-16630 .

The Circuit Court below rejected Respondent's argument and determined that

> The Court agrees that the 1993 crime of which Petitioner was convicted (Case No. 93-16779CF10A, Grand Theft), was a category 6 offense (Court's Exhibit "III"). The sentence imposed for that crime, **standing alone,** would not have allowed Petitioner to have been released from prison under the Conditional Release Act in force at that time, *supra.*
>
> However, the sentence imposed for the 1994 crimes of which Petitioner was convicted (Case No. 94-16630CF10A, Count I, Strong-arm Robbery; Count II, Battery on a Law Enforcement Officer; and Count III, Resisting Arrest With Violence) was ordered to run concurrently with the 1993 sentence (FPC's Exhibit G). It is clear that Counts I and II of the 1994 case fall squarely within categories 3 and 4 respectively, of the 1994 version of Rule 3.701, Florida Rules of Criminal Procedure (Court's Exhibit "IV"). Therefore, it was both appropriate and fortuitous for the Petitioner to be granted Conditional Release according to the 1994 revision of the Conditional Release statute (Court's Exhibit "V").
>
> As a result, Petitioner's contention that Conditional Release was inapplicable because **both** crimes do not fall into categories 1 through 4, must fail. It would be unreasonable to construe the legislative intent of the Conditional Release Act to mean that if a prisoner is released on one sentence which fits within the Conditional Release Statute, it must either be the **only** sentence in place, or else **all concurrent sentences** must fall into categories 1

through 4. Hence, it was legally correct for Petitioner to be granted Conditional Release under the prevailing law for each offense.

(R 33, 34)

On appeal, Respondent Cooper relied on the First District Court of Appeals' decision in Westlund v. Florida Parole Commission, 637 So.2d 52 (Fla. 1 st DCA 1994).

Westlund was convicted of three drug-related offenses committed on 2/3/88 and of two violent offenses committed on 12/9/88. He was resentenced in 1991. He received two 7-1/2 year sentences and one 5 year sentence for the 2/3/88 offenses, and two 4-1/2 year sentences for the 12/9/88 offenses, all concurrent. The Parole Commission established Westlund's last date of conditional release supervision to be 8/5/95, which was the maximum sentence date of the two 2/3/88 7-1/2 year sentences. The court held that "Sentences imposed on account of the drug-related offenses Westlund committed on February 3, 1988, cannot be the basis for determining his last date of conditional release supervision under the Act." Id. at 54 (emphasis supplied).

Therefore, Westlund applies to the situation where an inmate has concurrent sentences consisting of both pre-10/1/88 nonqualifying

(nonviolent) offenses and post-l 0/1/88 qualifying (violent) offenses. The case does not address the situation of mixed concurrent sentences ail consisting of post-10/1/88 sentences, as in the present case.

The Fourth District Court of Appeal overturned the Circuit Court's judgment, stating in its Opinion On Motion for Rehearing, Clarification and Certification that

> The Conditional Release Act allows the supervision of certain repeat offenders after their release from prison by reason of their accrual of gain time, and revocation of their gain time in the event that they violate one or more conditions. Under the version of the Act that was in effect at the time of Cooper's crimes, his release on only the category 3 and 4 crimes could be made conditional. S. 947.1405(2)(a), Fla. Stat. (Supp. 1992) (applies to category 1-4 crimes only). In the absence of another statutory basis for supervised release on the grand theft charge, his early discharge on that sentence was unconditional. S. 944.291, Fla. Stat. (1991); Heuring v. State, 559 So.2d 207 (Fla. 1990).
>
> Cooper was conditionally released on both cases. That release was revoked on both cases after violation. Cooper sought relief in the circuit court, arguing that his release on the grand theft sentence should not have been revoked. The circuit court disagreed, finding that although he ordinarily would not have been subject to conditional release on the grand theft charge, because that sentence was concurrent with sentences that did fall under the Conditional Release Act, his gain time could be revoked on that charge as well.

> That finding was error. Although his sentences were to be served concurrently, they nevertheless remained distinct sentences for the purpose of eligibility under the Act. Westlund v. Florida Parole Comm'n, 637 So.2d 52, 54 (Fla. 1st DCA 1994). Appellant's last date of conditional release supervision should have been calculated with reference only to those sentences that were subject to the Act, that is the robbery/resisting concurrent 20 month sentences. Id at 54.
>
> Once the appellant was released from the remaining period of his incarceration on the grand theft charge due to his gain-time award, that remaining period of the sentence was extinguished. Heuring, 559 So.2d at 208 (quoting State v. Green, 547 So.2d 925, 926 (Fla. 1989)). The appellant should have been released from prison on May 30, 1996, when he had completed his prison terms on the category 3 and 4 charges in their entirety...

