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.

PETITIONER'S SUPPLEMENTAL BRIEF Requested by the Court

On Discretionary Review of a Decision
of the Fifth District Court of Appeal
and Petition for Writ of Habeas Corpus and/or Mandamus

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INTRODUCTION AND BRIEF RESPONSES

On February 16, 1999, the Court ordered supplemental briefs addressing the following questions:

1 What effect should the decision in Saucer v. State, 24 Fla. L. Weekly D37 (Fla. 1st DCA Dec. 17, 1998), have on this case?

2 What was the intent of the legislature in enacting chapter 97-78, section 14, Laws of Florida, which amended section 944.279, Florida Statutes (Supp. 1996), to remove the specific reference to a gain time forfeiture for frivolous filings under section 944.28(2)(a), Florida Statutes and replace that reference with a statutory reference to discipline under the department's rules?

3. What was the actual effect of the aforementioned amendment?

The short answers are:

1. Saucer should have no effect on this case, because (a) application of § 944.279 (1997) and § 944.28(2)(a) (Supp. 1996) to Petitioner's case would violate the Ex Post Facto Clause regardless of whether Saucer is correct as to the application of those statutes, and (b) the Saucer majority's reasoning is flawed; the dissent correctly concludes that § 944.28(2)(a)'s gain-time forfeiture provisions do not apply to criminal

and collateral criminal proceedings.

2. The intent of the legislature in enacting chapter 97-78, section 14, Laws of Florida, was to broaden the range of the disciplinary actions that are available to the Department of Corrections when a prisoner is found by a court to have filed a frivolous lawsuit, and to "allow the department to use penalties such as disciplinary confinement in addition to the penalty of gain time forfeiture authorized under current law." April 18, 1997 House of Representatives Committee on Corrections Bill Research & Economic Impact Statement for CS/HB 1347 (emphasis supplied). There was no apparent intent to apply the gain-time forfeiture statutes to criminal and collateral criminal proceedings.

3. The actual effect of the aforementioned amendment is the same as the intended effect; section 944.279 continues to operate *in pari materia* with section 944.28, and with related Rules of Administrative Procedure, together prescribing the circumstances giving rise to discipline for filing frivolous lawsuits, and the procedures for imposing that discipline.

ARGUMENT

I.

SAUCER V. STATE, 24 FLA. L. WEEKLY D37 (FLA. 1ST DCA DEC. 17 1998), DOES NOT AFFECT THIS CASE

One issue in this case is whether § 944.28(2)(a), Fla. Stat. (Supp. 1996) can be used to sanction prisoners who file frivolous pleadings in *criminal and collateral criminal* proceedings, or whether that statute applies only to sanction prisoners who engage in frivolous *civil* litigation. Saucer v. State, 24 Fla. L. Weekly D37 (Fla. 1st DCA Dec. 17, 1998) (attached as **Appendix A**), addresses that question and, in a divided opinion, concludes that gain-time forfeiture can be imposed for frivolous criminal and collateral criminal proceedings.[1]

Petitioner Clarence Hall submits that Saucer is irrelevant to his case, because in view of the constitutional prohibition against ex post facto laws, the 1996 gain-time forfeiture enactments (and the 1997 amendments to § 944.279) cannot be applied to him, in this post-conviction case challenging his pre-1996 convictions. (See Initial Brief, p. 21). But as a matter of general statutory interpretation, Petitioner

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[1] The Saucer court certified a question of great public importance on whether the gain-time forfeiture provisions of § 944.28(2)(a) apply in criminal and collateral criminal proceedings, but Saucer did not seek discretionary review in this Court.

submits that Saucer was wrongly decided, and that the reasoning of the dissent is more persuasive and should guide this Court's analysis.

On December 17, 1998, the First District Court of Appeal withdrew its earlier order, which had been reported at Saucer v. State. 23 Fla. L. Weekly D1972 (Fla. 1st DCA Aug. 17, 1998) (per curiam) [2] (and which had been cited and relied upon in Petitioner's Initial Brief), and issued a revised order reversing its position on an issue of statutory construction. Contrary to the panel's earlier view, the new majority held that the gain-time forfeiture provisions of § 944.28(2)(a), Fla. Stat., *are* applicable to criminal proceedings. 24 Fla. L. Weekly at D38. Judge Webster filed a lengthy dissenting opinion. Id.

In its revised, divided opinion, the First District reversed itself and granted the State's motion to forfeit Saucer's gain time. The court distinguished § 944.279, Fla. Stat. (1997), and § 944.28(2) by drawing a distinction between the

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[2] The First District had held, in its August 1998 Saucer order, that section 944.28(2), Fla. Stat., authorizing forfeiture of gain time for frivolous litigation, did *not* apply to Saucer's habeas corpus petition seeking a belated appeal, because that was a criminal proceeding and the statute, read *in pari materia* with § 944.279, Fla. Stat., did not apply to a criminal proceeding. 23 Fla. L. Weekly D1972 (citing Bradley v. State, 703 So. 2d 1176, 1178 (Fla. 5th DCA 1997) (Griffin, C.J., concurring)). Thus, the State's motion to sanction Saucer under § 944.28(2) (authorizing forfeiture of gain time when a prisoner "knowingly or with reckless disregard for the truth brought false information or evidence before the court") was initially denied. 23 Fla. L. Weekly D1972.

