IN THE SUPREME COURT OF FLORIDA

JOSEPH DUANE SAUCER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,031

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the respondent/appellee in the District Court of Appeal (DCA), will be referenced in this brief as respondent or the State. Petitioner, Joseph Duane Saucer, the petitioner/appellant in the DCA will be referenced in this brief as petitioner, appellant, or by proper name.

The symbol "I" will refer to the one volume record on appeal; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State adds the following facts for clarity:

On October 24, 1997, petitioner filed in the First District Court of Appeal a petition for writ of habeas corpus seeking a belated appeal. (I.1-4). In his petition, petitioner stated:

> The appellant contends he timely requested his attorney on numerous occasions, to file an appeal on his behalf due to his judgment and sentence. Counsel has failed to advance this request of the appellant, thus aggravating appellant[’]s chance to seek appellant [sic] review.
>
> Appellant contends that his counsel knew he wished to appeal his sentence as well as the denial of his motion in limine of a motion to suppress.

However, counsel failed to do so.

(I.2).

The First District appointed a special master to hold an evidentiary hearing in this case. (I.16-17). Regina Wilson, appellant's trial counsel, Patrick McGuinness, an assistant public defender, and Patricia Dodson, the prosecutor, testified at the hearing. (I.16-17). In the Special Master's Report, it stated:

> 5. The appellant's Amended Petition for Writ of Habeas Corpus included a representation that he made several request to Ms. Wilson to appeal his case: on December 3, 1995, December 12, 1995; and January 18, 1996.
>
> 6. **These representations are not accurate, as evidenced by appellant's own testimony at the instant hearing.**

(I.34) (emphasis added). The Special Master discussed the findings of fact, and further stated:

> 25. The claim by the appellant that he repeatedly requested to Ms. Wilson that she appeal his case and that she agreed to do so was refuted by Ms. Wilson and by the lack of such a request or agreement in the plea form or on the record.
>
> 26. Having considered both the appellant's and Ms. Wilson's testimony, along with other testimony and evidence, it is concluded that no such requests to appeal were made by the appellant, and no representation to appeal the appellant's case were made by Ms. Wilson.
>
> 27. In correspondence sent by the appellant to the Public Defender's Office after his sentencing, there is no request to appeal the court's order on the motion to suppress.
>
> 28. There is, therefore, no evidence to suggest that the appellant made any request to appeal his case after he was sentenced but within 30 days of his sentencing.

(I.37-38). The First District denied appellant's petition seeking a belated appeal. Saucer v. State, 718 So.2d 1238 (Fla. 1st DCA 1998).

The State moved the court impose sanctions in the form of forfeiture of gain time earned by petitioner pursuant to Section 944.28(2)(a), Florida Statutes (1997), because appellant had knowingly or with reckless disregard for the truth brought false information or evidence before the court. (I.42). On rehearing, the First District determined that Section 944.28(2)(a) applied to criminal proceedings, and the First District certified the following question to this Court as a question of great public importance:

> May the gain-time forfeiture provisions of Section 944.28(2)(a) apply in criminal and collateral criminal proceedings?

Saucer v. State, 24 Fla. L. Weekly D37 (Fla. 1st DCA Dec. 17, 1998),(I.41-54).

This Court granted review on March 23, 1999.

SUMMARY OF ARGUMENT

The gain-time forfeiture provisions of Section 944.28(2)(a), Florida Statutes (1997), apply in criminal and collateral criminal proceedings. Section 944.28(2)(a) authorizes the sanctions in the form of forfeiture of gain-time if a prisoner filed a frivolous appeal or "knowingly or with reckless disregard for the truth brought false information or evidence before the Court." Section 944.279, Florida Statutes (1997), a similar statute, authorizes disciplinary proceedings for filing frivolous or malicious actions or false information before the court. Section 944.279(2), specifically states that "[t]his section does not apply to a criminal proceeding or a collateral criminal proceeding." A general principle of statutory construction is that the mention of one thing implies the exclusion of another. If the Legislature had intended Section 944.28 to apply only in civil cases and not criminal or collateral criminal cases it would have expressly said so as it did in Section 944.279. Therefore, because Section 944.28 does not have the limiting language of Section 944.279, Section 944.28 applies to criminal and collateral criminal proceedings.

