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.

REPLY 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

BRUCE ROGOW
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Boulevard
Fort Lauderdale, Florida 33394
(954) 767-8909

Appointed Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

TABLE OF AUTHORITIES (continued)

Page

OTHER

CERTIFICATE OF FONT SIZE

This Brief is prepared using Times New Roman 14-point font.

ARGUMENT

I.

THE STATE'S ATTEMPT TO *FINESSE* THE CONFLICT WITH *MERCADE* FAILS TO JUSTIFY THE *HALL II* DIRECTIVE

Because the Fifth District's directive to the Department of Corrections to forfeit Clarence Hall's gain time plainly intrudes on the Department's discretionary executive authority (see Initial Brief at pp. 15-20), the State's Brief attempts to re-cast the decision below and opens with the argument that there is no conflict between Hall v. State, 698 So. 2d 576 (Fla. 5th DCA 1997) ("Hall II"), and Mercade v. State, 698 So. 2d 1313 (Fla. 2d DCA 1997). This Court's July 28, 1998 Order disposes of that argument:

> [T]he Court accepts jurisdiction . . . based on conflict with Mercade . . . .

R-71.

Mercade explicitly rejected the Hall II approach to the forfeiture of gain time as a sanction, writing, "we decline to follow the `direct' approach of Hall II." 698 So. 2d at 1316; Initial Brief, pp. 17-18. Despite that plain language, and despite this Court's acceptance of jurisdiction based on conflict, the State seeks to harmonize the two district court decisions by rewriting one of them.

Acknowledging that Hall II *directed* the Department of Corrections to forfeit Hall's gain time, while Mercade merely *recommended* that sanctions be imposed by the Department, the State's Brief suggests that the difference is only a "semantic distinction," and that "[t]his Court should simply substitute or interpret the word `direct' to mean either 'refer' or 'recommend.'" Answer Brief, p. 4; see also id. at 5 (urging this Court to "constructively or actually substitut[e] the word `recommend' for 'direct' in the District Court's opinion"). That novel and incredible suggestion – that district court conflict can be reconciled by substituting one word for another in a written opinion – sets the tone for the remainder of the State's arguments. In its case law and statutory analysis, the State both ignores words it does not like and imposes terms that it wishes were there. Neither analytical method is valid, and both lead to faulty legal conclusions.

Seeking to downplay the import of what Hall II required, the State points to the September 4, 1998 Susan Maher letter (Initial Brief, App. C),[1] which states that "[g]ain-time is forfeitable only after hearing in accordance with section 944.28(2)(a) or, where appropriate, section 944.279." That letter is presumably offered as an assurance that no matter what the Fifth District said in Hall II, statutory due process

[1] The Answer Brief (p. 4) cites "Exhibit F" for the statement that the Department's intentions are "uncontroverted." We assume that is a typographical error and actually a reference to Exhibit E (the Susan Maher letter).

procedures for forfeiture of gain time are guaranteed. Based on the Department's implicit intention to ignore the plain words of Hall II, the State contends that "the District Court's `directive' had no legal effect other than to initiate discretionary forfeiture procedures . . . ." Answer Brief, p. 4. But it is for this Court, not the Department or the State, to determine the legal effect of the District Court's directive. Thus, the Susan Maher letter does not minimize the conflict between Hall II and Mercade. Instead, it highlights the problem of a conflict between Hall II and the Department of Corrections.

If the State's "no conflict" argument seeks to divest this Court of jurisdiction by rewriting the decision below, it must fail. The July 28, 1998 Order accepted jurisdiction based on conflict, and we therefore move to the merits. However, as stated in the Initial Brief, we urge the court to reject *both* Hall II and Mercade, and to hold that no forfeiture is permitted in this collateral criminal case.

II.

§ 944.279 AND § 944.278, FLA. STAT., ARE "COMPANION STATUTES" AND BOTH ARE INAPPLICABLE TO POST-CONVICTION PROCEEDINGS

The Initial Brief began with a discussion of § 944.279 and its interrelationship with § 944.278, Florida Statutes (§§ 5-6 of Ch. 96-106). Initial Brief, pp. 10-14. We began there because, if we are correct that the gain time forfeiture sanction contained in both statutes is inapplicable to criminal or post-conviction proceedings such as this one, the decision below must be reversed and the other issues in this case are moot. The State devotes but two-and-a-half pages to this critical issue (Answer Brief, pp. 18-20), and again crafts an argument, unsupported by any case law authority, which defies the plain words and stated legislative intent of the statutes.

