IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00 2166

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Petitioner,

-vs-

STEVEN PEARSON,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

OF THE DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

BRIEF OF PETITIONER ON THE MERITS

SHERON WELLS
Assistant General Counsel
Florida Bar No.: 0068410
Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399-2500
(850) 488-2326

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

PAGES

ISSUE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT CERTIFYING TYPE SIZE AND STYLE

Petitioner’s Brief on the merits is certified as being typed in 12 point Courier New, a font that is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Statement of the Facts

Respondent Pearson is an inmate in the custody of the Department of Corrections. He was received into the department on June 21, 1993, having been sentenced in Duval County Case No. 95-164 to five (5) years for an offense committed on July 14, 1995. The sentence was imposed concurrent to other active sentences.[1] (Appendix A1-3[2])

In November 1996, Pearson was transferred to Hamilton County where he was sentenced in Case No. 96-20 on 26 counts. Specifically, he was sentenced on counts 10-19, 29-31, 37 and 40 to thirteen (13) years, concurrent with all other counts and all other active sentences. (Appendix p. A4-5; A9-52) He was sentenced on counts 6-9, 33-36, 38, 39, to five (5) years, each count concurrent with the other and with all other active cases. (Appendix p. A4-A5) The court further adjudicated Pearson a habitual offender on all counts. (Appendix p. A4-5; A9-52) Because the 13 year terms were the sentences to expire last, they became Pearson's controlling terms. (Appendix p. A4-5) All offenses in Case No. 96-20 were committed after October 1, 1985, therefore, under §

---

[1] Pearson was on escape status from another sentence when he was returned to the department's custody on June 21st. (Appendix p. A-1) His other sentences are not relevant to this action.

[2] The affidavit attached that the Appendix (p. A1-A7) was part of the record below, however, it appears that page 2 of the affidavit was inadvertently omitted from the copy sent to the District Court. A complete copy of the affidavit is attached.

944.275(4)(b)3), Fla. Stat., Pearson must serve at least 85% of the terms imposed. (Appendix p. A4-5)

On July 16, 1997, the department received an "Order Granting Motion to Correct Clerical Mistake" in Case No. 96-20 which directed that pursuant to the terms of the plea agreement, the case was to run concurrent and **coterminous** with all other active sentences. (Appendix at p. A5; A53) Since running Case No. 96-20 coterminous with the other active sentences would require the department to grant the benefit of gaintime to Case No. 96-20 in an amount that would reduce it below 85% service, the department could not structure Case No. 96-20 coterminous to the other active sentences. (§ 944.275(4)(b)3)) (Appendix p. A5-6) Thus, Pearson's tentative release date is established based on the 13 year term in Case No. 96-20. The earliest he could be released is December 12, 2007 which is the date he will have served 85% of the sentence. (Appendix p. A5-6)

Statement of the Case

On November 12, 1998, Pearson filed a Petition for Writ of Mandamus in the Second Judicial Circuit seeking to compel the Department of Corrections to structure his sentences coterminously. The court issued an order to show cause, and on April 19, 1999, the department filed a response to the Petition indicating 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.

On June 17, 1999, the Honorable Charles McClure denied Pearson's petition upon finding that

> the Department of Corrections has properly structured Plaintiff's 13 year sentence to run concurrent but not co-terminous to an existing 5 year sentence which was imposed for an offense committed prior to October 1, 1995. See, Turner v. Singletary, 689 So.2d 1107 (Fla. 2d DCA 1997).

Pearson sought review in the First District Court of Appeal through a petition for writ of certiorari, and the department was issued an order to show cause as to why the petition should not be granted. The department filed a response indicating that the circuit court had not departed from the essential requirements of law in finding that the department had properly calculated Pearson's sentences under section 944.275, Florida Statutes. Oral arguments were held on June 28, 2000.

