IN THE SUPREME COURT OF FLORIDA

Case No. SC00-2166

HON. MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,

Petitioner,

v.

STEVEN PEARSON,

Respondent.

On petition for discretionary review of the decision of the First District Court of Appeal in Pearson v. Moore, 767 So. 2d 1235 (Fla. 1st DCA 2000)

CORRECTED BRIEF OF RESPONDENT, STEVEN PEARSON, ON THE MERITS

Baya Harrison, III, Esq.
Florida Bar No. *099568*
P. O. Drawer 1219
Monticello, Florida 32345-1219
Tel: (850) 997-8469
Fax: *(850)* 997-8468
Email: bayalaw@aol.com
Counsel for Respondent,
Steven Pearson

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitution, Statutes and other Authority

PRELIMINARY STATEMENT

Petitioner, Hon. Michael W. Moore, Secretary of the Florida Department of Corrections, will be referred to by the abbreviated name of his agency, "the DOC," or as "the department." These are the same designations used in the brief on the merits filed by the petitioner. The respondent, Steven Pearson, will be referred to as "Mr. Pearson" or "the respondent."

The DOC*s brief on the merits will be referred to as "petitioner*s brief on the merits." The appendix attached thereto will be referred to by using the same designation as employed by the DOC.

All emphasis is added by the undersigned unless noted otherwise. Words in parenthesis within quotes have been added. Quotes within quotes are not included but they are identified.

AS TO THE DOC*S STATEMENT OF THE CASE AND OF THE **FACTS**

Mr. Pearson accepts for the most part the DOC s statement of the case and of the facts as set forth on pages 1 (unnumbered) through 3 of the petitioner*s brief on the merits. However, some of it is unnecessarily argumentative. We clarify the record by noting the following:

Prior to July of 1996, Mr. Pearson was sentenced to 5 years in state prison in Duval County Circuit Court Case No. 95-164-CF, and other cases. The fact that he was on "escape status" (the DOC*s brief on the merits, page 1, footnote 1) at some point in time, and that he was later sentenced as an habitual felony offender regarding some of his offenses, is irrelevant to the issue presented for review here and unnecessarily derogatory.

In November of 1996, Mr. Pearson was sentenced to a total of 13 years in state prison on a variety of counts in Hamilton County Circuit Court Case No. 96-20-CF pursuant to a plea bargain struck between Mr. Pearson and the State of Florida, whereby all parties and the trial court agreed that the sentences would be served concurrent and coterminous with the active sentences referenced above.

The offenses in Case No. 96-20-CF were committed *after* October 1, 1995, the effective date of § *944.275(4)(b)(3),* Fla. Stat., commonly referred to as Florida*s "85% law."

On July 16, 1997, Third Judicial Circuit Judge Paul S. Bryan entered an order clarifying the sentence imposed in Case No. 96-20-CF as follows:

> "Having reviewed the above-styled Motion filed on the 23rd day of June 1997, the Court corrects the commitment papers of Defendant on the above-numbered case in the following manner; Defendant*s sentence which began on 1 / 15/96 is to be concurrent and co-terminus to his preceding active sentence in accordance with the plea agreement signed on 9/16/96."

(~ the DOC*s brief on the merits, appendix, *A-53,* emphasis supplied by the trial court.) Judge Bryan provided both the state attorney*s office and the DOC with a copy of this order. j~. Neither the state attorney*s office nor the DOC appealed the aforementioned sentences imposed in Case No. 96-20-CF or the July 16, 1997 order clarifying same despite the fact that, by its own admission, "(o)n July 16, 1997, the department received..." the aforementioned order from Judge Bryan. (~ the DOC*s brief on the merits, page 2.)

> The DOC* s assertion on page 2 of its brief on the merits, therefore, that
>
> "...it could not structure Pearson*s *85%* sentence coterminously with his pre-85% sentence since to do so would violate the department*s obligations under section 944.275 and would allow the 85% sentence to expire prior to service of the 85% minimum required by section 944.275(4)(b)3,"

is argumentative and should not be contained in the statement of the case and of the facts. The same is true of the DOC*s claim (unnumbered page 1 of its brief on the merits) that ... under § 944.275(4)(b)3, Fla. Stat., Pearson must serve at least *85%* of the terms imposed." j~. That, of course, is the issue for this Honorable Court to resolve.