First, the State agrees with Petitioner that § 944.279 (subjecting prisoners to disciplinary procedures for filing "a frivolous or malicious suit, action, claim, proceeding, or appeal" and establishing procedures for a court to report its findings in that regard "to the appropriate institution or facility for disciplinary procedures pursuant to the rules of the department as provided in § 944.09") applies

"as long as the frivolous pleading is not related to a criminal proceeding."[2] Answer Brief, p. 18 (emphasis in original); see § 944.279(2). But then, while acknowledging that § 944.28 is "the companion statute to § 944.279," the State posits that one is for civil lawsuits and the other for criminal and post-conviction proceedings: "They are companion laws, enacted to cover frivolous suits or actions in civil *and criminal* cases." Answer Brief, p. 18-19 (emphasis supplied). Nothing in the statutes themselves or in the legislative history supports that dichotomy. And no court has so held.

Indeed, the genesis of the two statutes confirms their relatedness and common purpose. In Laws 1996, Chapter 96-106, §§ 5 and 6 became § 944.279 and an amendment to § 944.28(2)(a), respectively. Chapter 96-106 was "[a]n act relating

---

[2] Section 944.09, Fla. Stat., as amended 1998 Fla. Sess. Law. Serv. Ch. 98-200 § 228 (C.S.S.B. 1440) (West), does not prescribe "disciplinary procedures" as the State suggests. Answer Brief, p. 18. Section 944.09 is an enabling statute delegating rule-making power to the Department of Corrections. It gives the Department the authority to adopt rules to implement its statutory authority, relating to, *inter alia*, inmate disciplinary procedures and punishment and gain time. The Department has adopted rules consistent with § 944.279 and § 944.28, Florida Statutes. See disciplinary infraction 9-32 in Fla. Admin. Code § 33-22.012 (defining prohibited conduct and penalties for infractions), providing for a maximum of 60 days disciplinary confinement and the forfeiture of all of an inmate's gain time, if "found by the court to have brought a frivolous or malicious suit, action, claim, proceeding or appeal . . . ." The disciplinary "procedures" themselves are set forth in § 944.28(2)(c), Florida Statutes.

to legal actions brought by prisoners. . . ." Its preamble states:

> WHEREAS, frivolous inmate lawsuits congest civil court dockets and delay the administration of justice for all litigants, and
>
> WHEREAS, each year self-represented indigent inmates in Florida's jails and prisons file an ever-increasing number of frivolous lawsuits at public expense against public officers and employees, and
>
> WHEREAS, state and local governments spend millions of dollars each year processing, serving, and defending frivolous lawsuits filed by self-represented indigent inmates, and,
>
> WHEREAS, the overwhelming majority of civil lawsuits filed by self-represented indigent inmates are frivolous and malicious actions intended to embarrass or harass public officers and employees, and
>
> WHEREAS, under current law frivolous inmate lawsuits are dismissible by the courts only after considerable expenditure of precious taxpayer and judicial resources. . .

Nothing in that preamble, or in any section of Chapter 96-106, supports the State's argument that the amendment to § 944.28(2)(a) – but not § 944.279 – was enacted to address a problem with frivolous criminal and collateral criminal proceedings and appeals. In Chapter 96-106, the Legislature only addressed the problem of frivolous prisoner-initiated *civil* actions.

A Rule 3.850 proceeding is not an original "legal action" or "lawsuit" as contemplated by the Legislature in Chapter 96-106. A Rule 3.850 *motion* is a continuation of a criminal proceeding which was brought -- not by the inmate -- but by the State of Florida. A Rule 3.850 *motion* does not "congest civil court dockets;" it is not a "lawsuit . . . against public officers and employees;" it is not "intended to embarrass or harass public officers and employees. . . ." See Preamble, quoted *supra*, p. 6. Rule 3.850 motions seek relief from a conviction obtained in violation of the Constitution. Likewise, appeals from orders denying Rule 3.850 motions are within the criminal realm, not the civil arena.