Cooper v. Florida Parole Commission, et al., ___ So.2d ___, 22 Fla. L. Weekly D781, 782 (Fla. 4th DCA, March 21, 1997), On Motion for Rehearing, Clarification and Certification (Attached Hereto as Appendix A).

The District Court's decision was incorrect, inasmuch as it misapprehended the clearly-expressed legislative intent inherent in Section 947.1405(2), Florida. Statutes (Supp. 1992). That statute, on its face, stated in pertinent part that **"(a)ny 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.**"

The statute speaks of the qualifying offenses as conditions precedent to conditional release supervision status, it does not say that once the qualifying sentence has expired that the inmate has had his status as a violent offender meriting further supervision removed as to concurrent sentences, or that he has ceased to be a member of that class of violent offenders. This Court has held that legislative intent must be determined primarily from the language of the statute, and a district court of appeal need not resort to rules of construction when the words of a statute are clear and legislative intent is manifest. Miele v. Prudential-Bache Securities, Inc., 656 So.2d 470 (Fla. 1995); Zuckerman v. Hofrichter & Quiat, **P.A., 646** So.2d 187 (Fla. 1994).

The First District's decision in Westlund was based on the plain language of the statute which expressly applied its operation to offenses committed subsequent to 10/1/88. This was a clear expression of

legislative intent. Here, in contrast, the Fourth District has ignored the clear legislative intent and reached a result not mandated by the language of the statute, and indeed in violation of the clear expression of legislative intent that Respondent, who achieved conditional release status on the basis of his criminal history, **shall be placed on conditional release supervision upon reaching his tentative release date.** This Court has held that If the language of a statute is clear and unambiguous, legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended. Zuckerman v. Alter. 615 So.2d 661 (Fla. 1993).

Section 947.1405, Florida Statutes, applies to the class of offenders who have been convicted of offenses enumerated in the statute, and that class of offenders shall be subject to further supervision upon reaching their tentative release date, as expressed in the plain language of the statute.

indeed, the Florida House of Representatives Final Staff Analysis & Economic Impact Statement for House Bill 1574 (attached hereto as

Appendix B)[ii] regarding Chapter 88-122, Laws of Florida, enacting the Conditional Release Program Act, recognized that the Act

> . ..targets "high risk" inmates being released early due to gain-time, requiring conditional supervision for up to 2 years. It targets the worst 6-7% of inmates being released... offenders who have committed murder/manslaughter, sexual offenses, robbery, and violent personal crimes, and inmates sentenced as "habitual offenders".

Id. at p. 11 . The Legislature intended that these offenders be subject to supervision because **an offender's criminal history and conditional release status do not disappear merely because one component of his sentence expires.** Any other interpretation would not make sense.

Unfortunately, the District Court did not have the benefit of the Florida Legislature's latest pronouncement on this subject. On May 2, 1997, the last day of the 1997 Legislative session, the Legislature enacted CS for CS for Senate Bill 310, (attached hereto as Appendix C) which amended Section 947.1405(2)(c), Florida Statutes, to include the following language:

> Such (Conditional release) supervision shall be applicable to all sentences within the overall term of sentences if the

[ii] Judicial notice of this official action and record of the Florida Legislature is appropriate pursuant to Section 90.202(5), Florida Statutes, and Petitioner moves that this Court take proper judicial notice thereof.

inmate's overall term of sentences includes one or more conditi[redacted]ase eligible sentences as provided h[redacted][iii]

In Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985), this Court held that

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. *United States* ex *rel. Guest* v. *Perkins,* 17 F.Supp. 177 (D.D.C. 1936); *Hambel* v. Lowry, 264 Mo. 168, 174 S.W. 405 (1915). This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute. *Gay v. Canada Dry Bottling Co., 59* So.2d 788 (Fla.1952).

In Parker v. State, 406 So.2d 1089 (Fla. 1981), this Court recognized that **the Court has the right and duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.**

Accord: State Dept. of Banking & Finance v. Evans, 540 So.2d 884 (Fla. 1 st DCA 1989); State Dept. of Highway Safety v. Scott, 583 So.2d 785 (Fla. 2d DCA 1991); Pfeiffer v. City of Tampa, 470 So.2d 10

[iii] Judicial notice of this official action and record of the Florida Legislature is appropriate pursuant to Section 90.202(5), Florida Statutes, and Petitioner moves that this Court take proper judicial notice thereof.

(Fla. 2d DCA 1985), *rev. den.,* Grieves v. Pfeiffer, 478 So.2d 53 (Fla. 1985); Automobile Ins. Co. of Hartford,, Conn. v. Reem, 469 So.2d 138 (Fla. 3d DCA 1985); State v. Nuckolls, 606 So.2d 1205 (Fla. 5th DCA 1992); Rowles v. Department of Business Regulation , 585 So.2d 319 (Fla. 5th DCA 1991).

