IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,122

CLARENCE H. HALL, JR.,

Petitioner,

vs.

STATE OF FLORIDA, and HARRY K. SINGLETARY, JR.,

Respondents.

INITIAL BRIEF

On Discretionary Review of a Decision
of the Fifth District Court of Appeal
(Conflict Noted by this Court
in Order Accepting Jurisdiction)
and Petition for Writ of Habeas Corpus and/or Mandamus

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STATEMENT OF THE CASE

Petitioner Clarence H. Hall, Jr., an inmate of the Department of Corrections at Washington Correctional Institution in Chipley, Florida, seeks review of a decision of the Fifth District Court of Appeal which affirmed the summary denial of his *pro se* motions for post-conviction relief and sanctioned him for bringing a series of frivolous *pro se* appeals from those post-conviction motions. The decision below, Hall v. State, 698 So. 2d 576 (Fla. 5th DCA 1997) ("Hall II") (R-38-39), is attached as **Appendix A**.

The district court called the post-conviction motion under review, which sought to vacate a 1986 conviction for constructive possession of a firearm by a convicted felon (R-3-10) "untimely and without merit and clearly frivolous." App. A-1. That conclusion is supported by the record, and we do not seek review of that aspect of the decision below. See R-1-37. It is the sanction imposed by the district court – forfeiture of Petitioner's gain time by court directive – which presents a number of important statutory and constitutional issues. Indeed, as discussed more fully below, there is a substantial question under the present statutory scheme of whether forfeiture of gain time is *ever* permissible as a sanction in a post-conviction collateral criminal proceeding.

Hall has been an active but unsuccessful *pro se* litigant.[1] In an earlier case, the Fifth District Court of Appeal had advised him that "any further frivolous pro se appeals would subject him to sanctions as provided in section 944.28(2)(a), Florida Statutes (Supp. 1996)." App. A-1; see also Hall v. State, 690 So. 2d 754 (Fla. 5th DCA 1997), rev. denied 705 So. 2d 570 (1998) ("Hall I").

Section 944.28(2)(a), provides in relevant part:

> (2)(a) All or any part of the gain-time earned by a prisoner according to the provisions of law is subject to forfeiture if such prisoner . . is found by a court to have brought a frivolous suit, action, claim, proceeding, or appeal in any court; is found by a court to have knowingly or with reckless disregard for the truth brought false information or evidence before the court; or violates any law of the state or any rule or regulation of the department or institution.

(Emphasis supplied).

When the district court concluded that Hall had violated its admonition

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[1] See e.g., Hall v. State, 697 So. 2d 155 (Fla. 5th DCA 1997); Hall v. State, 690 So. 2d 754 (Fla. 5th DCA 1997), rev. denied 705 So. 2d 570 (1998); Hall v. State, 691 So. 2d 1080 (Fla. 1997); Hall v. State, 619 So. 2d 969 (Fla. 5th DCA 1993); Hall v. State, 613 So. 2d 15 (Fla. 1st DCA 1993); Hall v. State, 611 So. 2d 533 (Fla. 5th DCA 1993); Hall v. State, 594 So. 2d 753 (Fla. 5th DCA 1992); Hall v. State, 529 So. 2d 708 (Fla. 5th DCA 1988); Hall v. State, 512 So. 2d 838 (Fla. 5th DCA 1987); Hall v. State, 506 So. 2d 1045 (Fla. 5th DCA 1987). All of the Hall cases relate to his criminal conviction.

not to file any more frivolous post-conviction proceedings, the court ordered the Department of Corrections to forfeit his gain time as a sanction:

> [W]e direct the Department of Corrections to forfeit the applicable gain time earned by Hall pursuant to section 944.28(2)(a), Florida Statutes (Supp. 1996).
>
> * * *
>
> AFFIRMED; DEPARTMENT OF CORRECTIONS DIRECTED TO FORFEIT GAIN TIME.

Hall II, App. A-2.