"disciplinary" procedures authorized by § 944.279 and the "sanction" of forfeiture of gain time authorized by § 944.28(2). 24 Fla. L. Weekly D38. But it is a linguistic distinction without a difference.[3]

The Saucer court acknowledged that Chapter 96-106, which created § 944.279 and amended § 944.28(2)(a), was "for the expressed purpose of reducing the onslaught of frivolous prisoner civil lawsuits," 24 Fla. L. Weekly D38, and that there was no declared legislative intent to target frivolous or malicious proceedings in

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[3] Although the word "sanction" does not appear in § 944.28(2), it is a fair characterization of the statutory penalties. However, the First District's microanalysis, attempting to draw a distinction between the statutory language of § 944.279 ("disciplinary proceeding") and its own characterization of § 944.28 ("sanction"), is not a fair construction of the two, interrelated statutes. Section 944.28(2)(c) prescribes what can only be described as a disciplinary proceeding, and the disciplinary procedures mentioned in § 944.279 carry the same risk of gain-time forfeiture as does the sanction of § 944.28. See also § 944.09, and footnote 2 in Petitioner's Reply Brief, clarifying that Section 944.09 (now referenced in § 944.279) does not itself prescribe "disciplinary procedures," but rather is an enabling statute merely delegating rule-making power to the Department of Corrections. As we stated in the Reply Brief, § 944.09 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 . . . ."

criminal matters. Id. However, because the "limiting language" of § 944.279(2) ("This section does not apply to a criminal proceeding or a collateral criminal proceeding") does not appear in § 944.28, the court concluded (without much conviction) that § 944.28 "appears to apply in both civil and criminal proceedings." Id. (emphasis supplied).

> In the absence of limiting language in section 944.28, there appears to be no reason why the gain-time forfeiture cannot apply to criminal proceedings.

Saucer, 24 Fla. L. Weekly D38.

The Saucer majority's reasoning is flawed, and fails to recognize the genesis of the forfeiture provisions, arising as two consecutive sections of Chapter 96-106. (See Saucer, 24 Fla. L. Weekly D38) (Webster, J., dissenting). The "limiting language" in § 944.279(2) is not limited to that statute alone; the legislative history confirms that the gain-time forfeiture scheme contemplates that statute working in tandem with § 944.28. More importantly, it is highly unlikely that the legislature would create such a powerful sanction – forfeiture of the gain-time of prisoners whose largely *pro se* post-conviction litigation might be deemed frivolous – without doing so explicitly, and without one word about that significant change in the law appearing in the available legislative history. For these reasons, the Saucer majority's

reasoning is illogical and unreasonable.

The reasons why the gain-time forfeiture in § 944.28(2) cannot apply to criminal proceedings is cogently set forth in Judge Webster's dissenting opinion in Saucer. Because it is the same analysis that Hall advanced in his Initial Brief (pp. 7-8), we will not repeat it here. But suffice it to say that if this Court were to reject Petitioner's ex post facto arguments, the Saucer majority's reasoning should not be adopted by this Court. Sections 944.279 and 944.28 must be read together, and they do not apply in this collateral criminal case.

II.

CHAPTER 97-78, § 14, LAWS OF FLORIDA, SOUGHT TO BROADEN THE AVAILABLE SANCTIONS AGAINST INMATES WHO FILE FRIVOLOUS CIVIL ACTIONS OR APPEALS

Section 14 of Chapter 97-78, Laws of Florida, amended, *inter alia*, § 944.279, Fla. Stat. (Supp. 1996). The amendment, with additions (underlined) and deletions (~~struck-through~~), is shown below in relevant part:

> (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 June 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 ~~forfeiture of gain-time and the right to earn gain time~~. 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 ~~action~~ as provided in § 944.09 ~~944.28(2)~~.
>
> (2) This section does not apply to a criminal proceeding or a collateral criminal proceeding.

The Senate Staff Analysis and Economic Impact Statements (March 17, 1997 and March 21, 1997) for C.S.S.B. 310, the Senate bill which contained the above amendment, does not mention its amendment to § 944.279. Thus, the Senate's intent is not stated. However the House version of the same bill, H.B. 1347, § 3, proposed identical changes to § 944.279 as those in the Senate version which became law, and illustrative legislative history does exist with regard to the House bill.