Accordingly, based on a plain reading of the statute and in light of the legislative clarification of intent regarding Section 947.1405(2), Florida Statutes, it is clear that Respondent Cooper's Conditional Release supervision extended to all sentences within his bundle (overall term) of concurrent sentences, including the longer Grand Theft sentence. This is so because 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. The Legislature's concern is with the protection of the public from offenders who have proven by their violent crimes and repeated actions that they pose a danger to the public. As a statute enacted for the protection of the public, Section 947.1405 must be construed in favor of the public even though it may

contain a penal provision. State v. Hamilton, 388 So.2d 561 (Fla. 1980).

It is important to note that the Parole Commission's interpretation and application of Section 947.1405(2), Florida Statutes, to Respondent and other similarly situated inmates has been its consistent and only interpretation of this statutory provision since its enactment in 1988. To now alter that interpretation as suggested by the Fourth District will result in the release of many dangerous offenders into the community without supervision, and in others being released early from incarceration, contrary to the clear legislative intent as expressed in the statute.

Further, the Fourth District Court of Appeals' reliance on Heuring v. State, 559 So.2d 207 (Fla. 1990), and State v. Green, 547 So. 2d 92.5 (Fla. 1989), for the proposition that Respondent's Grand Theft sentence was extinguished upon reaching his tentative release date'" is misplaced. The First District Court of Appeals' decision in I incoln v. Florida Parole Commission, 643 So.2d 668 (Fla. 1 st DCA 1994), clarified that

[iv] "Tentative release date" means the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited pursuant to s. 944.275(3)(a). Section 947.005(6), Florida Statutes.

application of gain-time does not constitute the expiration of a sentence imposed subsequent to the enactment of the Conditional Release Program Act, stating that:

> At one time, any "prisoner who (wa)s released early because of gain-time (wa)s considered to have completed his sentence in full." State v. Green, 547 So.2d 925, 926 (Fla. 1989). See Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). But the same law that created the conditional release program amended the gain-time statute...

Lincoln, supra, at 670.

That statute, Section 944.291 (1), Florida Statutes, now states that

> (1) 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...

Petitioner Florida Parole Commission respectfully submits that the certified question in this case must be answered in the affirmative and the decision of the District Court of Appeal, Fourth District of Florida, must consequently be reversed.

CONCLUSION

Based on the foregoing arguments and citations of legal authorities, Petitioner respectfully urges this Honorable Court to answer in the affirmative the certified question in this case and reverse the judgment of the District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing has been furnished by U.S. mail to Mark Cooper, DC # 634429, Moore Haven Correctional Institution, Dorm 2-E-5, P.O. Box 718501, Moore Haven, Florida 33471; Susan Maher, Deputy General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500; and Diane Cuddihy, Assistant Public Defender, 201 S.E. 6th Street, Third Floor, Fort Lauderdale, Florida 33301-3302, this 7th day of May, 1997.

BRADLEY R. BISCHOFF
Assistant General Counsel

APPENDIX TO PETITIONER'S

BRIEF ON THE MERITS

APPENDIX A

REVERSED and REMANDED. (GUNTHER, C.J., DELL and POLEN, JJ., concur.)

* * *

Criminal law—Post conviction relief—Question certified: Is *State v.* Gray retroactive?

MARVIN DAVIS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 97-0646. Opinion filed March 26, 1997. Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Stanton S. Kaplan, Judge: L.T. Case No. 90-1168 CF10B. Counsel: Marvin Davis, Immokalee, pro se. No appearance required for appellee.

(PER CURIAM .) Based on the reasoning of our recent opinion in *Freeman* v. *State, 679 So.* 2d 364 (Fla. 4th DCA 1996). we affirm the denial of appellant's rule 3.850 motion but again certify to the supreme court the same question certified in *Freeman:*

IS STATE v. *GRAY*, 654 So. 2d 552 (Fla. 1995), RETROACTIVE?

(DELL, WARNER and POLEN, JJ., concur.)

* * *

Corporations-Receiverships-Order appointing receiver for corporation's business activities in judicial dissolution proceeding affirmed without prejudice to appellants' applying to trial court to consider necessity of continuing receivership in light of material change in circumstances occurring since appeal was filed

COUNTY COLLECTION SERVICES, INC. and JAMES P. McCARTHY. Appellants, v. W.G. LASSITER, JR., ROBERT CHARLES MALT, ROBERT CHRISTOPHER MALT, EDWARD T. BIERCE, and ROGER GAMBLIN, Appellees. 4th District. Case No. 96-3054. Opinion filed March 26, 1997. Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County: Moses Baker, Jr., Judge; L.T. Case No. CL 96-2624 AD. Counsel: Richard W. Glenn. West Palm Beach, for Appellant-County Collection. *Wendy* R. St. Charles, Palm Beach, for Appellant-James P. McCarthy. Michael R. Bakst of Ackerman, Bakst & Cloyd, P.A.. West Palm Beach, for appellee.