The decision below did not acknowledge or discuss the relevance of section 944.279(2), Fla. Stat. (Supp. 1996) (stating that the forfeiture of gain time authorized in subsection (1) "does not apply to a criminal proceeding or a collateral criminal proceeding."). Likewise -- assuming *arguendo* that § 944.28(2)(a) does apply to collateral criminal proceedings -- the decision below did not acknowledge or discuss the procedures contained in subsection (2)(c) of § 944.28, which dictates the administrative method of declaring a forfeiture of an inmate's gain time. Those statutory procedures provide for a written charge, notice, a hearing and an opportunity to be heard before a Department of Corrections disciplinary committee. Under that subsection, after the required hearing the disciplinary committee makes

a recommendation to the superintendent of the correctional institution, who has discretion to approve or reject the recommendation. The superintendent's decision is then subject to further review and approval by the Department. § 944.28(2)(c), Fla. Stat. The decision below circumvented those statutory requirements.

Hall's motion for rehearing was denied (R-62), and, *pro se*, he sought review in this Court. R-64-70. In an Order of July 28, 1998, the Court treated the petition as both a petition for discretionary review and a petition for habeas corpus and/or mandamus, added Department of Corrections Director Harry K. Singletary, Jr. as a Respondent, and appointed undersigned counsel to represent Petitioner. R-71-72. The Court accepted jurisdiction based upon conflict with a case decided subsequent to Hall II, Mercade v. State, 698 So. 2d 1313, 1316 (Fla. 2d DCA 1997) ("we decline to follow the "direct" [gain time forfeiture] approach of Hall II") (**Appendix B**), and issued guidelines for issues to be briefed.[2] See R-71-72. This Court directed that the "brief concerning conflict and the brief concerning the writ petition may be one and the same, but should contain separate sections." R-72, ¶ 3.

Our analysis of the legal issues has prompted us to re-order the argument based on the Court's questions. We begin with the argument which is dispositive of

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[2] The July 28, 1998 Order (R-71-72) accepted jurisdiction and thus obviated the need for briefs on jurisdiction.

Petitioner's case, and identify within each section of the Argument whether it pertains to the issues arising under the Court's conflict jurisdiction, or the petition for writ of habeas corpus and/or mandamus.

STATEMENT OF THE ISSUES

I. Assuming *arguendo* that § 944.28(2)(a), Fla. Stat. (Supp. 1996) applies to inmates who file frivolous collateral criminal proceedings and appeals, did the district court exceed its statutory and constitutional authority by directing the Department of Corrections to forfeit Petitioner's gain time pursuant to that statute?

II Is the forfeiture of gain time for the filing of a frivolous pleading an ex post facto violation as applied to inmates whose criminal offenses were committed prior to the effective date of the statute authorizing such forfeitures?

III. Does subsection (2) of section 944.279, Florida Statutes (Supp. 1996), and/or its current version, authorize the forfeiture of gain time for the filing of a frivolous post-conviction motion and/or the appeal therefrom?

IV Has the Department of Corrections already forfeited Petitioner's gain time or contemplated forfeiting Petitioner's gain time pursuant to Hall v. State, 698 So. 2d 576 (Fla. 5th DCA 1997) (Hall II)?

SUMMARY OF THE ARGUMENT

1. The decision below, directing the Department of Corrections to forfeit Petitioner's gain time pursuant to § 944.28(2)(a), Fla. Stat. (Supp. 1996), as a sanction for filing a frivolous appeal, should be reversed. The pertinent Florida Statutes do not authorize the forfeiture of gain time for filing frivolous post-conviction collateral criminal attacks.

In 1996, two statutes were passed: § 944.279 and an amendment to § 944.28(2)(a). Laws 1996, Ch. 96-106, §§ 5 and 6. Section 944.279(1) establishes procedures that a court may follow if it determines an inmate has filed a "frivolous or malicious suit, action, claim, proceeding, or appeal," including notification to the appropriate Department of Corrections institution of that finding. Section 944.279(2) states unequivocally that "This section does not apply to a criminal proceeding or a collateral criminal proceeding." (emphasis supplied). Section 944.28(2)(a), which describes the events which may subject an inmate to a forfeiture of gain time, including the almost identical language, "found by a court to have brought a frivolous suit, action, claim, proceeding, or appeal. . . ." must be read *in pari materia* with § 944.279 and its exclusion of criminal or collateral criminal proceedings.