We are at a loss to understand the State's contention that "the certification required for a violation of § 944.279 is not remotely similar to that which is required to authorize a forfeiture in § 944.28." Answer Brief, p. 20. Both statutes contemplate a court notifying the Department of Corrections that a prisoner has filed frivolous pleadings, and subsequent disciplinary proceedings by the Department.

The only logical reading of the statutes is that in Chapter 96-106 § 5 (§ 944.279) the Legislature has authorized courts to question and examine whether civil actions brought by prisoners have been brought in good faith. If not, courts are directed to issue a written finding regarding the frivolous proceeding and to provide a copy to the appropriate institution so that "disciplinary procedures" can be

instituted. In Chapter 96-106 § 6 (§ 944.28(2)(a)) the new grounds for gain time forfeiture were added to the already existing grounds. Subsequent to the enactment of those statutes, the Department amended Florida Administrative Code § 33-22.012 by adding disciplinary infraction 9-32 to its list of prohibited acts – the same frivolous pleading prohibitions contained in § 944.279 and § 944.28(2)(a), as amended. The procedures that the Department must use to prove a 9-32 disciplinary infraction (consistent with due process of law) are not contained in 9-32 or in § 944.09, and are not left to the Department's discretion, but are set forth in detail in § 944.28(2)(c).

The above *in pari materia* reading of the two new statutes is supported by the legislative history. The House of Representatives Judiciary Committee Final Bill Analysis & Economic Impact Statement of CS/HB 37, which became Chapter 96-106, Laws of Florida, explains that both statutes subject the inmate to gain time forfeiture for the *same* "frivolous lawsuit" misconduct, and that, contrary to the State's Answer Brief arguments, the method of declaring the forfeiture is identical for both statutes, not "distinct." See Answer Brief, p. 19. The Judiciary Committee Final Bill Analysis provides in relevant part:

> **Section 6**. Amends § 944.28(2)(a), Florida Statutes, to include the provisions of the newly-created § 944.279, Florida Statutes, in the list of behaviors which may result in the forfeiture of a prisoner's accumulated gain-time or right to earn gain-time in the future. Although this behavior is "external" to the prison, it is related to the overall operation of the criminal justice system and appears to be rationally related to the grant/forfeiture of gain-time.
>
> Pursuant to section (1) of 944.279, F.S., as created by this bill, such forfeiture may not occur until after the prisoner receives notice and a hearing. This due process is required since the prisoner has not been "convicted." . . . .

(emphasis supplied).

Thus, the State's argument that "[b]oth statutes exist independently, expressly address separate actions, and provide for divergent and distinct penalties" (Answer Brief, p. 20), cannot be squared with the legislative scheme. None of the pertinent statutes authorize or permit the forfeiture of a prisoner's gain time because a court has found a post-conviction Rule 3.850 motion or appeal to be frivolous. Either one can read § 944.279(2) ("This section does not apply to a criminal proceeding or a collateral criminal proceeding") to apply to both statutes, or the general principle of statutory construction -- *expressio unius est exclusio alterius* -- (the mention of one thing implies the exclusion of the other) applies. Where the Legislature only referred to frivolous *civil* actions in its bill, criminal and collateral criminal proceedings are excluded from the reach of § 944.28(2)(a). Therefore, the

decision below must be reversed, and all related issues *vis a vis* Clarence Hall are moot.

III.

FORFEITURE OF PETITIONER'S GAIN TIME WOULD VIOLATE THE EX POST FACTO CLAUSE

Petitioner's argument that forfeiture of his gain time would violate the Ex Post Facto Clause relied upon this Court's decision in Britt v. Chiles, 704 So. 2d 1046 (Fla. 1997), which was based on the Supreme Court of the United States' most recent ex post facto decision, Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), and which rejected some of the same arguments that the State makes in this case. Initial Brief, pp. 21-26. The State's ex post facto analysis urges this Court, one year after Britt, to adopt its dissent as the majority opinion in this case. Answer Brief, p. 8. That invitation should be declined. The State's authorities are inapposite or unpersuasive, and the majority's reasoning in Britt, bolstered by the weight of federal authority, controls this case.[3]