SUMMARY OF THE ARGUMENT

The DOC begs the essential question to be decided in this case when, on page 4 of its brief on the merits, it asserts that

> "(i)n Pearson v. State, 767 So. 2d 1235 (Fla. 1st DCA 2000), the court held that the department must give effect to a coterminous provision in a sentencing order, even if doing so would result in the inmate serving less than 85% of the sentence in violation of section
> *944.275(4)(b)3."*

This is so because the original coterminous sentence imposed in Case No. 96-20-CF, as clarified by Judge Bryan*s order dated July 16, 1997, was lawful, and the district court of appeal was right when it found that the DOC exceeded the limitations on its executive authority by virtue of the doctrine of the separation of powers when it effectively negated the coterminous sentence which, by operation of law, expired when Mr. Pearson*s previously imposed active sentences expired.

As the court in Pearson stated, "(u)nder article I, section 9 of the Florida Constitution, once service of a sentence has begun, the state cannot alter it unilaterally to a prisoner*s detriment." **Pearson, 767 So. 2d at 1238, citing Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973). This is especially true in the case at bar where the coterminous sentence was entered into between Mr. Pearson and the state pursuant to a plea agreement, and neither the state attorney*s office nor the DOC appealed the sentence. The State of Florida and its agencies, like its residents, must honor their contractual obligations and cannot speak with a forked tongue by agreeing to the**

terms and effect of a coterminous sentence one day and

3

denying them the next. Taylor v. State, 710 So. 2d 636 (Fla. 3d DCA 1998). A coterminous sentence is a sentence that runs concurrently with another and terminates simultaneously with the earlier imposed sentence. Pearson, 767 So. 2d at 1237, n.1; Madden v. State, 535 So. 2d 636 (Fla. 5th DCA 1988). The DOC does not claim that coterminous sentencing is unlawful in Florida.

The First District Court of Appeal was correct in holding that the DOC violated the separation of powers provisions of Article. II, Section 3 of the Florida Constitution, when it effectively nullified the practical effect of the coterminous sentence imposed upon Mr. Pearson in Case No. 96-20-CF. Section 944.275(4)(b)3, Florida Statutes, invests no sentencing authority in the DOC, Instead, the statute merely prevents the petitioner from granting gain-time which would cause a sentence involving only a term of years to expire prior to the service of *85%* thereof. Gain-time is irrelevant and not what caused the expiration date of Mr. Pearson*s sentence in Case No. 96-20-CF to collapse into the expiration date of his previously imposed active sentences. That simultaneous termination of sentence occurred by operation of law in the context of the very nature of a coterminous sentence.

"Sentencing is a power, obligation, and prerogative of the courts, not DOC." Pearson, 767 So. 2d at 1239. Even if the DOC considered the coterminous sentence illegal, it lacks the authority to correct an illegal sentence or render the illegality harmless." Id. at 1239, *quoting* Slay v. Singletary, 676 So. 2d 456 (Fla. 1st DCA 1996).

Therefore, the decision of the First District Court of Appeal in this case should be approved and affirmed by this Honorable Court.

ARGUMENT

Issue (As Framed By The DOC):

> Where a trial court imposes a sentence for a term of years to be calculated "coterminous" with a shorter sentence, does the coterminous provision violate the separation of powers doctrine under Art. III, § 9, of the Florida Constitution if it usurps the duties delegated by the Legislature to the Executive through the Department of Corrections under Section 944.27 *5?*

(See the DOC*s brief on the merits, page 6, emphasis in bold supplied.)

What Does **"Calculated" Mean?**

The DOC seeks affirmation of its illegal nullification of Judge Bryan*s sentencing order imposed in Case No. 96-20-CF by stacking the deck in terms of the wording of the issue it presents for review. When Judge Bryan sentenced Mr. Pearson, he did not direct the DOC to "calculate" the sentence in a certain way. The DOC seeks to inject the concept of "calculations" into the mix in order to support its claim that this is a function of the Executive Branch of government in general and the DOC in particular. What is really at issue here -- and what the law requires -- has nothing to do with administrative calculations of Mr. Pearson*s end-of-sentence date. On the contrary, it is the critical need to maintain an independent judiciary by again reminding the DOC that it must stay out of the sentencing business and, instead, confine itself to executing the sentence exactly as imposed by the trial court. As the First District Court of Appeal recognized in Pearson, 767 So. 2d at 1237,

> "(t)he sentence of which DOC disapproves is the sole authority for Mr. Pearson*s incarceration. By refusing to execute the sentence exactly as imposed by the sentencing court, DOC has allegedly* transformed what was effectively a five-year term of incarceration into a term of incarceration more than twice as long."