On August 14, 2000, the First District Court of Appeal granted Pearson's petition for certiorari with an opinion. (Pearson v. Moore, 767 So.2d 1235 (Fla. 1st DCA 2000) The department filed a timely motion for clarification and/or correction; motion for rehearing; motion for rehearing *en banc*; and/or certification of question. All motions were denied. The department filed a notice to invoke the discretionary jurisdiction of this Court, and moved for a stay of the Pearson opinion pending review. The motion for stay was denied in the First District Court of Appeal, but was subsequently granted by order of this Court dated October 3, 2000. This Court accepted jurisdiction on January 5, 2001.

SUMMARY OF THE ARGUMENT

In 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. Id. The court reasoned that the department's execution of Mr. Pearson's sentence without the coterminous provision violated separation of powers because sentencing is within the realm of the judiciary. Id. at 1239.

The department respectfully contends that it is the judiciary, not the department, who has violated the separation of powers doctrine. The judiciary imposed a 13 year sentence to run coterminous with a 5 year sentence currently being served. A coterminous sentence not only determines the length of the sentence, but also the amount of time the inmate will actually serve in prison on the sentence. The former is a judiciary function, the latter an executive function. In other words, the judiciary sets a cap on the amount of time that an inmate can be incarcerated, but it is the department who determines if and when the inmate will be released short of that cap. The legislature governs the actions of both branches on the punishment of criminals, and the department makes its determinations on when inmates are to be released from custody based solely on what has been legislatively mandated. Inmates are released short of the cap set by the judiciary through the award of gaintime. A coterminous

sentence puts this executive function into the hands of the judiciary.

In a variety of similar contexts, Florida courts have agreed that sentencing courts cannot impose sentencing provisions that interfere with duties that fall within the realm of the department, even if that provision was a part of the plea to which the state attorney agreed at sentencing. *See, e.g.,* Shupe v. State, 516 So.2d 73 (Fla. 5th DCA 1987); Hall v. State, 493 So.2d 93 (Fla. 2d DCA 1986)(a sentencing court order directing matters within the exclusive purview of the department, such as the application of gaintime, are essentially "surplusage", or without effect). The department does not attempt to correct illegal sentences as the First District accuses, rather, the department complies with statutes the Legislature has charged it with administering.

The reasoning of opinions from the Second and Third Districts support the department and recognize that coterminous structuring conflicts with the 85% statute, and that the department must apply the 85% statute to post-October 1, 1995 sentences. As a result, these cases hold, it is a legal impossibility to give effect to the coterminous provision on a post-October 1, 1995 sentence. Turner v. State, 689 So.2d 1107 (Fla. 2nd DCA 1997); Nieves v. State, 24 Fla. L. Weekly D591 (Fla. 3rd DCA 1999); *see also,* Boney v. State, 731 So.2d 150 (Fla. 4th DCA 1999); Podvin v. State, 2001 WL 8353 (Fla 3rd DCA, Jan. 3, 2001); Obaya v. State, 723 So.2d 924 (Fla. 3rd DCA 1999).

ARGUMENT

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 944.275?

Overview of the Separation of Powers Doctrine

Pearson v. State, 767 So.2d 1235 (Fla. 1st DCA 2000) holds that because sentencing is in the realm of the judiciary, the Department of Corrections must execute a sentencing order "exactly as imposed", including the effectuation of a coterminous provision. Id. at 1237. The department contends that, although courts determine the length of a sentence within the range established by statute, the execution of a sentence is a function of the executive branch in accordance with the statutory duties delegated to the DOC by the Legislature, and that the imposition of a coterminous provision encroaches upon the DOC's delegated authority. Thus, the separation of powers in the context of sentencing is central to this case.