(PER CURIAM.) In this non-final appeal, we affirm the order of the trial court, appointing a receiver for appellants' business activities in a section 607.1430, Florida Statutes (1995) dissolution proceeding. This is without prejudice to appellants' applying to the trial court to consider the necessity of continuing the receivership, in light of their purported election under section 607.1436 to purchase the stock of the complaining shareholders, or any other material change in circumstances that may have occurred since the filing of this appeal. We note that the section 607.1436 election occurred during the pendency of this appeal, so the trial court has not yet considered what effect, if any, it may have. (GUNTHER, C.J., POLEN and PARIENTE, JJ., concur.)

* * *

Criminal law-Scutenciug-Restitution-Error to modify restitution four years after entry of the original order without having reserved jurisdiction to do so

HOMER NUNLEY, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 961208. Opinion riled March 26, 1997. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Joe Wild, Judge; L.T. Case No. 91-715 CF. Counsel: Richard L. Jorandby. Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Tbc state concedes and we hold that the trial court erred in modifying appellant's restitution four years after entry of the original order of restitution. The trial court did not reserve jurisdiction to modify the amount of restitution after assessing the costs of counseling for the victim. Accordingly, WC quash the amended order of restitution. (GUNTHER, C.J., GLICKSTEIN and DELL, JJ., concur.)

* * *

MORA v. KARR. 4th District. #96-3322. March 26, 1997. Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. *See Applegate v. Bartlett Bank of Tallahassee, 377 So.* 2d 1150 (Fla. 1980).

* * *

Criminal law-Habeas corpus-Revocation of conditional release—Conditional Release Act does not apply to grand theft, a category 6 offense—In absence of any other statutory basis for supervised release on grand theft charge, early discharge of defendant on that sentence was unconditional-Fact that sentence for grand theft was concurrent with sentences that did fall under Conditional Release Act not basis for revoking gain time on grand theft charge at same time that conditional release was revoked on other charges-Once defendant was released from remaining period of incarceration on grand theft charge due to gain time award, that remaining period of sentence was extinguished—Defendant entitled to habeas relief where sentences on other offenses had been completed in their entirety, and continued detention was based on grand theft conviction—Question certified: When an inmate who is serving concurrent sentences is released after accruing sufficient gain time, and his release on one or more of those sentences is conditional under section 947.1405, is his release status revoked as to all concurrent sentences, including sentences imposed for offenses that did not qualify for conditional release?

MARK COOPER, Appellant, v. FLORIDA PAROLE COMMISSION and THE DEPARTMENT OF CORRECTIONS, Appellees. 4th District. Case No. 96-3641. Opinion filed March 21, 1997. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Howard M. Zeidwig, Judge; L.T. Case Nos. 93-16779 CF10A, 94-16630 CF10A. Counsel: Mark Cooper, Moore Haven, pro se. Kurt E. Ahrendt. Assistant General Counsel. Tallahassee, for Appellee-Florida Parole Commission.

ON MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION

[Original Opinion at 22 Fla. L. Weekly D73 lc]

(PER CURIAM.) We deny the motion for rehearing, and rehearing en banc, grant the motion for clarification and certification and substitute the following opinion for that originally issued.

Prisoner Mark Cooper appeals the denial of his petition for writ of habeas corpus. He is serving the remainder of his prison sentence after having been returned to prison upon a finding that he had violated his conditional release by committing a new crime.

On September 1, 1995. Cooper received concurrent sentences for crimes charged in two separate cases. He received a four year sentence on one count of grand theft, which is classified as a category 6 offense under Florida Rule of Criminal Procedure 3.701(c). With credit for time served and without any additional credit that would entitle him to early release, that prison term was due to expire on December 8, 1997.

Cooper received 20 month concurrent sentences for the offenses charged in the second information: robbery (category 3), battery on a law enforcement officer (category 4), and resisting arrest with violence (category 4). With credit awarded only for time served, those terms were fully served on May 30, 1996.