The Legitimacy of Coterminous Sentencing in Florida

The DOC cites a host of court decisions such as Ex Parte United States, 242 U.S. 27, 37 5. Ct. 72 (1916), Glock v. Moore, 2001 WL 10604, *7 (Fla. 2001), Dorminey v. State, 314 So. 2d 134 (Fla. 1975) and Bateh v. State, 101 So. 2d 869 (Fla. 1St DCA *1959),* for the proposition that there are limitations on judicial authority in the field of sentencing. the DOC*s brief on the merits, pages 6-12.) We do not take issue with that general proposition, and simply point out that none of those cases involves a coterminous sentence.

The sentence imposed in Case No. 96-20-CF is not novel. It is a coterminous sentence which, by operation of law, not some bureaucratic "calculation," expired when Mr. Pearson*s previously imposed 5 year sentences expired. (See the DOC*s brief on the merits, appendix, A-53.) Coterminous sentencing is accepted and perfectly legal in Florida. See. e.g., Madden v.

* There is nothing “alleged” about the effect of what the DOC has done to Mr. Pearson. He has expired the 5 year sentences which the coterminous sentence collapsed into. Yet, he remains behind bars and, according to the DOC, his tentative release date is September 8, 2009. the petitioner*s brief on the merits, appendix, A-6.)

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

acknowledges the legitimacy of coterminous sentencing and, more importantly, makes rather clear what the nature and effect of such a sentence is in Section 921.16(3), Florida Statutes.* A coterminous sentence is a "...sentence that runs concurrently with another and terminates simultaneously." Pearson, 767 So. 2d at 1237, n.1.

The Pearson Case and the Separation of Powers Doctrine

According to the DOC, however, a coterminous sentence for an offense committed after October 1, 1995 is a legal impossibility if the effect of the sentence would cause the defendant to be released before serving 85% of the term of years imposed as a part of that coterminous sentence. Thus, at pages 14 and 15 of its brief on the merits, it argues,

> "...the separation of powers violation lies with the judiciary imposing a coterminous provision which interferes with the department*s authority to give effect to the 85% service requirement and its authority to calculate release dates under section 944.275."

The DOC is wrong.

* § 921.16(3), Fla. Stat., has not been repealed by the Florida Legislature since the enactment of the 85% law. Thus, under the rules of statutory construction, this statute recognizing "coterminous" sentences and § 944.275(4)(b)3 must be permitted to coexist and, contrary to the DOC*s argument, the latter does not cancel the former. This state of coexistence is exactly what the First District Court of Appeal has recognized in its Pearson case.

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

On pages 12-3 0 of its brief on the merits, the DOC cites case law affirming the scope of its authority to enforce sentences -- and the fact that the judiciary cannot infringe upon that executive power. Again, we do not dispute that authority. However, it is relevant to point out that the department is on very thin ice when it criticizes the judiciary for failing to properly apply Florida statutes and to respect the doctrine of separation of powers. Sadly, the DOC has a long record of misapplication of early release laws and abusing the separation of powers doctrine in the course of violating the liberty interests of Florida prison inmates under the guise of the "calculation" of their release dates, See. e.g., Lynce v. Mathis, 519 U.S. 433 (1997), Gomez v. Singletary. 733 So. 2d 499 (Fla. 1998), Calamia v. Singletary, 694 So. 2d 733 (Fla. 1998), Gwong v. Singletary, 733 So. 2d 109 (Fla. 1996), Weaver v. Graham, 450 U.S. 24 (1981), Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990), Harris v. Wainwright, 376 So. 2d 855 (Fla. 1979), and Raske v. Martinez, 876 F.2d 1496 (11th Cir. 1989). This is especially true regarding Florida*s "85% law" and the issue of gain-time. Gwong v. Singletary. 683 So. 2d 109 (Fla. 1996).