An often cited case from the United States Supreme Court examines the origin of, and the limits on, the judiciary's statutory and inherent authority. Ex Parte Untied States, 242 U.S. 27, 37 S.Ct. 72 (1916). There, the trial court sentenced a defendant to 5 years in prison, the minimum allowed under the statute. The trial court then permanently "suspended" the sentence

which “absolutely removed the accused from the operation of the punishment provided by the statute”. Id. at 37. The United States sought to vacate the order of suspension through mandamus. Id. at 39. The respondent defended the court’s authority to permanently suspend execution of the sentence on four grounds: 1) the sentencing court has inherent authority to “refuse to impose a sentence fixed by statute, or to refuse to execute such a sentence when imposed”; 2) the right was recognized and exerted at common law; 3) the right was recognized by decisions of state and federal courts; and 4) because such action had been practiced for so long, it was “tacitly” recognized through inaction by the legislature. Id. at 41.

The U.S. Supreme Court rejected each of these arguments and held that as to the first ground, judicial sentencing authority does not encompass the inherent power the respondent claimed, and that the “plain legislative command for fixing a specific punishment for a crime” cannot be permanently set aside by a court. Id. at 42. With regard to the constitutional distribution of powers, the court stated that it is “indisputable”,

> that the authority to define and fix the punishment for crime is legislative, and includes the right in advance to bring within judicial discretion for the purpose of executing the statute elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment fixed by the law and ascertained according to the methods by it provided, belongs to the executive department.

Id. at 42.

As to respondent’s second ground, the court found no basis in

common law for a court to permanently suspend a sentence. Id. at 44. The court rejected respondent's third ground and cited to state and federal cases holding that where a court imposes a sentence and then permanently suspends it, the court has essentially granted a pardon, which is an exclusive function of the executive. Id. at 45-6.

The court also rejected the respondent's fourth argument that the authority to permanently suspend a sentence arises from the states' prior practice of doing it. The supreme court stated that the practice may have been well-intentioned because it allowed the judiciary to take into consideration conditions the legislature could not have foreseen in fixing the penalty, however,

> we can see no reason for saying that we may now hold that the rights exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. (*emphasis supplied*)

Id. At 51-2.

This opinion instructs that the judiciary has the authority to impose a sentence as provided by law, and the "discretion to enable them to wisely exert their authority", but that inherent judicial authority does not extend to matters of sentencing which belong to other branches of government. Id. At 41-2. For instance, the Legislature decides what acts are criminal, and the extent of the penalty to be imposed. The executive through the state attorney's office decides whether, and under which statutes to charge persons accused of committing a crime. Through DOC, the executive

calculates the release date for the sentence imposed. Finally, the governor and cabinet have the authority to grant a pardon and excuse a sentence entirely. See, Glock v. Moore, 2001 WL 10604, *7 (Fla. 2001)(pardon powers are within the exclusive domain of the executive branch). Thus, the court's inherent sentencing powers are limited to matters where the exercise of authority does not override the lawful functions of the other branches of government. See, Tanner v. Wiggins, 54 Fla. 203, 212 (Fla. 1907)(trial court had no authority to suspend the execution of a sentence because "exclusive control over the subject of pardons and of commutation and mitigation of penalties is lodged by our Constitution in other official than the judges of the courts", thus, any attempt to suspend execution is a "nullity"); Carnley v. Cochran, 118 So.2d 629, 632 (Fla. 1960)("the fact that agencies other than the court are endowed with the power to exercise [probation and parole] functions does not constitute any encroachment upon the judicial prerogative or the exercise of judicial functions by nonjudicial officers"); Dorminey v. State, 314 So.2d 134 (Fla. 1975)(the maximum and minimum penalties to be imposed for violation of the laws is a matter for the Legislature, not the courts); Cotton v. State, 769 So.2d 345, 350 (Fla. 2000)(the court has the discretion to impose a sentence within the range set by the legislature, but "congress has the power to define criminal punishments without giving the courts any sentencing discretion"),*citing*, Chapman v. Unites States, 500 U.S. 453 (1991); *see also*, State v. Bateh, 110 So.2d 7 (Fla. 1959).

