IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioner,

v. **CASE NO.: SC22-1207**

MCMILLAN C. GOULD,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

MR. GOULD'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUE

The immediate issue to be decided is whether this court can exercise its discretionary jurisdiction to review a decision of the First District Court of Appeal that does not expressly and directly conflict with any decision of this court or any other Florida court of appeal on the same question of gain time law. The ultimate issue of Mr. Gould's eligibility for gain time needs only to be addressed if the court accepts jurisdiction and chooses to review this case on its merits.

In its eagerness to misdirect the court from the start, the Department's statement of the issues begins by telling this court what the Fifth District has said - in dicta - in cases that do not even mention gain time, much less decide that issue.

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PRELIMINARY STATEMENT

In this brief the Petitioner, **FLORIDA DEPARTMENT OF CORRECTIONS**, will be referred to as "the Department." The Respondent, **MCMILLAN C. GOULD**, will be referred to as "Mr. Gould." The Department's brief on jurisdiction will be referred to as "DBJ." Its amended appendix to its jurisdictional brief will be referred to by "DBJ App'x."

STATEMENT OF THE CASE AND FACTS

The state recites a few facts in its brief (DBJ 1-3), but importantly several of the primary facts it cites to are from one of the dissents to the First District's opinion. However, the facts and arguments found in a dissent cannot be used as the basis for a determination that a direct and express conflict exists. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

SUMMARY OF THE ARGUMENT

THIS COURT MUST DECLINE JURISDICTION BECAUSE THE FIRST DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DECISION ON THE SAME QUESTION OF GAIN TIME LAW

It is important to note that in the Department's summary of the argument (DBJ 3) and in its argument (DBJ 4-6) it simply argues that the First District's decision conflicts with other decisions. But it neglects to discuss, much less argue, that the decision conflicts "on the same question of law," as required by Article V, §3(b)(3), Florida Constitution. That is because it cannot show conflict "on the same question of law" - that of gain time eligibility - decided by the First District. The First District recognized this when it declined to certify any conflict by a vote of 13-2 (DBJ App'x. at 40-46).

The First District correctly cited and analyzed the law pertaining to gain time eligibility under current Florida Statutes. This decision does not directly and expressly conflict with any other decision on the gain time issue.

ARGUMENT

THIS COURT MUST DECLINE JURISDICTION BECAUSE THE FIRST DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER DECISION ON THE SAME QUESTION OF GAIN TIME LAW

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. Among the classes of cases that may, in the Court's discretion, be reviewed are those where it is alleged that a district court's opinion "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, §3(b)(3), Florida Constitution.

The cases from this Court make clear that the express and direct conflict "on the same question of law" must appear on the face of the opinion - the face of the majority opinion and not a dissent - which the Court is being requested to review. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

The First District's decision in Florida Department of Corrections v. Gould, ___ So.3d ___ (Fla. 1st DCA 6/10/22)[47 Fla. L. Weekly D1273], is in accord with Florida law on the eligibility of a prison inmate for gain time consideration. There is nothing new or novel about the gain time law it applied. There is simply no basis to find that Gould does expressly and directly conflict with any decision cited by the Department on the same

question of gain time law.

The Department discusses at length the six sentence decision from the First District in Wilcox v. State, 783 So.2d 1150 (Fla. 1st DCA 2001)(en banc) (DBJ 6-9). Wilcox - unlike Gould - did not discuss or decide any gain time issue. It is not the First District decision under review and simply cannot serve as a basis to create a conflict.

So in the end the Department is left with three cases from the Fifth District Court of Appeal cited by the Gould dissenters (and not discussed in the Gould majority opinion): State v. Thurman, 791 So.2d 1228 (Fla. 5th DCA 2001); Donovan v. State, 821 So.2d 1099 (Fla. 5th DCA 2002); State v. Fureman, 161 So.3d 403 (Fla. 5th DCA 2014). The obvious problem with the Department's argument is that **none of the Fifth District cases cited by the Department even mentions the term gain time or the gain time statute, must less decides a question of law that involved gain time or the gain time statute.** Thus none of these three cases involve the same question of law as in Gould. Gould held that Mr. Gould must be considered as eligible by the Department of Corrections for incentive gain time because he was convicted of attempted sexual battery, and not sexual battery as required by the incentive gain time statute. The Department was not a party to any of the

three Fifth District decisions. None of the three considered a question of gain time at all; indeed none even mention those words. Each considered a question of law related to sex offender probation, a question of law obviously not discussed or decided in Gould. That these decisions contain dicta discussing attempted sexual battery offenses cannot obscure the fact that none of them decided the same ultimate question of law as Gould did. See e.g., State v. Lovelace, 928 So.2d 1176, 1177 (Fla. 2006)(cases addressing two distinct situations with different factual circumstances do not provide basis for jurisdiction).

The Department filed a notice to invoke jurisdiction in which it asserted the constitutional basis for review in this case was a conflict of decisions. Seeing the weakness of that argument, and desperate to obtain review, the Department now asks this court to go rogue. Its second argument asks this court to ignore the constitutional bases of jurisdiction and simply accept the case for review " . . . because this case is exceptionally important and because the decision below is wrong" (DBJ 10-13). That argument must be rejected out of hand. Neither of those reasons can provide this court with a constitutional basis to accept the case for review. This argument seeks to have the court ignore fundamental law and accept the case on emotion and

despite the lack of conflict. This argument would allow the court to accept virtually any case it chose to review, untethered to any constitutional basis for jurisdiction. This argument must not even be considered by the court.

The bottom line is that the Department cannot show that the First District's decision in Gould expressly and directly conflicts with any decision - not one - from this court or a district court of appeal on the same question of gain time law. The Court must therefore decline to accept jurisdiction in this case.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must decline to accept jurisdiction over this case.

Respectfully submitted this 24th day of October, 2022.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this brief was efiled and that system sent a true copy by email address christopher.baum@myfloridalegal.com to counsel for the Petitioner: Christopher J. Baum, Senior Deputy Solicitor General, 1 S. E. 3rd Avenue, Suite 900, Miami, FL 33131-1706, on October 24, 2022.

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.045(b) and 9.210(a)(2)(A) I hereby certify that this brief is typed in Arial 14-point font and does not exceed 2,500 words.

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