More relevant to the case at bar, the DOC does not see fit to quote the provisions of Section 944.275(4)(b)3, Fla. Stat., in support of its argument that this statute was ignored by the First District Court of Appeal in the Pearson case. Had it done so, it would be clear that this statute does not delegate to the DOC "authority to give effect to the 85% service requirement." Nor does it extend to

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically the DOC the "authority to calculate release dates..." On the contrary, the statute is concerned solely with limitations upon the amount of incentive gain-time that the DOC may award to inmates who committed crimes after October 1, 1995. It states, in pertinent part,

> "(f)or sentences imposed for offenses committed on or after October 1, 1995, the department may grant up to 10 days per month of incentive gain-time, except that no prisoner is eligible to earn any type of gain-time in an amount that would cause a sentence to expire, end or terminate, or that would result in a prisoner*s release, prior to serving a minimum of 85 percent of the sentence imposed."

As the Pearson court correctly observed, "...we do not understand how Section 944.275(4)(b)3 can be read as anything more than a limitation on DOC*s authority to grant gain-time..." Pearson, 767 So. 2d at 1237. For this precise reason, therefore, the respondent does not rely upon the DOC*s authority to award him "gain-time" on his 13-year post-October 1, 1995 coterminous sentence imposed in Case No. 96-20-CF as a basis for relief. Gain-time is totally irrelevant to his claim. Instead, Mr. Pearson expects the DOC to faithfully execute and not interfere with the plain language of the coterminous sentence

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

> imposed by Judge Bryan which, by operation of law, was to run concurrently and to terminate with another, previously imposed sentence. Whether to award or not award gain-time and how much of it to award plays no part in executing the court*s order. As stated above, the 13 year coterminous sentence imposed in Case No. 96-20-CF expired when the earlier imposed *5* year sentence expired, not because of gain10

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

time - but by virtue of Judge*s Bryan*s sentence itself and by operation of law. Therefore, the DOC*s contention that § 944.275(4)(b)3, Fla. Stat., has been violated and that the statute renders the coterminous aspects of the sentence a nullity is incorrect.

In addition, even if this court found that the Legislature*s intent was for all inmates whose crimes were committed after October 1, 1995 to serve 85% of the terms of years imposed, Mr. Pearson*s 13-year coterminous sentence would not violate that law. This is so because the sentence Judge Bryan imposed upon Mr. Pearson was not just a flat 13 years. It was for 13 years to run concurrent and coterminous with an earlier imposed 5 year sentence. the DOC*s brief on the merits, appendix, A-53.) That is a major distinction. By sentencing Mr. Pearson to 13 years concurrent and coterminous with the 5 year sentence, the sentencing court fully intended for Mr. Pearson to serve no more time in prison than the time he would serve on his 5 year sentence. In other words, when Mr. Pearson served out the 5 year sentences, he effectively had served 100% of the coterminous sentences imposed in Case No. 96-20-CF. Whether the DOC likes it or not, that was the trial court*s prerogative. The judge has that judicial power. The DOC must honor (execute) that sentence. As the Pearson court noted, the "DOC is an executive branch charged with faithfully implementing sentences imposed by the courts." Pearson, 767 So. 2d at 1238. The District Court of Appeal added quite correctly on page 1239:

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

"As part of the executive branch, DOC lacks the power to adjudicate

11

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

the legality of a sentence or to add or delete sentencing conditions," *citing* Slay v. Singletary, 676 So. 2d 456, 457 (Fla. 1st DCA 1996). Stated differently, the DOC asks this Court to conclude that Mr. Pearson must serve 11.05 years (85% of a term of 13 calendar years) of a coterminous sentence. This is obviously not what the sentencing court intended, not what Mr. Pearson bargained for and, as the Pearson court clearly recognized, beyond the DOC 's "asserted authority to review the legality of sentences imposed by the courts and alter them as it deems fit." Pearson,, 767 So. 2d at 1237, n.1.