The interrelationship of the two statutes was recognized in Saucer v. State, ___ So. 2d ___, 23 Fla. L. Weekly D1972 (Fla. 1st DCA 1998), and by the

concurring chief judge in Bradley v. State, 703 So. 2d 1176, 1178 (Fla. 5th DCA 1997) (Griffin,C.J., concurring specially). They agreed that the § 944.28(2)(a) forfeiture sanction for filing frivolous pleadings is only as broad as the scope of § 944.279, which explicitly *excludes* criminal proceedings and collateral criminal proceedings. That conclusion is bolstered by the preamble to Chapter 96-106, which refers only to the problem of frivolous "civil lawsuits" filed by inmates. 703 So. 2d at 1178. Thus, the gain time forfeiture directed by the court below must be reversed and the Department precluded from instituting gain time forfeiture proceedings against Petitioner based on the Hall II "frivolousness" finding.

2. As an alternative argument, assuming *arguendo* that § 944.28(2)(a) may be read to authorize the Department of Corrections to forfeit an inmate's gain time where a court has found the inmate's post-conviction collateral criminal proceedings to be frivolous, the decision below must be reversed because the district court had no statutory authority to *direct* the Department to forfeit Petitioner's gain time. Only the Department has authority to implement the statute. For a court to direct the Department to forfeit an inmate's gain time -- a discretionary function of the executive branch -- violates the separation of powers principles embodied in Article II, § 3, Florida Constitution, and deprives Petitioner of the due process protections found in § 944.28(2)(c). If our first Saucer / Bradley argument is unsuccessful, this

Court should resolve the conflict between the Fifth District in Hall II and the Second District in Mercade v. State, 698 So. 2d 1313 (Fla. 2d DCA 1997), in favor of the Mercade approach: a court may *recommend*, but not order, the forfeiture of gain time for filing frivolous appeals.

3. As a further alternative argument, assuming *arguendo* that the Department of Corrections seeks to apply § 944.28(2)(a) to forfeit an inmate's gain time for the filing of a "frivolous suit, action, claim, proceeding or appeal," the Ex Post Facto Clause of the United States Constitution, Art. I, § 10, and of the Florida Constitution, Art. I, § 10, preclude the application of that statute to those inmates (like Petitioner) whose offenses were committed prior to the effective date of the statute. The forfeiture of gain time would effectively increase the length of the sentence for such offenses *via* the retroactive application of a statute, a result that the Ex Post Facto Clause prohibits. The fact that the frivolous court proceedings were brought after the 1996 amendment to § 944.28(2)(a) is not dispositive; it is the effect of the statute – the lengthening of a pre-amendment offense sentence -- that is precluded by the Constitution.

4. The Department of Corrections has not taken any action against Petitioner's gain time in response to the Hall II decision. Counsel for the Department has advised it to take no action, pending the outcome of these proceedings. (App.C).

ARGUMENT

I.

THE LEGISLATURE HAS NOT AUTHORIZED THE FORFEITURE OF GAIN TIME FOR FILING FRIVOLOUS POST-CONVICTION COLLATERAL CRIMINAL PROCEEDINGS

This section is in response to the Court's question #2 (R-72), and pertains to the petition for habeas corpus and/or mandamus. The question was:

> 2. Whether subsection (2) of section 944.279, Florida Statutes (Supp. 1996), and/or its current version, authorizes the forfeiture of gain time for the filing of a frivolous post-conviction motion and/or the appeal therefrom?

A copy of the statute is included as **Appendix D** to this Brief. (Subsection (2) is unchanged since 1996).

The answer to the Court's question seems almost too obvious, because subsection (2) provides that "This section does not apply to a criminal proceeding or a collateral criminal proceeding." (emphasis supplied). Thus, the § 944.279(1) risk of gain time forfeiture for filing frivolous pleadings does not extend to post-conviction motions or appeals, even if deemed frivolous by a court. Section 944.279 provides in full:

> (1) At any time, and upon its own motion or on motion of a party, a court may conduct an inquiry into whether any action or appeal brought by a prisoner was brought in good faith. A prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal in any court of this state or in any federal court, which is filed after July 30, 1996, or who knowingly or with reckless disregard for the truth brought false information or evidence before the court, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections. The court shall issue a written finding and direct that a certified copy be forwarded to the appropriate institution or facility for disciplinary procedures pursuant to the rules of the department as provided in § 944.09.
>
> (2) This section does not apply to a criminal proceeding or a collateral criminal proceeding

It follows logically that if § 944.279 does not apply to criminal or collateral criminal proceedings -- and it expressly does not -- the procedures for gain time forfeiture proceedings contained in its companion statute, § 944.28, are similarly inapplicable to criminal or collateral criminal proceedings.