The April 18, 1997 House of Representatives Committee on Corrections

Bill Research & Economic Impact Statement for CS/HB 1347 (attached in relevant part as **Appendix B**) provides in its summary that the proposed changes to Chapter 944 would "allo[w] the Department of Corrections to impose other disciplinary actions, in addition to gain time forfeiture, against prisoners who file lawsuits deemed by the court to be frivolous." App. B-1 (Emphasis supplied). Thus, the amendment was intended to broaden the range of available sanctions; nothing in the report suggests that the amendment was designed to end the interplay between § 944.279 and § 944.28 that was created in 1996.

The House Committee Research and Economic Impact Statement discusses the subject of frivolous prisoners' lawsuits; discusses the various disciplinary procedures that can be imposed for violating rules of the Department generally (reprimands, loss of privileges such as routine mail, visitation or telephone privileges, extra work assignments, disciplinary confinement, and loss of accrued gain time); and notes that the 1996 version of § 944.279 did not permit the full range of disciplinary actions against an inmate who files frivolous lawsuits, only the loss of gain time:

> Currently, the department's disciplinary procedures and punishment outlined in the departmental rules do not apply to the filing of frivolous or malicious lawsuits or knowingly providing false information to a

> court. The only penalty for such acts involves forfeiture of gain time prescribed by statute.

Appendix B-2.

The effect of the proposed changes to the statute was set out in the Research and Economic Impact Statement, which provides in relevant part:

> Section 944.279, F.S., 1996 Supplement, would be amended to:
>
> • allow the Department of Corrections to impose disciplinary procedures authorized by rule on a prisoner who has been found by a court to have brought a frivolous or malicious lawsuit or who has knowingly provided false information to the court. This revision would allow the department to use penalties such as disciplinary confinement in addition to the penalty of gain time forfeiture authorized under current law.

Appendix B-8 (emphasis supplied). The Research and Economic Impact Statement concluded that the bill would give the Department of Corrections greater discretion in imposing sanctions for frivolous lawsuits:

> The bill increases the ability of the department to impose additional sanctions, such as disciplinary confinement, on inmates who file frivolous lawsuits or provide false information to the court.

Appendix B-10 (emphasis supplied).

The potential impact on "individual freedom" was reported as follows:

> a. Does the bill increase the allowable options of individuals . . . to conduct their own affairs?
>
> The bill, in authorizing the department to impose additional sanctions on an inmate who is deemed by the court to have filed a frivolous lawsuit or provided false information, could potentially discourage inmates from filing claims, legitimate or otherwise.

Appendix B-12 (emphasis supplied).

As to the fiscal effect of the bill, the Research and Economic Impact Statement stated:

> According to the Department of Corrections, this bill will have a limited fiscal impact if the department increases the overall disciplinary actions taken against inmates who file frivolous lawsuits; however, court costs could be reduced if frivolous lawsuits decrease.

Id. at B-13 (emphasis supplied).

Thus, the constant theme throughout the House Committee Research and Economic Impact Statement is that the bill would permit additional sanctions, by incorporating other sanctions as authorized by § 944.09 and the administrative rules implementing that statute. The deletion of the specific reference to § 944.28(2) in § 944.279 was not intended to dissolve the *in pari materia* relationship of the two

statutes.

III.

THE ACTUAL EFFECT OF CHAPTER 97-78, § 14, LAWS OF FLORIDA, WAS TO PERMIT SANCTIONS OTHER THAN GAIN-TIME FORFEITURE FOR INMATES WHO FILE FRIVOLOUS CIVIL ACTIONS OR APPEALS

The actual effect of Chapter 97-78, § 14 is the same as the intended effect: section 944.279, Fla. Stat. (1997), continues to operate *in pari materia* with section 944.28, and with the related Rules of Administrative Procedure. Together, they prescribe the circumstances giving rise to inmate discipline for filing frivolous lawsuits, and the procedures for imposing that discipline.

CONCLUSION

Petitioner has argued in his Initial Brief and Reply Brief, and here, that the Ex Post Facto Clause precludes application of § 944.279 (1997) and § 944.28 (Supp. 1996) to this post-conviction case arising from pre-1996 convictions. Thus, while Saucer v. State held that those statutes may be applied to inmates who file frivolous post-conviction proceedings, the statutes may not be applied to Petitioner and Saucer does not govern this case. And, Petitioner submits that Saucer was

wrongly decided and should not guide this Court. As the Saucer dissent explains, the sanctions authorized in § 944.279, Fla. Stat. (1997), and § 944.28(2) (Supp. 1996), apply only to frivolous *civil* actions, and not to post-conviction proceedings.

Chapter 97-78, § 14, Laws of Florida, amending § 944.279, intended to and does provide the Department of Corrections with a number of additional disciplinary measures which may be imposed, pursuant to § 944.09, Fla. Stat., including but not limited to the forfeiture of gain time. Chapter 97-78 did not intend to, and did not, sever § 944.279 from § 944.28; the two statutes work in tandem to effect the gain-time forfeiture scheme.

Respectfully submitted,

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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 12th day of March, 1999.

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BEVERLY A. POHL