In 1958 the First District Court of Appeal analyzed a line of Florida Supreme Court cases concerning trial courts' inherent powers, and the constraints placed upon that power by statute and by the separation of powers. Bateh v. State, 101 So.2d 869 (Fla. 1st DCA 1959)[3]. The First District reviewed trial courts' practice of deferring imposition of a sentence and found that the practice began long ago as a necessity, but over time, it had occurred so often that it came to be recognized as an "inherent power". Id. at 872, *citing,* Bronson v. State, 148 Fla. 188 (Fla. 1941)(where nothing in statutes limited or restrained courts authority to suspend imposition of sentence, court had inherent authority to do so); see also, State v. Bateh, 110 So.2d 7, 8 (Fla. 1959). However, the First District found no foundation for this "so-called inherent right", and questioned the authority to defer sentence, since it had never "been reconciled with the exclusive power of the executive department of our state government to grant pardons and the equally exclusive delegation of the power to enact laws to the Legislature." Id. at 872; State v. Bateh at 8. The First District concluded that the practice of deferring sentencing was "inconsistent with the doctrine which vests the law-making authority in the legislative branch", and that based on § 948.01(3), Fla. Stat., which strictly limits the circumstances in which imposition of a sentence can be deferred, any attempt by the court to defer "would constitute infringement upon the powers

[3] The holding and reasoning of Bateh was later adopted by this Court in State v. Bateh, 101 So.2d 7 (1959).

lawfully delegated to the executive branch of our government". Id. at 872, 873; *see also*, State v. Bateh, (adopting the reasoning of the First District in Bateh).

These cases support the position that although imposition of a sentence is a primary function of the judiciary, including matters inherent to the judicial process, the trial court has exceeded its authority when it imposes provisions that encroach upon the duties of the executive branch, including those powers delegated to the executive by the legislature regarding the execution of a sentence. (It also encroaches upon the powers granted to the legislative branch to establish the range of penalties.) See, United States, *supra* at 40 (the trial court exceeded its sentencing authority by imposing a sentence and then "remov[ing] the accused from the operation of the punishment provided by the statute").

In Mr. Pearson's case, the imposition of a 13 year sentence with a provision that it run coterminous to an existing 5 year term (i.e., that it expire when the 5 year terms expires), is not authorized by statute,[4] and encroaches upon the duties delegated to the DOC to calculate a release date based on the sentence imposed, and to give effect to section 944.275(4)(b)3 which mandates to DOC that every inmate sentenced for an offense committed after October 1, 1995 must serve at least 85% of the sentence imposed. Thus, the court has the authority to determine the length of sentence

[4] Section 921.16 only authorizes the court to impose sentences concurrent or consecutive.

imposed, but it cannot impose additional provisions which override the department's statutory authority to determine how much of that sentence will be physically served.

The Pearson Case and the Separation of Powers

Section 944.275 is directed to the Department of Corrections and grants to it the authority to structure sentences, award gaintime credit, apply jail credit, and calculate release dates. Through the enactment of section 944.275(4)(b)3, the Legislature delegated to the department the duty to ensure that inmates who commit offenses on or after October 1, 1995 physically serve at least 85% of the sentence imposed, and are not awarded gaintime in an amount that would reduced service to less than 85% of the sentence imposed.

The Second and Third District Courts of Appeal have considered section 944.275(4)(b)3 in the context of coterminous sentences and found that because the department "must apply" the 85% provision to post-October 1, 1995 sentences, it is a "legal impossibility" to structure a post-October 1, 1995 sentence coterminous to a pre-October 1, 1995 sentence because to do so would result in less than 85% service of the post-October 1, 1995 sentence. See, Turner v. Singletary, 689 So.2d 1107, 1110 (Fla. 2d DCA 1997); Nieves v. State, 24 Fla. L. Weekly D591 (Fla. 3d DCA 1999); *see also*, Boney v. State, 731 So.2d 150 (Fla. 4th DCA 1999); Podvin v. State, 2001 WL 8353 (Fla 3rd DCA, Jan. 3, 2001); Obaya v. State, 723 So.2d 924 (Fla. 3rd DCA 1999).