The Conditional Release Act allows the supervision of certain repeat offenders after their release from prison by reason of their accrual of gain time, and revocation of their gain time in the event that they violate one or more conditions. Under the version of the Act that was in effect at the time of Cooper's crimes, his release on only the category 3 and 4 crimes could be made conditional. § 947.1405(2)(a), Fla. Stat. (Supp. 1992) (applies to category 1-4 crimes only). In the absence of another statutory basis for supervised release on the grand theft charge, his early discharge on that sentence was unconditional. $944.291, Fla. Stat. (1991); *Heuring v. State, 559 So.* 2d 207 (Fla. 1990).

Cooper was conditionally released on both cases. That release was revoked on both cases after violation. Cooper sought relief in the circuit court, arguing that his release on the grand theft sentence should not have been revoked. The circuit court disagreed, finding that although he ordinarily would not have been

subject to conditional release on the grand theft charge, because that sentence was concurrent with sentences that did fall under the Conditional Release Act, his gain time could be revoked on that charge as well.

That finding was error. Although his sentences were to be served concurrently, they nevertheless remained distinct sentences for the purpose of eligibility under the Act. *Westlund* v. *Florida Parole Comm'n*, 637 So. 2d 52, 54 (Fla. 1st DCA 1994). Appellant's last date of conditional release supervision should have been calculated with reference only to those sentences that were subject to the Act, that is the robbery/&sting concurrent 20 month sentences. Id. at 54.

Once the appellant was released from the remaining period of his incarceration on the grand theft charge due to his gain-time award, that remaining period of the sentence was extinguished. *Hewing,* 559 So. 2d at 208 (quoting *State v. Green, 547 So.* 2d 925, 926 (Fla. 1989)). The appellant should have been released from prison on May 30, 1996, when he had completed his prison terms on the category 3 and 4 charges in their entirety. We therefore reverse the trial court's order, remand with direction to grant the petition for writ of habeas corpus and certify the following question as one of great public importance:

> WHEN AN INMATE WHO IS SERVING CONCURRENT SENTENCES IS RELEASED AFTER ACCRUING SUFFICIENT GAIN TIME AND HIS RELEASE ON ONE OR MORE OF THOSE SENTENCES IS CONDITIONAL UNDER SECTION 947.1405, FLORIDA STATUTES, IS HIS RELEASE STATUS REVOKED AS TO ALL THE CONCURRENT SENTENCES, INCLUDING THE SENTENCES IMPOSED FOR OFFENSES THAT DID NOT QUALIFY FOR CONDITIONAL RELEASE?

(GUNTHER, C.J., GLICKSTEIN and DELL, JJ., concur.)

* * *

Dissolution of marriage-Child support—Visitation—Modification—General master erred by refusing to hear father's motions to enforce visitation and to modify child support on ground that appeal from child support arrearage order was still pending-In family matters, trial court retains jurisdiction to enforce an order which is being appealed, while the appeal is pending—Pendency of post-dissolution appeal on issue of child support arrearages did not have any effect on father's ability to move for enforcement of visitation provisions of final judgment—Prospcctivc modification of child support obligation would have no effect on arrearage order covering earlier time periods—Contempt-Error to find father in willful contempt for failure to pay private school tuition where it was clear that father did not have ability to pay monthly child support obligation, monthly arrearage payment, and private school tuition-Error to enter arrcarage order and increased deduction order in response to mother's motion for enforcement without considering father's motion for modification which covered same time period—Ability to pay-Income-On remand, master should consider actual income figures for father for prior year-Error to disallow bona fide credit card indebtedness on theory that debt should have been consolidated absent showing in record that consolidation was feasible and what savings would be realized through consolidation-No basis for master's disallowance of all payments toward father's attorney's fees

JEFFREY H. MERIAN, Appellant, v. SUZANNE M. MERHIGE, Appellee. 3rd District. Case No. 95-2689. L.T. Case No. 86-28635. Opinion filed March 26. 1997. An appeal from the Circuit Court for Dade County, Maria M. Korvick, Judge. Counsel: Peter A. Collins and Mary Raymond. for appellant. Fred M. Dellapa, for appellee.

(Before COPE, GERSTEN and SHEVIN, JJ.)

(COPE, J.) Appellant-father Jeffrey H. Merian appeals an order entered on report of the General Master in post-dissolution of marriage proceedings. We affirm in part and reverse in part.

During the marriage of the father and the appellcc-mother Suzanne M. Merhigc, one child was born. The parties divorced in 1986. By agreement, the mother was to be the primary residential parent and the father was to pay an agreed amount of monthly child support. The parties' agreement, which was incorporated into the final judgment dissolving marriage, provided in part:

> The Husband shall pay for any and all schooling of the minor child, *whether public or private*, and for all school supplies and incidentals needed by the child in connection thereof. It is recognized and acknowledged by the Parties that *the current intention* **is that** the child be educated in private school from preschool through high school.

(Emphasis added). At the time of the dissolution of marriage the child was two years old. She was enrolled in day care at a cost of $200 per month.