ARGUMENT

ISSUE I

MAY THE GAIN-TIME FORFEITURE PROVISIONS OF SECTION 944.28(2)(a) APPLY IN CRIMINAL AND COLLATERAL CRIMINAL PROCEEDINGS?

Petitioner contends that Section 944.28(2)(a), Florida Statutes (1997), does not apply to criminal proceedings. Petitioner argues that Section 944.28(2)(a) must be read in pari materia with Section 944.279, Florida Statute (1997), the application of Section 944.28(2)(a) to his case violates the ex post facto clause, Section 944.279 controls over Section 944.28(2)(a), Section 944.28(2)(a) must be construed in favor of the accused, the district court misinterpreted the impact of Chapter 97-78, Laws of Florida, and the State misled the district court in its motion for rehearing. Petitioner's arguments must fail.

Section 944.28(2)(a), provides that:

> **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** unsuccessfully attempts to escape; assaults another person; threatens or knowingly endangers the life or person of another person; refuses by action or word to carry out any instruction duly given to him or her; neglects to perform in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him or her; **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 added). Section 944.279, Florida Statutes (1997), a similar statute, provides that:

> (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**. 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 s. 944.09.
>
> (2) **This section does not apply to a criminal proceeding or a collateral criminal proceeding**.

(Emphasis added). Unlike Section 944.279, Section 944.28(2)(a), omits the phase "[t]his section does not apply to a criminal proceeding or a collateral criminal proceeding."

"It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius." Thayer v. State, 335 So.2d 815, 817 (Fla.1976). Brown v. State, 672 So.2d 861, 863 (Fla. 3d DCA 1996)("It is a firmly established principle of statutory construction that the mention of one thing in a statute implies the exclusion of another or 'expressio unius est exclusio alterius.'"). Therefore, if the Legislature had intended for Section 944.28 to apply only in civil cases and not criminal cases, the Legislature would have expressly said so as it did in Section 944.279. Thus, "[i]t appears the legislature has now authorized gain-time forfeiture and other disciplinary action in the case of frivolous civil litigation. 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 at 38. Therefore, even if Section 944.28 is read in conjunction with Section 944.279, because Section 944.28 does not have the limiting language of Section 944.279, Section 944.28 applies to criminal and collateral criminal proceedings.

Hence, the First District held that "the provisions of Section 944.28(2) are applicable to the instant proceeding." Saucer at 38. Furthermore, all of the district courts have found that Section 944.28 applies to criminal proceedings. In Hall v. State, 698 So.2d 576, 576-577 (Fla. 5th DCA 1997), Hall appealed two untimely and frivolous motion for postconviction relief attacking his judgment and sentence. Thus, Hall was a criminal case. The Fifth District directed that "the Department of Corrections to forfeit the applicable gain time earned by Hall pursuant to section 944.28(2)(a), Florida Statues (Supp.1996)." Following its decision in Hall, the Fifth District sanctioned other prisoners for filing frivolous suits in criminal cases. In Bradley v. State, 703 So.2d 1176 (Fla. 5th DCA 1997), Bradley filed a "Petition for a Writ of Habeas Corpus, Mandamus, or Other Constitutional Writ" attacking his 1987 convictions and sentences claiming that "his crime should have been reclassified as a life felony and that therefore his fifty-year sentence exceeded the forty-year statutory maximum sentence for life felonies." Id. at 1177. The Fifth District stated:

> [A] prisoner who is found by a court to have brought a frivolous suit, action, claim, proceeding or appeal in any court is subject to having all or any part of his or her gain time forfeited. § 944.28(2)(a), Fla. Stat.

Id. See also O'Brien v. State, 689 So.2d 336, 337 (Fla. 5th DCA 1997), rev. den., 697 So.2d 511 (Fla. 1997)(prohibiting O'Brien from filing any other documents attacking his 1976/1980 convictions and sentences and stating that "a prisoner who is found by a court to have brought a frivolous suit, action, claim, proceeding or appeal in any court is subject to having all or any part of his or her gain time forfeited. Section 944.28(2)(a), Florida Statutes.").