Turner discussed the application of section 944.275(4)(b)3 [the 85% statute] to post-October 1, 1995 sentences that had been imposed coterminous to pre-October 1, 1995 sentences and stated:

> It is obvious that the legislature's intent, as embodied in this statutory provision, is to stop the early release of prisoners because of the awarding of gain-time credits by requiring that such prisoners serve a minimum of eighty-five percent of sentences imposed for offenses committed on or after October 1, 1995. It is also clear that the Department of Corrections must apply this provision to the appellant's new sentences because they are based on offenses committed on October 9, 1995, but cannot apply it to his earlier sentence because the offense in that case was committed prior to October 1, 1995. (citation omitted).

Id. at 1108. Thus, consistent with the long line of cases holding that the sentencing court cannot interfere with duties delegated to DOC, the Turner court found that Turner could not escape the 85% requirement on his new coterminous sentences, and therefore, was entitled to withdraw his plea. Id. at 1111.[5]

Thus, in Pearson's case, the department structured his sentences in accordance with the directive in section 944.275 and ran the post-October 1, 1995 13 year term concurrent but not coterminous to the pre-October 1, 1995 5 year term. As pointed out in Turner, structuring the sentences coterminously would be a legal

[5] In a recent case where an inmate appealed the denial of her post-conviction motion to compel the Department to give effect to her coterminous provision, the Second District issued an opinion indicating that the appropriate relief was mandamus against the Department. Magni v. State, 25 Fla. L. Weekly D22409 (Fla. 2d DCA, Oct. 2000). On December 15, 2000, the Second DCA withdrew its opinion an substituted one that provided that the court was not ruling on the merits of appellant's claim. Magni v. State, 25 Fla. L. Weekly D2858 (Fla. 2d DCA, Dec. 15. 2000)

impossibility under the 85% statute. Id. at 1110. However, the department's purpose was not to correct an illegal sentence, but rather, to give effect to the sentencing order to the extent possible without violating statutory provisions the DOC has been charged with administering.

Mr. Pearson challenged the Department's actions in circuit court through a petition for writ of mandamus seeking to compel the department to give effect to the coterminous provision. The circuit court denied his petition for writ of mandamus, but on review, the First District Court of Appeal granted his petition for writ of certiorari. Pearson v. State, 767 So.2d 1235 (Fla. 1st DCA 2000). Pearson holds that the department must give effect to a coterminous provision, 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. The court reasoned that the department's execution of Mr. Pearson's sentence without the coterminous provision violated separation of powers because "sentencing is an exclusively judicial function". Id. at 1238. The Pearson decision was premised on the perception that by not giving effect to the coterminous provision, the department was impermissibly attempting to correct an illegal sentence. The court further stated that only limited power exists to alter a sentence to the defendant's detriment, and that power belongs solely to the state attorney. Id.

The department contends that 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 department is not attempting to correct an illegal sentence, but rather is fulfilling its statutory obligations under section 944.275 with regard to the execution of the sentence.

In the context of sentencing, authority has been allocated as follows:

> [T]he Legislature has the sole authority to determine what acts are criminal acts and what the penalties for crimes are to be. The Legislative authority in the penalties area allows for the setting of maximum and minimums, both of confinement and probation, the limits and guidelines for parole, and the particular means and methods of execution of sentences. The courts have had the sole province over the particular sentence to be given an individual, but only within the statutory authority given in the various sentencing statutes, and the executive has the duty to see that the sentences are enforced. The executive performs its function through the governor and cabinet . . . and finally, the Department of Corrections in its particular field, also statutorily limited. (*emphasis supplied*)

Moore v. State, 392 So.2d 277 (Fla. 5th DCA 1980). *See, e.g.*, Johnson v. State, 336 So.2d 93 (Fla. 1976). Thus, the Department of Corrections executes the sentence and any other substantive statutory provision enacted by the Legislature that works in conjunction with the execution of a sentence. In Pearson's case, the department has not encroached on the sentencing powers of the court. The department has only given effect to legislative directive in the execution of that sentence.