In 1987 the child began Montessori School. The tuition was substantially higher.

Ultimately the mother filed a motion for enforcement of child support and contempt. The General Master found that the father had financial difficulties in 1988 and 1989, but that by 1991 and 1992 his financial position had improved. The General Master rejected the father's claim that there had been an oral modification of the child support agreement, In her 1993 order, the Master assessed arrearages through June 1, 1993. established a payment schedule, and directed that there be an income deduction order, The father's exceptions were denied.'

In August 1993, the father filed a motion to modify his child support obligation. The father also filed a motion to enforce his visitation rights. The General Master refused to hear the father's motions on the theory that the General Master (and trial court) could not exercise jurisdiction while the father was pursuing an appeal from the 1993 order.

Subsequently, the mother filed another motion for enforcement of child support and contempt. The mother sought reimbursement for Montessori School tuition and supplies for the 1993-94 and 1994-95 school year, as well as other relief.

In May 1995, the General Master conducted a hearing on the mother's motion for enforcement of child support and contempt. The General Master again refused to hear any of the father's motions, in the belief that the Master could not properly do so while the father's appeal was pending.

After an evidentiary hearing, the Master concluded that the father did not have the ability to pay the combined total of child support, arrearages, and tuition. Inconsistently, the Master then found the father to be in willful contempt. The Master modified the payment schedule and directed that a new income deduction order be entered. The father's exceptions were denied, and the father has appealed.

I.

The General Master erred by refusing to hear the father's pending motion to enforce visitation and motion for modification of child support,

A.

Florida Rule of Appellate Procedure 9.600(c) specifies that in family law matters, the trial court retains jurisdiction to enforce an order which is being appealed, while the appeal is pending. Rule 9.600(c) currently provides:

> RULE 9.600. JURISDICTION OF LOWER TRIBUNAL PENDING REVIEW
>
> . . .
>
> (c) Family Law Matters. In family law matters:
>
> (1) The lower tribunal shall retain jurisdiction to enter and enforce orders awarding separate maintenance, child support, alimony, attorney's fees and costs for services rendered in the lower tribunal, temporary attorney's fees and costs reasonably necessary to prosecute or defend an appeal, or other awards necessary to protect rhe welfare and rights of any party pending appeal.
>
> . . . .
>
> (3) Review of orders entered pursuant to this subdivision

APPENDIX B

PAROLE

This bill would change the name from the Florida Parole and Probation Commission to the Florida Parole Commission since all probation duties were transferred to the Department of Corrections in 1975. It also would increase the number of commissioners from 6 to 7, effective December 1, 1988, to handle the increased workload as a result of this bill's passage.

The bill would also repeal section 35, chapter 83-131, Laws of Florida, which repeals the Commission, would and extend parole eligibility to offenders with sentences of at least 10 years. It would also remove the early termination of parole; requiring biennial progress reviews to consider reform of conditions. Release plans would require verification prior to release, allowing a 60 day delay.

The bill would also create the "Conditional Release Program Act of 1988" which would target the "high risk" inmates being released earlier than sentenced due to gain-time, requiring conditional supervision for up to 2 years. It would target the worst 6-7% of inmates being released; offenders sentenced under categories 1,2,3,& 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure. These are offenders who have committed murder/manslaughter, sexual offenses, robbery, and violent personal crimes. This program would also allow for restitution, revocation, and input from the crime victim:

COMMUNITY CONTROL PAROLE

This bill would allow the Commission to require community control as a special condition of parole thus providing the releasee with a period of intense supervision while adjusting to life outside the prison system. This period of supervision would be stricter than regular parole is designed to provide.

The bill would also offer greater supervision by authorizing the officer to request random testing for drug usage as a condition of community control, probation and parole. In addition, the Department of Corrections at its discretion, may require the probationer to bear the costs of testing.

The community control program office would be notified immediately upon placement of a parolee on community control. Approximately 10% of parolees would be supervised under community control program, and an additional 10% of eligibles who would not receive parole without this special condition, resulting in a total of 20% or 112 parolees in FY 88-89, and decreasing each following year, if parole is not reinstated in some form.

COMMUNITY RESIDENTIAL PROBATION CENTERS

This bill proposes alternative housing in county residential probation centers for certain non-violent prisoners. Where available capacity may exist, such as in existing residential probation facilities, counties may contract with DOC to house non-violent prisoners in these facilities. Counties presently at capacity with residential probation facilities or counties with no residential probation facility, may construct, purchase, renovate or lease facilities to accommodate such prisoners.