Turner and Nieves

The DOC grafted its "legal impossibility" language from Turner v. State. 689 So. 2d 1107, 1110 (Fla. 2d DCA 1997) and Nieves v. State, 1999 WL 104437 (Fla.App. 3 Dist.). Since this Honorable Court accepted jurisdiction in this case, presumably due to a conflict between the First District in Pearson, and the Second and Third Districts in Turner and Nieves, it is not our place to continue to argue the point. We do feel it appropriate to point out that, in both Turner and Nieves, the district courts were faced with the issue of whether the defendants should be allowed to withdraw their pleas subsequent to the DOC ' s refusal to run the sentences coterminously. This is different than the issue in the case at bar since:

> "Here, Mr. Pearson does not seek to withdraw his plea. Instead, he asks to serve only the sentence the trial court imposed, and raises the question

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

> whether DOC has the authority to declare a sentence illegal, although it was duly pronounced by the trial court and

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically never appealed."

Pearson, 767 So. 2d at 1237, n.2.

Other Authority cited by the DOC

The DOC cites a host of other cases in support of its position in this cause. Space will not allow us to address all of them. Instead, we address the ones not previously discussed and upon which the DOC relies the most.

The DOC cites, for example, Shupe v. State, 516 So. 2d 73 (Fla. 5th DCA 1987) and Hall v. State, 493 So. 2d 93 (Fla. 2d DCA 1986), for the proposition that it is the agency which has primary authority over awarding gain-time. In Shupe, the trial court*s sentencing order included language to the effect that "..no gaintime shall be allowed until restitution is paid." Shupe, 516 So. 2d at 73. The Fifth District stated that the trial court is without authority to prevent gain time and that the award of gain time, pursuant to Section 944.275, Florida Statutes, is solely within the province of the Department of Corrections." Id. Hall stands for the same proposition. We could not agree more simply noting, as we did above, that gain-time is not relevant to the legal effect of Mr. Pearson*s coterminous sentence.

The DOC also relies too heavily upon Moore v. State, 392 So. 2d 277 (Fla. 5th DCA 1980) and Brooke v. State, 128 So. 14, 99 Fla. 1275 (Fla. 1930) because these

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

decisions actually strengthen Mr. Pearson*s position. Moore clearly provides that "(t)he courts have had the sole province over the particular sentence to be given an individual, but only within the statutory authority given in the

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

various sentencing statutes, and the executive has the duty to see that the sentences are enforced." Moore, 392 So. 2d at 277. Judge Bryan imposed a coterminous 13 year sentence upon Mr. Pearson which even the DOC cannot deny was intended to terminate when the other active, previously imposed sentences expired. The DOC had no power to modify that sentence. Instead, it only had the "duty to see that the sentences are enforced," at 277. In Brooke, the court affirmed that the "court fixes the penalty and the law fixes the beginning and expiration..." adding that "(t)he law does not contemplate that the court, in fixing the punishment, shall also fix the beginning and the end of the period during which the imprisonment shall be suffered." Brooke 99 Fla. at 1279-80, *citing* State v. Horne, 52 Fla. 125, 135, 42 So. 388, 389 (Fla. 1906). Judge Bryan did not dictate the exact date that the period during which the imprisonment to be suffered would actually end. That mathematical calculation was left to the DOC. But Judge Bryan did fix the penalty (which the Florida Supreme Court in Brooke, supra, clearly indicated is synonymous with the punishment) in Case No. 96-20-CF and that was a sentence which expired when (based upon calculations to be made by the DOC) the previous 5 year sentences expired. (See the DOC ' s brief on the merits, appendix, A-53.) That was Judge Bryan*s right. The DOC was obligated to enforce his sentence, not negate it. It is as simple as that.

Exposing the DOC*s Conduct in the Pearson Case for what it Really is -- Hudson Revisited

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

The bureaucratic spin which underlies the DOC*s effort to justify its refusal to honor Judge Bryan*s coterminous sentencing order in Case No. 96-20-CF is that it is not modifying the sentence -- it is merely "structur(ing)" that sentence per the provisions of Section 944.275(4)(b)3. See the DOC*s brief on the merits, page 12. The First District rejected the DOC*s explanation, finding that the agency "structuring" was in reality an unconstitutional effort to alter the coterminous sentence imposed by Judge Bryan, emphasizing that "sentencing is a power, obligation, and prerogative of the courts, not DOC." Pearson, 767 So. 2d at 1239.