Neither the court below nor the Mercade court addressed the interrelationship between the two statutes and the argument that the forfeiture sanction cannot be imposed for a frivolous appeal from the denial of a post-

conviction motion. There is appellate authority for that conclusion, however.

In a Fifth District decision, announced after Hall II, Chief Judge Griffin wrote:

> When the Florida legislature enacted chapter 96-106, Laws of Florida, which created section 944.279, Florida Statutes and amended section 944.28(2)(a), Florida Statutes, I understood that the reference to "a frivolous suit action, claim, proceeding or appeal" in section 944.28(2)(a) referred to the same kind of "frivolous suit, action, claim, proceeding or appeal" that had previously been described in section 944.279. This would mean that it does not apply to criminal and criminal collateral proceedings. . . . It seems odd that section 944.279, which requires certification from the court that "a frivolous or malicious suit, action, claim, proceeding or appeal in any court of this state. . . ." does not include criminal or collateral criminal proceedings, but section 944.28(2)(a) applies to any type of proceeding and has no such procedural requirement. If the two statutes are independent, the first, section 944.279 would seem to be superfluous since both substantively and procedurally it is entirely subsumed in the broader statute, section 944.28(2)(a),(b).

Bradley v. State, 703 So. 2d 1176, 1178 (Fla. 5th DCA 1997) (Griffin, C.J., concurring specially). Judge Griffin also relied on and set forth the text of the preamble to Chapter 96-106, which makes reference to congested "civil court dockets," lawsuits

against "public officers and employees," and "the overwhelming majority of civil lawsuits filed by self-represented indigent inmates are frivolous and malicious actions. . . ." It appears that the statute was enacted in response to inmates' lawsuits such as those complaining about chunky versus smooth peanut butter.[3] There is nothing in the preamble to suggest that the Legislature sought to include post-conviction proceedings within the sweep of the statute. Indeed, the opposite is true: "This section does not apply to a criminal proceeding or a collateral criminal proceeding." § 944.279(2), Fla. Stat. (emphasis supplied).

Judge Griffin's view could not carry a majority in the Bradley case, but his reasoning was later adopted by the First District Court of Appeal. In Saucer v. State, ___ So. 2d ___, 23 Fla. L. Weekly D1972 (Fla. 1st DCA August 17, 1998), the court concluded that § 944.28(2)(a) did not apply in a belated appeal habeas proceeding:

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[3] See Orlando Sentinel, Wednesday, March 13, 1996 (Local and State p. D5) ("A bill designed to cut the number of lawsuits over bad prison food and other conditions inmates find unsatisfying . . . . Florida inmates have filed suits over the lack of raincoats, the use of reconstituted milk rather than fresh milk, the presence of gristle in a turkey leg and meals of two pancakes rather than three"); Fort Lauderdale Sun Sentinel, Saturday, March 9, 1996 (Editorial, p. 10A) ("Florida Attorney General Bob Butterworth says it costs Florida taxpayers about $2 million a year to defend the state against these nonsensical lawsuits." Examples included "the ludicrous demand for name-brand athletic shoes. . . [and] the inane complaint of another murderer who sued because his meals were served on paper plates").

> Sections 944.279 and 944.28(2) must be read in pari materia and the former would appear to have no purpose unless the certification described therein is the same which serves as the authority for a forfeiture pursuant to the latter. See Bradley v. State, 703 So. 2d 1176, 1178 (Fla. 5th DCA 1997) (Griffin, C.J., concurring). We are therefore constrained to find that there is no statutory authority for a gain-time forfeiture in this criminal proceeding. . . .

Id. (emphasis supplied).

Likewise, there is no statutory authority for a gain time forfeiture in this collateral criminal proceeding – neither by a court, nor by the Department of Corrections. Thus, this Court should grant the petition for writ of mandamus, and direct that no gain time forfeiture proceedings be instituted against Petitioner as a sanction for the Hall II "frivolousness" finding.

II.