This alternative housing for prisoners, who would otherwise be housed in a state

APPENDIX C

all the defendant's offenses pending before the court for sentencing. Either the office of the state attorney or the Department of Corrections, or both where appropriate, shall prepare the scoresheet or scoresheets, which must be presented to ~~the state attorney and~~ the defense counsel for review for accuracy in all cases unless the judge directs otherwise. The defendant's scoresheet or scoresheets must be approved and signed by the sentencing judge.

~~(4) The Department of Corrections shall develop and submit the revised sentencing guidelines scoresheet to the Sentencing Commission by June 15 of each year, as necessary. Following the Supreme Court's approval of the revised procedures, the Department of Corrections shall produce the revised scoresheets by no later than December 31 of each year, as necessary. To facilitate the purposes of this subsection, all legislation that affects the sentencing guidelines scoresheet shall have an effective date of January 1.~~

Section 10. Section 947.1405, Florida Statutes, 1996 Supplement, is amended to read:

947.1405 Conditional release program.--

(1) This section and s. 947.141 may be cited as the 'Conditional Release Program Act."

(2) Any inmate who:

(a) Is convicted of a crime committed on or after October 1, 1988, and before January 1, 1994, and any inmate who is convicted of a crime committed on or after January 1, 1994, which crime is or was contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure (1993), and who has served at least one prior felony commitment at a state or federal correctional institution:

(b) Is sentenced as a habitual or violent habitual offender or violent career criminal pursuant to s. 775.084; or

(c) IS found to be a sexual predator under's, 775.21 or former s. 775.23,

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, including payment of the cost of supervision pursuant to s. 948.09. Such supervision shall be applicable to all sentences within the overall term of sentences if the inmate's overall term of sentences includes one or more conditional release eligible sentences as provided herein. Effective July 1, 1994, and applicable for offenses committed on or after that date, the commission may require, as a condition of conditional release, that the releasee make payment of the debt due and owing to a county or municipal detention facility under s. 951.032 for medical care, treatment, hospitalization, or transportation received by the releasee while in that detention facility. The commission, in determining whether to order such repayment and the amount of such repayment, shall consider the amount of the debt, whether there was any fault of the institution for the medical expenses incurred, the financial resources of the releasee, the present and potential future financial needs and -earning ability of the releasee, and dependents, and other appropriate factors. If an inmate has received a term of probation or community control supervision to be served after release from incarceration, the period of probation or community control must be substituted for the conditional release supervision. A panel of no fewer than two

commissioners shall establish the terms and conditions of any such release. If the offense was a controlled substance violation, the conditions shall include a requirement that the offender submit to random substance abuse testing intermittently throughout the term of conditional release supervision, upon the direction of the correctional probation officer as defined in s. 943.10(3). The commission shall also determine whether the terms and conditions of such release have been violated and whether such violation warrants revocation of the conditional release.

(3) As part of the conditional release process, the commission shall determine:

(a) The amount of reparation or restitution.

(b) The consequences of the offense as reported by the aggrieved party.

(c) The aggrieved party's fear of the inmate or concerns about the release of the inmate.

(4) The commission shall provide to the aggrieved party information regarding the manner in which notice of any --developments concerning the status of the inmate during the term of conditional release may be requested.

(5) Within 180 days prior to the tentative release date or provisional release date, whichever is earlier, a representative of the commission shall interview the inmate. The commission representative shall review the inmate's program participation, disciplinary record, psychological and medical records, and any other information pertinent to the impending release. A commission representative shall conduct a personal interview with the inmate for the purpose of determining the details of the inmate's release plan, including his planned residence and employment. The results

of the interview must be forwarded to the commission in' writing.

(6) Upon receipt of notice as,required under s. 947.175, the commission shall conduct a review of the inmate's record for the purpose of establishing the terms and conditions of the conditional release. The commission may impose any special conditions it considers warranted from its review of the record. If the commission determines that the inmate is eligible for release under this section, the commission shall enter an order establishing the length of supervision and the conditions attendant thereto. However, an inmate who has been convicted of a violation of chapter 794 or found by the court to be a sexual predator is subject to the maximum level of supervision provided, with the mandatory conditions as required in subsection (7), and that supervision shall continue through the end of the releasee's original court-imposed sentence. The length of supervision must not exceed the maximum penalty imposed by the court.

(7) Any inmate who is convicted of a crime committed on or after October 1, 1995, or has been previously convicted of a crime committed on or after October 1, 1995, and who meets the criteria of s. 775.21 or former s. 775.23(2)(a) or (b) shall have, in addition to any other conditions imposed, the-following special conditions imposed by the commission:

(a) A curfew, if appropriate, during hours set by the commission.

(b) If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate.

(c) Active participation in and successful completion

of a sex offender treatment program, at the releasee's own expense, unless one is not available within a SO-mile radius of'the releasee's residence.