In arguing that a forfeiture of Petitioner's gain time under § 944.28, as

---

[3] Three federal decisions cited in the Initial Brief in support of Hall's ex post factor argument were inadvertently omitted from the Table of Authorities. They are Beebe v. Phelps, 650 F.2d 774, 775 (5th Cir. Unit A 1981); United States v. Paskow, 11 F.3d 873 (9th Cir. 1993); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989).

amended, would not violate the Ex Post Facto Clause, the State begins by denying that the 1996 amendments to § 944.28 brought about by Chapter 96-106 created new law: "Respondents do not believe that the amended statute created a `change' in the law . . . ;" . . . "[t]here has been no `change' in the statute. . . ." Answer Brief, pp. 7, 9; id. at 13 ("Petitioner's gain time could have been forfeited based upon the 1981 statute"). We disagree. The 1981 provision requiring prisoners to obey "duly given" instructions applies to instructions given by Department of Corrections personnel, not appellate courts. If prisoners' gain time could have been forfeited for filing frivolous pleadings under the 1981 version of the statute, as the State contends (Answer Brief, p. 13), there would have been no perceived need for the 1996 amendments. Obviously, there has been a change in the statute. Chapter 96-106, §§ 5-6 added new grounds for the forfeiture of gain time, and it is those grounds which are at issue in this case. The fact that statutes previously authorized the forfeiture of gain time for other misconduct (misconduct other than filing frivolous pleadings in court) is irrelevant to the issue of whether the application of the amended statutes to Hall and others similarly situated (*i.e.*, those whose convictions pre-dated the amendments) is constitutional.

Nor is the State's hyperbolic prediction ("Utter chaos will result if the DOC cannot change or amend its rules and regulations and punish any failure to

comply") (Answer Brief, p. 12) relevant to the ex post facto issue. We do not deny that the Department can revise institutional rules and disciplinary measures necessary to the administration of the facility without running afoul of the Ex Post Facto Clause. See Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995) (cited in Answer Brief) (new rule requiring sexual offenders to provide blood sample for genetic marker data bank prior to their release does not violate the Ex Post Facto Clause because it was not punitive). But the statutory amendments at issue in this case have nothing to do with institutional rules and discipline; filing frivolous pleadings in court is by definition misconduct occurring outside the prison. Gilbert is thus inapposite, and the State's concern about "chaos" is misplaced. What is relevant here is whether the amended statutes, applied to Petitioner, are retrospective and disadvantageous, the two aspects of any ex post facto analysis. Britt v. Chiles, 704 So. 2d at 1047; Initial Brief, p. 23.

The California case offered by the State, In re Ramirez, 39 Cal. 3d 931, 705 P.2d 897, 218 Cal. Rptr. 324 (1985), cert. denied, Ramirez v. California, 476 U.S. 1152, 106 S.Ct. 2266, 90 L.Ed.2d 711 (1986), agreed that under Weaver v. Graham, 450 U.S. 24, 33, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981), a new statute subjecting "good behavior credits" to forfeiture for misconduct, disadvantaged a prisoner. 39 Cal. at 935-936, 705 P.2d at 900, 218 Cal. Rptr. at 327. Similarly, it is easy to conclude that Hall would be disadvantaged if § 944.28(2)(a) were applied to

forfeit his gain time as a result of Hall II. Thus, the disagreement between the State and Petitioner centers on whether application of the statute would violate the second ex post facto factor: is the statute retrospective, applying to events occurring before its enactment? We say it is, because it punishes non-criminal misconduct by effectively lengthening the sentence for an offense committed prior to the statute's enactment.