THE COURT BELOW EXCEEDED ITS AUTHORITY BY DIRECTING THE DEPARTMENT OF CORRECTIONS TO FORFEIT PETITIONER'S GAIN TIME FOR VIOLATING § 944.28(2)(a), FLA. STAT.; IF 944.28(2)(a) APPLIES AT ALL TO THIS CASE THE CONFLICT SHOULD BE RESOLVED IN FAVOR OF THE SECOND DISTRICT'S *MERCADE* ANALYSIS

This argument pertains to the Court's acceptance of conflict jurisdiction over Petitioner's petition for discretionary review. This section is presented as an alternative argument, if the Court rejects our primary position argued in Point I, *supra*.

The district court erred and exceeded its authority by directing a forfeiture of Petitioner's gain time pursuant to § 944.28(2)(a), Fla. Stat. (Supp. 1996). By its terms, the statute gives the Department of Corrections – and no other entity, person, or branch of government – *exclusive* power and discretion to forfeit an inmate's gain time for various statutory reasons. *Cf.* Britt v. Chiles, 704 So. 2d 1046, 1047 (Fla. 1997) (Governor and Attorney General "have no legal authority to award or forfeit gain-time based on a prisoner's behavior"). Although the court below did not address whether or not it had the statutory authority to order a forfeiture of gain time, the Department's exclusive authority in this area was recognized and discussed in the Second District's post-Hall II decision, Mercade v. State, 698 So. 2d 1313 (Fla.

2d DCA 1997) (**Appendix B**) (rejecting the Hall II approach; see *infra*). That court found Mercade's appeal to be a "paradigm of frivolousness," id. at 1315, but deferred to the Department's exclusive authority to implement the sanctions provided in § 944.28(2)(a):

> We point out, however, that the legislature in section 944.28(2)(c) has vested sole discretion in the Department of Corrections to declare a forfeiture of a prisoner's gain time for any violation of section 944.28(2)(a), including the bringing of a frivolous appeal. That section, in conformity with the constitutional requirements of due process, mandates the following intricate procedural mechanism which must first be adhered to before the Department of Corrections may declare a forfeiture of a prisoner's gain time: (1) the preparation of a written charge specifying an instance of misconduct for which forfeiture of a prisoner's gain time is available; (2) the furnishing of a copy of the charge to the prisoner; (3) a hearing, at which the prisoner must be present, before a duly constituted disciplinary committee at the prisoner's institution of confinement; (4) the submission of a report by the committee to the superintendent of the prisoner's institution after the hearing in the event it finds the prisoner guilty and recommends a forfeiture of gain time; (5) the superintendent's approval of the committee's recommendation of forfeiture of the prisoner's gain time in whole or in part; and (6) the forwarding of the

> committee's report to the Department of Corrections by the superintendent together with his or her endorsement of the committee's recommendation as to forfeiture of the prisoner's gain time. Thereafter, in the words of the statute, "the department may, in its discretion, declare the forfeiture thus approved by the superintendent or any specified part thereof."

Mercade, 698 So. 2d at 1315 (emphasis supplied). Thus, the Second District did not *direct* that Mercade's gain time be forfeited (as did the Fifth District in Hall II), but instead "strongly *recommend[ed]* that the Department of Corrections invoke the provisions of section 944.28(2)(c) and thereafter, in its discretion, declare a forfeiture of the appellant's gain time. . .," and "direct[ed] the clerk . . . to furnish a certified copy of our opinion to the superintendent of the institution where the appellant is now confined." 698 So. 2d at 1315 (emphasis supplied).

Mercade acknowledged the different approach taken in Hall II, but:

> conclude[d] that we do not have the authority to simply direct the Department of Corrections to forfeit a prisoner's gain time after finding that the prisoner's appeal is frivolous. In our view, to do so would be in direct conflict with the legislative scheme of section 944.28(2)(c) which, as previously analyzed, establishes a host of mandatory procedural requirements which must first be met before the Department of Corrections, "in its discretion," may declare a forfeiture of a

> prisoner's gain time. Accordingly, we decline to follow the "direct" approach of Hall II.

698 So. 2d at 1316 (emphasis supplied).

Mercade is consistent with the strict separation of powers doctrine which is part of our organic state law. Article II, § III, Fla. Const.[4] It is well established that "under the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights." Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So. 2d 912, 918 (Fla. 1985) (emphasis supplied). As Mercade correctly concluded, the forfeiture of gain time is a discretionary function of the Department of Corrections, an arm of the executive branch of government. *Supra*, p. 16-17. And, the Legislature has dictated the due process procedures which must be followed — procedures that were ignored by the Hall II court. See § 944.28(2)(c).