The DOC tried essentially the same thing in Hudson v. State, 682 So. 2d 657 (Fla. 3d DCA 1996). In Hudson, the trial court determined that the defendant was an habitual felony offender under Section 775.084, Florida Statutes, but exercised its discretion to decline to impose a minimum mandatory prison term upon him. At that time, the Third District Court of Appeal had not ruled that a minimum, mandatory sentence was automatic under these circumstances, although apparently another district court of appeal had. Nevertheless, the DOC, obviously anxious to punish Mr. Hudson more than the trial court had, blatantly injected itself into the very heart of the sentencing process, and presumptuously advised the trial court that

> "...the sentencing documents did not refer to a mandatory term but they had set up the defendant*s record to show a twelve year mandatory sentence pursuant to Florida Statute Section 775.084."

Pearson, 767 So. 2d 1238, *quoting* Hudson, 682 So. 2d at 658.

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

The court in Hudson recognized the DOC*s illegal attempt to "add additional conditions to a sentence," soundly rejecting this obvious violation of the separation of powers doctrine. Hudson. 682 So. 2d at 658.

The department uses semantics as it attempts to justify its action in Hudson and to fault the Pearson court for relying upon it, on pages 36 and 37 of its brief on the merits. According to the department, the Pearson court essentially misunderstood its good intentions in Hudson and evaluated them out of their proper context. Nothing could be further from the truth. The DOC violated the separation of powers doctrine in Hudson in the same manner as it has abused Mr. Pearson in the case at bar by donning a judge*s robe, ignoring the sentence imposed by the court and altering Mr. Pearson*s coterminous sentence substantially changing "what was effectively a five year term of incarceration into a term of incarceration more than twice as long." Pearson, 767 So. 2d at 1237. Instead of admitting that it is in fact altering the sentence, the department pretends that it is merely "structuring" or executing it. This is not legal because, no matter how confusing the DOC tries to make it, "(n)o administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." Art. I, § 18, Fla. Const.

Even the department*s ability to "structure" sentences in the context of early release credits is not as all-inclusive as it apparently would like it to be. Thus, in Thomas v. State, 612 So. 2d 684 (Fla. 5th DCA 1993), the sentencing court did not give

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

the defendant full credit for time served. Apparently, the DOC

16

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically advised the court that it could make that determination itself. The district court of appeal stated, however, that while "(t)his is not to say that the court cannot consider input from the department,..." in the final analysis, "(s)entencing is the obligation of the court, not the department of corrections..." See also Wilson v. State, 603 So. 2d 93 (Fla. 5th DCA 1992).

The DOC lacks the Authority to do anything other

than carry out Judge Bryan*s Coterminous Sentencing Order

In the final analysis, the DOC simply lacks the power to fail to enforce Judge Bryan*s coterminous sentencing order, Section 944.275(4)(b)3, Florida Statutes, notwithstanding. Nowhere is this fact better illustrated than in the recent decision of the First District Court of Appeal in the case of Hall v. Moore, Case No. 1DOO-931, 2001 WL 76282 (Fla. 1st DCA 2001), decided January 31, 2001 (mandate not yet issued), and based in part upon the First District*s decision in Pearson. In Hall, the defendant received a series of consecutive sentences. He was first to serve four and one-half years, followed by a 20-year habitual felony offender sentence, and then a final three-year sentence. After he began serving his first (four and one-half year) sentence, the habitual felony offender sentence was reversed. He was retried and again convicted on the habitual felony offender charge. This time, he received a 13 year sentence on the habitual offender charge. Hall filed a motion to correct an illegal sentence based upon his contention that he was not given proper credit for time served. The trial court granted

State, 535 So. 2d 636 (Fla. 5th DCA 1988). The Florida Legislature specifically

his motion and ordered that Hall receive some 1012 days of credit for the time he had spent in

custody between his arrest and the second trial. The state attorney did not appeal

the trial court*s order. Later, the DOC improperly injected itself into the sentencing process and

> "(d)espite the specific order, the Department determined that Hall was not entitled to 693 of the 1012 days because this represented the time that he was in Department custody and serving his four and one-half-year sentence, not his habitual felony offender sentence."

Hall, 2001 WL 76282, p.1. Hall then filed a petition for writ of mandamus against the DOC seeking an order requiring the department to honor the sentencing judge*s order granting the credit for time served. The lower court sided with the DOC, and Hall sought a writ of certiorari in the district court. The court did not necessarily disagree with the DOC s legal position but found that a higher principle of law -- the separation of powers between the three branches of government must control, stating at pages 1, 2:

> "Although this (the DOC*s legal position regarding the calculation of credits for time served) is the argument that the State should have raised at Hall*s hearing to correct his sentence,* the Department does not have the authority to review and reject a trial court*s specific award of credit."