A divided court in Ramirez concluded that the answer is no, because post-amendment misconduct triggered the forfeiture, and therefore no ex post facto violation existed. 39 Cal. 3d at 936-938, 705 P.2d at 90-9021, 218 Cal. Rptr. at 328-329. The State echoes that view. Answer Brief, p. 11 ("[t]he law prohibiting frivolous pleadings only applies to actions taken after its enactment"); id. at 15 ("The `penalty' imposed in this cause is directed to the conduct which gave rise to the loss of gain time, not to the original offense"). However, that view has not been adopted by the majority of federal courts, nor by any other state supreme court.[4] Indeed, Ramirez was deemed sufficiently aberrant by three members of the Supreme Court

---

[4] The State relies on United States v. Reese, 71 F.3d 580 (6th Cir. 1995), which has been criticized and is in conflict with every other federal circuit on the ex post facto effect of changes to the federal supervised release statutes. See Ryan M. Zenga, Retroactive Law or Punishment for a New Offense? – The Ex Post Facto Implications of Amending the Statutory Provisions Governing Violations of Supervised Release, 19 W. New Engl. L. Rev. 499 (1997).

to warrant certiorari review:

> The decision of the California Supreme Court conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in Beebe v. Phelps, 650 F.2d 774 (CA5 1981). . . . The decision of the California Supreme Court also is in tension with our decision in Weaver, ...See also Greenfield v. Scafati, 277 F. Supp. 644 (Mass. 1967), summarily aff'd, 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968). . . . [T]he California Supreme Court's distinction here between the ability to earn good-time credits, at issue in Weaver, and the forfeiture of such credits, at issue here, does not seem immediately relevant to this analysis. To resolve the conflict with Beebe and the tension with Greenfield and Weaver, I would grant certiorari and set the case for argument.

Ramirez v. California, 476 U.S. 1152, 106 S.Ct. 2266, 90 L.Ed.2d 711 (1986) (White, Brennan, and Powell, JJ., dissenting from the denial of certiorari).[5] Subsequently, other circuits have fallen in line with Beebe (see Initial Brief, p. 25, citing cases, and note 3, *supra*), and the Ramirez analysis of Weaver's requirements remains an anomaly.

The majority in Britt v. Chiles already rejected Ramirez (which was cited

---

[5] The fact that a majority of the Supreme Court voted to deny certiorari does not ratify the Ramirez analysis. A denial of certiorari has no precedential value. See Teague v. Lane, 489 U.S. 288, 296 109 S.Ct. 1060, 1067, 103 L.Ed.2d 334 (1989).

by the dissenting justices), and held that a 1995 statutory amendment governing loss of gain time (§ 944.281) could not be constitutionally applied to an inmate convicted in 1992, although his disciplinary infraction was committed in 1996, after the statute in question was enacted. 704 So. 2d 1046. Here, Hall was convicted in 1982, the statute in question was enacted in 1996, and the misconduct in question occurred in 1997. Application of the statute – forfeiting Hall's gain time for his 1982 conviction – would effect a retroactive disadvantage by lengthening his sentence for a crime committed before the statute was enacted. Under Britt, Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), Weaver, Beebe, and the authorities cited in the Initial Brief, such a forfeiture would violate the Ex Post Facto Clause.

CONCLUSION

Reversal of the sanctions aspect of the decision below is required because, under applicable statutes, gain time cannot be forfeited based on a court's finding that a criminal or post-conviction proceeding is frivolous; the "frivolous pleading" forfeiture statutes apply only in civil proceedings. Alternatively, the decision below should be reversed and the conflict should be resolved in favor of the Mercade v. State, 698 So. 2d 1313 (Fla. 2d DCA 1997), analysis, which recognized that a court may not direct the Department of Corrections to forfeit gain time, but may

only recommend that the Department initiate § 944.28 forfeiture proceedings.

As applied to Clarence Hall and other inmates whose criminal offenses were committed prior to the July 1, 1996 effective date of the statute authorizing the forfeiture of gain time for the filing of a frivolous pleading, the forfeiture of gain time on that basis would be an unconstitutional violation of the Ex Post Facto Clause.

Respectfully submitted,

BRUCE ROGOW
Florida Bar No. 067999
BEVERLY A. POHL
Florida Bar No. 907250
BRUCE S. ROGOW, P.A.
Broward Financial Centre
500 East Broward Blvd., Suite 1930
Fort Lauderdale, Florida 33394
Ph: (954) 767-8909
Fax: (954) 764-1530

By:_____
BEVERLY A. POHL

By:_____
BRUCE ROGOW

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 10th day of November, 1998.

BEVERLY A. POHL