Ironically, the Fifth District itself has previously acknowledged the

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[4] Article II, § 3, Fla. Const., provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

division of authority between the Department and the judiciary, *vis a vis* gain time, by granting a writ of prohibition precluding a circuit judge, absent statutory authority, from directing the Department of Corrections to award gain time credit to a defendant who was re-incarcerated for a violation of probation. Singletary v. Evans, 676 So. 2d 51, 53 (Fla. 5th DCA 1996) ("Judge Evans' attempt to compel DOC not to cancel Galston's provisional credits and gain time was a usurpation of DOC's executive authority.") (emphasis supplied). Accord, Cook v. State, 553 So. 2d 1292 (Fla. 1st DCA 1989) (forfeiture of a prisoner's gain time pursuant to § 944.28 is "a function that has been delegated by statute to the Department of Corrections," which courts cannot "usur[p]") (citing State v. Green, 547 So. 2d 925, 926 (Fla. 1989) ("`[t]he awarding of statutory gain time is solely a function of the [department], and the trial court is without authority to prevent such award or order its waiver.' The statute places in the hands of the department the ability to award, forfeit, or restore gain time. There is no statutory authority for the court to initiate the forfeiture of gain time. . . .") (citation omitted).[5]

The First District Court of Appeal has also aligned itself with the Mercade view that a court is without authority to order forfeiture of gain time. Martin

[5] Green, a 1989 case, did not address the 1996 amendments at issue here. It is cited only for its general separation of powers language, because on its particular legal issue, Green has been legislatively overruled.

v. Singletary, 713 So. 2d 1056, 1057 (Fla. 1st DCA 1998) ("The proceeding to determine whether forfeiture of gain time is appropriate must be instituted by the Department pursuant to its rules as provided in section 944.279(1)"); *cf.*, Saucer v. State, ___ So. 2d ___, 23 Fla. L. Weekly D1972 (Fla. 1st DCA 1998) (*supra*, p. 13) (finding § 944.28(2) inapplicable to a belated direct appeal criminal proceeding, but observing that "it is the role of the Department of Corrections, not the court, to order the forfeiture of gain time."). No appellate court has adopted the Fifth District's Hall II approach; it cannot be squared with the statutory language or with Florida's constitutional separation of powers principles.

For the foregoing reasons, even if this Court rejects our argument in Point I, *supra*, the forfeiture of gain time sanction directed by the district court should be reversed. The decision below exceeds the statutory authority of the court in the realm of gain time, violates Hall's right to due process of law, and violates the constitutional separation of powers doctrine of this State.[6]

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[6] The district court would, of course, retain the ability to impose sanctions under its inherent powers and in accordance with applicable rules of court. See Rule 9.410, Fla.R.App.P. (permitting the court, on its own motion, to impose sanctions for frivolous filings, including "reprimand, contempt, striking of briefs or pleadings, dismissal of proceedings, costs, attorneys' fees, or other sanctions."); see Bivens v. State, ___ So. 2d ___, 23 Fla. L. Weekly D412 (Fla. 2d DCA 1998) (affirming trial court's order prohibiting any further pro se pleadings directed to a particular judgment). Indeed, the Hall II court ordered that Hall "is prohibited from henceforth appearing in his own behalf in this court in this or

II.

THE FLORIDA AND FEDERAL EX POST FACTO CLAUSES PROHIBIT IMPOSING THE FORFEITURE OF GAIN TIME FOR FILING A FRIVOLOUS PLEADING ON INMATES WHOSE CRIMINAL OFFENSES WERE COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE AUTHORIZING SUCH FORFEITURES

This section pertains to the petition for writ of habeas corpus and/or mandamus, specifically the Court's question: "Whether the forfeiture of gain time for the filing of a frivolous pleading is an ex post facto violation as applied to inmates whose criminal offenses were committed prior to the effective date of the statute authorizing such forfeitures." R-71-72, ¶ 1. We submit that the answer is "yes," although for the reasons discussed in Point I, we contend that the Court need not reach this issue with regard to Petitioner. However, if the Court accepts the Mercade approach to gain time forfeiture, this question would require an answer. And, the Court's question is broad enough to encompass inmates whose frivolous civil pleadings are unquestionably encompassed by § 944.279 and § 944.28(2)(a), so we proceed with our analysis and conclusion.