The Second District, in Mercade v. State, 698 So.2d 1313 (Fla. 2d DCA 1997), applied Section 944.28(2)(a) to criminal cases. The Second District found that Mercade's appeal of the circuit court's order denying his motion to correct an illegal sentence was frivolous. The Second District stated that:

> **We use this case, therefore, to send a message to prisoners collaterally attacking sentences imposed by the trial courts of this district that we fully intend to invoke the applicable provisions of section 944.28, Florida Statutes (Supp.1996),** governing the forfeiture of gain time and the right to earn gain time in the future, when we are confronted with a frivolous appeal, such as this one, from the denial of a motion for postconviction relief. We do so even though such a preliminary cautionary notice is not required because the publication of this statute in the Laws of Florida or the Florida Statutes gives such prisoners constructive notice of the consequences of violating the statute in terms of forfeiture of gain time.

Id. at 1314 (emphasis added).

The Third and Fourth District Courts also warned prisoner that they will impose sanctions pursuant to Section 944.28 when defendants file frivolous pleadings attacking their criminal convictions. In Anderson v. State, 708 So.2d 1028 (Fla. 4th DCA 1998), the Fourth District affirmed the denial of Anderson's Florida Rule of Criminal Procedure 3.800 motion in which Anderson

requested additional jail credit, and the court warned Anderson, stating "[w]e write only to advise Anderson that if he continues to file frivolous motions and appeals seeking the same relief, he will forfeit his earned gain time. Fla. Stat. § 944.28(2)(a)(1997)." In Gorge v. State, 712 So. 2d 440 (Fla. 3d DCA 1998), Gorge filed a petition for writ of mandamus seeking to compel the circuit court to rule on his Rule 3.800(a) motion. The Third District noted that:

> We note that an abuse of the judicial process by filing successive pleadings raising sentencing claims that were previously rejected on the merits may be the basis for the imposition of sanctions such as the forfeiture of gain time. See § 944.28(2)(a), Fla. Stat. (1997); Jackson v. State, 707 So.2d 1211 (Fla. 5th DCA 1998); Brown v. State, 702 So.2d 1370, 1371 (Fla. 1st DCA 1997); O'Brien v. State, 689 So.2d 336 (Fla. 5th DCA), rev. denied, 697 So.2d 511 (Fla.1997).

Id. at 440 n.1.

Application of Section 944.28 to petitioner's case, does not violate the constitutional provisions against ex post facto. See U.S. Const. Art. I § 10. See Art. 1, § 10, Fla. Const. The central concern of the *ex post facto* clause is the lack of fair notice. United States v. Newman, 144 F.3d 531, 537 (7th Cir. 1998), *citing*, Weaver v. Graham, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In Gwong v. Singletary, 683 So.2d 109 (Fla. 1996), the Florida Supreme Court established a two-prong test for determining whether a law violates the Ex Post Facto Clause: "(1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Section 944.28(2)(a) does not

increase the penalty of the crime; rather, Section 944.28(2)(a) prohibits the filing of frivolous or false pleadings. Although petitioner may have committed the crime for which he is serving a sentence in 1995, appellant filed his petition for writ of habeas corpus on October 24, 1997. The amendments to Section 944.28, which allowed the State to seek a forfeiture of gain time for filing frivolous or false pleadings before the court took effect on July 1, 1996. Ch. 96-106, § 7 at 97 Laws of Fla. Because petitioner filed the petition which contained the false statements after the amendments to Section 944.28 took effect the statute does not violate ex post facto.

Petitioner's reliance on the rule of lenity is misplaced. Section 775.021(1), Fla. Stat. (1997), provides that "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."[1] However, "Section 775.021(1) applies only to statutes which define criminal offenses." Jones v. State, 24 Fla. L. Weekly D569 (Fla. 1st DCA Feb. 24, 1999). Moreover, Section 944.28 is not ambiguous or susceptible of differing constructions. It clearly does not contain the limiting language of Section 944.279, which precludes the imposition of sanctions for criminal and collateral proceedings. Therefore, petitioner is not entitled to lenity.

[1] Petitioner is no longer "the accused", rather, petitioner has been convicted of the offenses for which he was charged.

Accordingly, the First District properly recommended that the Department of Correction sanction petitioner in the form of loss of gain time, and this Court should affirm the decision of the First District.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the District Court of Appeal reported at 24 Fla. L. Weekly D37 (Fla. 1st DCA Dec. 17, 1998) should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

_____
TRISHA E. MEGGS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 045489

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# L99-1-04418]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Joseph Duane Saucer, DOC# 118860, Dorm F3-111U, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, Florida 32211, this _____ day of May, 1999.

_____
Trisha E. Meggs
Attorney for the State of Florida

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