(d) A prohibition on any contact with the victim, directly or indirectly, including through a third person, unless approved by the commission.

(e) If the victim was under the age-of 18, a prohibition, until successful completion of a sex offender treatment program, on unsupervised contact with a child under the age of 18, unless authorized by the commission without another adult present who is responsible for the child's welfare; has been advised of the crime, and is approved by the commission.

(f) If the victim was under age 18, a prohibitionon working for pay or as a volunteer at any school, day care center, park, playground, or other place where children regularly congregate, as prescribed by the commission.

(g) Unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, a prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually explicit material.

(h) A requirement that the releasee must submit two specimens of blood to the Florida Department of Law Enforcement to be registered with the DNA database.

(8) It is the finding of the Leqislature that the population of offenders released from state prison into the community who meet the conditional release criteria poses the greatest threat to the public safety of the groups of offenders under community supervision. Therefore, the Department of Corrections is to provide intensive supervision by experienced correctional probation officers to conditional

release offenders. Subject to specific appropriation by the Legislature, caseloads may be restricted to a maximum of 40 conditional release offenders per officer to provide for enhanced public safety and to effectively monitor conditions of electronic monitoring or curfews, if so ordered by the commission.

Section 11. Section 948.12, Florida Statutes, is created to read:

948.12 Intensive supervision for post prison release of violent offenders.--It is the finding of the Legislature that the population of violent offenders released from state prison into the community poses the greatest threat to the public safety of the groups of offenders under community supervision. Therefore, for the purpose of enhanced public safety, any offender released from state prison who:

(1) Was most recently incarcerated for an offense that is or was contained in category 1 (murder, manslaughter), category 2 (sexual offenses), category 3 (robbery), or category 4 (violent personal crimes) of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure (1993), and who has served at least one prior felony commitment at a state or federal correctional institution:

(2) Was sentenced as a habitual offender, violent habitual offender, or violent career criminal pursuant to s. 775.084; or

(3) Has been found to be a sexual predator pursuant to s. 775.21,

and who has a term of probation to follow the period of incarceration shall be provided intensive supervision by experienced correctional probation officers. Subject to

THE AMENDMENT TO THE CONDITIONAL RELEASE PROGRAM ACT IS DESIGNED TO CLARIFY THE ORIGINAL LEGISLATIVE INTENT AND DOES NOT VIOLATE EX POST FACTO PROSCRIPTIONS

This clarifying amendment is designed to respond to court challenges to placement on Conditional Release where an inmate is convicted of a Category 1, 2, 3, or 4 offense and a non-qualifying offense. Often the sentence imposed on the non-qualifying crime runs consecutively or is the longer of two concurrently imposed sentences. Inmates argue and a Court has recently held in Coooer v. FPC, that since they are not serving the "qualifying sentence at the time of release," they should not be subject to Conditional Release Supervision.

At the point in time these inmates were convicted, however, there was absolutely no doubt they would be subject to Conditional Release Supervision upon arrival of their TRD. The passage of time or temporal point of reference should not eliminate Conditional Release eligibility. The particular sentence that an inmate happens to be serving is irrelevant to Conditional Release eligibility because Section 947.1405, Florida Statutes, specifies convictions as the determinative criteria for eligibility -- not sentences.

The Conditional Release statute keys in on convictions, because the legislature wanted to ensure that persons convicted of the most serious types of criminal offenses would not be released from prison without serving a period of time under strict conditions of supervision. The legislature determined, in effect, that those who commit crimes in categories 1, 2, 3, and 4 are "bad guys" -- persons so dangerous that they should only be released from prison on the condition that they serve and successfully complete a term of supervision, thereby ensuring the protection of society. Inmates

convicted of less serious crimes contained in other Guidelines categories are permitted to expire their sentences without a required term of supervision. These are the "good guys," so to speak.

Inmates should not be rewarded merely because they happen to commit a "good guy" crime in addition to a "bad guy" crime. What inmates are doing is asking the courts to dissect their various sentences into components, determine that the "bad guy" component has expired, arid thereby transform themselves into "good guys" who need no period of supervision. This was never the legislative intent. Clarifying by stating that, "Such supervision shall be applicable if the inmate's overall term of sentences includes one or more conditional release eligible sentences as provided herein," ensures that the original legislative intent is carried out.

When an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. Lowery v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). Since the Commission has always interpreted the statute to require Conditional Release eligibility determinations be made based upon convictions (and not sentences), the clarifying amendment alters nothing to the detriment of any inmate. It does not increase the "penalty" or make the law "more onerous." It does not make eligible for supervision, who did not previously qualify for conditional Release. Accordingly, the amendment does not and cannot violate ex post facto proscriptions.

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