As applied to inmates whose offenses were committed prior to July 1,

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other causes as an appellant or petitioner. The clerk of this court is directed not to accept any further pro se pleadings or filings from Clarence H. Hall, Jr. relating to any prior criminal convictions." App. A-2.

1996, Section 944.28(2)(a), Fla. Stat. (Supp. 1996), is unconstitutional as an ex post facto violation under the Florida Constitution, Art. I, § 10, and the United States Constitution, Art. I, § 10. That is so because by authorizing the forfeiture of an inmate's gain time, albeit for misconduct (filing frivolous pleadings in court) occurring after the enactment of the statute, the forfeiture of gain time effectively lengthens the sentence for an offense committed prior to the enactment of the statute — a variation of the evil sought to be avoided by including provisions barring ex post facto laws in the federal Constitution and the Florida Constitution. See Weaver v. Graham, 450 U.S. 24, 31, 101 S.Ct. 960, 965 67 L.Ed. 17 (1981) ("The critical question is whether the law changes the legal consequences of acts completed before its effective date"); Lynce v. Mathis, 519 U.S. 433, ___, 117 S.Ct. 891, 898 137 L.Ed.2d 63 (1997) ("the removal of [gain time] provisions can constitute an increase in punishment, because `a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.'") (citing Weaver, 450 U.S. at 32, 101 S.Ct. at 966).

No case has considered the ex post facto question in the context of § 944.28(2)(a), or any similar statute in another state, according to our research. However, general ex post facto principles, and analogies drawn from cases which

have considered other statutes authorizing forfeiture of gain time for various forms of misconduct, confirm that § 944.28(2)(a) may not be constitutionally applied to inmates whose offenses were committed prior to the effective date of the statute. We begin with the general principles as restated by this Court:

> In Lynce [v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)], the United States Supreme Court reaffirmed the standard to be used in reviewing a statute for an ex post facto violation. "To fall within the ex post facto prohibition, a law must be retrospective – that is, `it must apply to events occurring before its enactment' – and it `must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." 519 U.S. at ___, 117 S.Ct. at 896 (citations omitted).

Britt v. Chiles, 704 So. 2d 1046, 1047 (Fla. 1997). In Britt, the Department of Corrections sought to apply a statute (§ 944.281) which changed the method for calculating the punishment for a prison disciplinary infraction to an inmate whose offense pre-dated the statute. The Department argued that since the statute was only invoked after "in-prison misconduct," it provided a penalty "directed solely to the new conduct" and thus was not an ex post facto law. 704 So. 2d at 1047. This Court properly rejected that argument. Id. at 1048 ("the latter statute works to the disadvantage of the prisoner by potentially lengthening the period that an inmate

spends in prison in the face of a disciplinary infraction."). Thus, the Court reasoned that the new statute could not be constitutionally applied to inmates whose offenses pre-dated the statute:

> [T]he department shall be barred from applying section 944.281 and its corresponding administrative rule to Britt and any other inmate convicted of an offense committed prior to October 1, 1995, the date the statute became law.

Britt, Id. at 1047-1048.

The United States Court of Appeals for the Eighth Circuit considered an analogous issue in Williams v. Lee, 33 F.3d 1010 (8th Cir. 1994), cert. denied sub nom. Class v. Williams, 514 U.S. 1032, 115 S.Ct. 1393, 131 L.Ed.2d 244 (1995). There, Williams had been released and violated his parole. Upon his reincarceration, based on a statute enacted after he had committed the offense that resulted in his conviction, his accumulated good time credits were revoked. 33 F.3d at 1011. The Eighth Circuit agreed that the statute operated as an unconstitutional ex post facto violation, based on the controlling precedent of Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass 1967) (three-judge court), aff'd, 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968), which had held that a subsequent law increasing the punishment that had been imposed as a result of a prisoner's initial offense is unconstitutional.