The district court then found that the "lower court departed from the essential requirements of law in denying Hall*s petition..." and quashed the order of the trial

* The DOC attempts to justify the fact that it did not appeal Judge Bryan*s coterminous sentencing order by citing Dep*t of Juvenile Justice v. J. R., 710 So. 2d 211 (Fla. 1st DCA 1989). The effort fails for several reasons. (Cont.)

custody between his arrest and the second trial. The state attorney did not appeal

custody between his arrest and the second trial. The state attorney did not appeal court with directions to grant Hall*s petition for writ of mandamus. This is exactly what this Honorable Court should do in the case at bar.

Denying the DOC Relief in this Case will not bring on the Problems Envisioned by the Petitioner in the Future - Instead it will Protect the Independence of the Judiciary

Finally, the DOC deviates from the facts in this case and raises concerns about the possible effects of the First District*s Pearson decision upon coterminous sentences which involve life sentences and minimum, mandatory sentences related to firearm convictions. the DOC*s brief on the merits, pages 3 7-8. This Court may recall that the DOC has a tendency to play upon the fears of people in the course of violating the constitutional rights of Florida prisoners, as evidenced by some of the arguments it made in cases such as Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996), even after this Court had decided Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990). There should be no cause for concern if this Honorable Court rules in Mr. Pearson*s favor here. As the District Court determined, Section 944.275(4)(b)3, Florida Statutes, is not a minimum,

* (Continuation of footnote from previous page.) In the J. R. case, the State of Florida, through the DJJ, filed a timely appeal of the adverse ruling from the circuit court. In Mr. Pearson*s case, neither the state attorney nor the DOC appealed even though both agenies were provided with the trial court*s order clarifying the coterminous sentence. the DOC*s brief on the merits, appendix, A-53.) More importantly, the State, via the state attorney*s office, specifically agreed to the coterminous sentence. Id.

custody between his arrest and the second trial. The state attorney did not appeal

custody between his arrest and the second trial. The state attorney did not appeal mandatory sentencing proviso. It merely limits the ability of the DOC to award gain-time. To the extent that there is any ambiguity in the "85%" law,

> "(t)he rule of law in all criminal cases is that any ambiguity in statutes, rules, verdicts, judgments, sentences, and any other matter is resolved in favor of the accused."

Williams v. State, 528 So. 2d 453, 454 (Fla. 5th DCA 1988). Giving Mr. Pearson the benefit of the doubt by requiring the DOC to honor Judge Bryan*s coterminous sentencing order in this case is by far the better course of action. To do otherwise is to allow the department to once again unconstitutionally encroach upon the authority of the judicial branch of government.

CONCLUSION

For the reasons set forth above, this Honorable Court is requested to affirm and adopt the decision of the court in Pearson v. Moore, 767 So. 2d 1235 (Fla. 1st DCA 2000), quash the order of the circuit court below, remand the cause to the circuit court for proceedings consistent with the decision of the First District in Pearson, require the DOC to release the respondent forthwith and grant Mr. Pearson such other and further relief as is deemed appropriate in the premises.

custody between his arrest and the second trial. The state attorney did not appeal

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been provided to legal counsel for petitioner/appellant, Hon. Susan Maher, Deputy General Counsel, and Hon. Sheron L. Wells, Assistant General Counsel, Florida Department of Corrections, c/o the Office of the general Counsel, The Department of Corrections Building, 2601 Blair Stone Road, Tallahassee, Florida, 32399-2500, by hand delivery this 12th day of February, 2001.

Respectfully submitted,

Baya Harrison, III, Esquire
Post Office Box 1219
Monticello, FL 32345
(850) 997-8469
Fla. Bar No. 099568
Counsel for Steve Pearson,
Respondent

CERTIFICATE OF COMPLIANCE

Counsel for the respondent, Steven Pearson, hereby certifies, pursuant to this Court*s Administrative Order of July 13, 1998, and other administrative orders rendered

custody between his arrest and the second trial. The state attorney did not appeal

in this regard, that the type used in this brief is Times New Roman, 14 point, not proportionally spaced.

Baya Harrison, III