33 F.3d at 1012. All other federal courts which have been presented with the same parole violation issue have agreed. Beebe v. Phelps, 650 F.2d 774, 775 (5th Cir. Unit A 1981) ("any law passed after the commission of an offense that, in relation to that offense or its consequences, alters the situation of a party to his disadvantage, is an unconstitutional ex post facto law"); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993) (same); *cf.* Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) ("statutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility – notwithstanding that the conduct purportedly triggering application of the statute occurred after its enactment") (emphasis supplied). [7]

The Britt analysis, consistent with Weaver and with Lynce, compels the same result here. Section 944.28(2)(a), which authorizes the forfeiture of gain time where an inmate has been found by a court to have filed frivolous pleadings, may not

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[7] The Eighth Circuit's ex post facto conclusion, while supported by Supreme Court precedent and decisions from other circuits, was reached grudgingly: "we are constrained to hold that South Dakota's application to Williams of the good-time forfeiture provision violates the Ex Post Facto Clause." 33 F.3d at 1013. Fortunately, in the area of constitutional rights of prison inmates, the judiciary cannot be guided by the measure of political popularity of legislative enactments. The presumption against retroactive application of criminal laws "`embodies a legal doctrine centuries older than our Republic.'" Lynce v. Mathis, __U.S. at ___ (citation omitted). Thus, while society can extract a price from inmates who file frivolous pleadings, it may not do so in a way which violates the Ex Post Facto Clause.

be constitutionally applied to inmates whose offenses were committed prior to the effective date of the statute. To do so would violate the Ex Post Facto Clause.

IV.

HALL II HAS NOT RESULTED IN ANY FORFEITURE OF GAIN TIME FOR PETITIONER; THE DEPARTMENT OF CORRECTIONS IS AWAITING THE OUTCOME OF THESE PROCEEDINGS

This section of the Brief pertains to the petition for writ of habeas corpus and/ or mandamus. This Court inquired whether the Department of Corrections has already forfeited Petitioner's gain time or contemplates forfeiting Petitioner's gain time pursuant to Hall II. R-72, ¶ 3. The answer does not appear in the record. However, our inquiries into the Department of Corrections records have confirmed that the answer is "no."

We have included correspondence from Department of Corrections Deputy General Counsel Susan A. Maher as **Appendix C,** [8] which confirms that no disciplinary action has been taken against Petitioner and that the Department's counsel is "instructing the institution not to initiate action until disposition of these

[8] An unopposed motion to supplement the record with this letter is filed contemporaneously with this Brief.

proceedings." (emphasis in original).

CONCLUSION

For the foregoing reasons, the decision below directing the forfeiture of Petitioner's gain time should be reversed, with directions that the statutory forfeiture provision for filing frivolous pleadings is inapplicable to this and all post-conviction collateral criminal attacks. Respondent should also be advised that the Department of Corrections is without independent authority to apply § 944.28(2)(c) against Petitioner based on the Hall II court's finding. Alternatively, the conflict between the Fifth District below and the Second District should be resolved in favor of the Mercade v. State, 698 So. 2d 1313 (Fla. 2d DCA 1997), analysis, which recognized that a court cannot implement § 944.28(2)(a) but may only recommend that the Department of Corrections do so. Under either legal theory, the decision of the Fifth District Court of Appeal below, directing the Department of Corrections to forfeit Clarence H. Hall, Jr.'s gain time, should be reversed.

The specific questions posed by the Court should be answered this way: (1) The forfeiture of gain time for the filing of a frivolous pleading would be an unconstitutional ex post facto violation as applied to inmates whose criminal offenses were committed prior to the July 1, 1996 effective date of the statute authorizing such

forfeitures (§ 944.28, Fla. Stat. (Supp. 1996)); (2) Subsection (2) of § 944.279, Florida Statutes, does not authorize the forfeiture of gain time for the filing of a frivolous post-conviction motion and/or the appeal therefrom; (3) the Department of Corrections has not and has been instructed by its counsel not to forfeit Petitioner's gain time, pending the outcome of these proceedings .

Respectfully submitted,

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By:_____
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By:_____
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Appointed Counsel for Petitioner
Clarence H. Hall, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: (1) CARMEN F. CORRENTE, OFFICE OF THE ATTORNEY GENERAL, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, (2) LOUIS A. VARGAS, DEPT. OF CORRECTIONS LEGAL BUREAU, 2601 Blairstone Road, Tallahassee, FL 32399-2500, and (3) SUSAN A. MAHER, General Counsel, Department of Corrections, 2601 Blairstone Road, Tallahassee, FL 32399-2500, by U.S. Mail this 23rd day of September, 1998.

BEVERLY A. POHL

APPENDIX