It is the function of the court to determine the length of a

sentence, but it is the function of the department to calculate the expiration date. Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997) (the Department of Corrections has been given the duty of calculating a release date, "taking into consideration gaintime and other factors"). As stated by this Court in Brooke v. State, 128 So. 814, 99 Fla. 1275 (Fla. 1930):

> The court fixes the penalty and the law fixes the beginning and expiration, unless more than one imprisonment sentence is passed upon the same defendant, in which case the trial court may provide that the period of imprisonment may run concurrently or consecutively. Wallace v. State, 41 Fla. 547, 26 So.2d 713.
>
> * * *
>
> 'The law does not contemplate that the court, in fixing the punishment, shall also fix the beginning and end of the period during which the imprisonment shall be suffered'. *Citing*, State v. Horne, 52 Fla. 125, 135, 42 So. 388, 389 (Fla. 1906)

Id. at 1279-80. *See also,* Lake v. McClelland, 134 So. 522, 523-24, 101 Fla. 536 (Fla. 1931)("[i]t may be considered settled in this state that, where one convicted of a criminal offense is adjudged guilty of such offense and is sentenced to serve a definite period of time being within the limit of the time prescribed by statute as punishment for such offense, neither the time for beginning of the sentence nor the time at which it may be concluded need be stated in the judgement or sentence and if stated, it will be construed as surplusage" except as to the determination of concurrent or consecutive (*emphasis supplied*)).

When a court imposes a coterminous provision, it encroaches upon the department's authority to execute the sentence, and in

particular, to calculate the expiration date. Section 944.275(2)(a) states that DOC shall calculate a maximum release date "which shall be the date when the sentence or the combined sentences imposed on a prisoner will expire. In establishing this date, the department "shall reduce the time to be served by any time lawfully credited." Id. Section 944.275(3)(a) states that the department shall also calculate a tentative release date "which shall be the date projected for the prisoner's release from custody by virtue of gaintime granted or forfeited as described in this section." Section 944.275(4)(a),(b) specifies the rate at which the inmate will earn gaintime, depending on the date of offense. (Other statutes may curtail or eliminate gaintime due to the nature of the offense.) Through the calculation of a maximum and tentative release date, and the award and forfeiture of gaintime, the department determines the date a sentence expires (or, if supervision is to follow, when to release the inmate to supervision). However, if a coterminous provision is imposed, the sentence is no longer subject to the provisions of section 944.275, and instead, its expiration synchronizes with expiration of another sentence. Thus, by imposing a coterminous sentence, the court has not only imposed a sentence, but has also determined when that sentence will expire, despite what the provisions of section 944.275 indicate the expiration date should be. Clearly a sentencing court would not have authority to impose a sentence of "13 years to be expired after serving 5", yet that is exactly what a coterminous sentence does. Thus, the sentencing court has

encroached upon the authority of the executive granted through the legislature to calculate a release date under section 944.275. *Cf*. McRae v. State, 408 So.2d 775 (Fla. 2d DCA (1982))(trial judge's recommendation in sentencing order that defendant never be considered for parole was stricken because parole is within the sole discretion of the Parole and Probation Commission).

A coterminous provision also interferes with the department's obligations under the 85% statute (section 944.275(4)(b)3)). The reasoning in Turner and Nieves are in accord, as these cases view Pearson's sentence as a 13 year sentence imposed coterminous to a shorter sentence, which in light of the 85% statute, is not possible to carry out. The Turner court interpreted section 944.275(4)(b)3 and found that coterminous structuring conflicts with this statute.[6] Turner concluded that "it is clear that the Department of Corrections must apply [the 85% provision]" to the exclusion of the coterminous provision. Id. at 1109; *see also*, Nieves;

Pearson, on the other hand, does not find a conflict between a coterminous provision and the 85% statute. It states that in order to decide the case, "we need not--and therefore, do not--reach the question of statutory interpretation [of section 944.275(4)(b)3] on which DOC volunteered its views" because section 944.275(4)(b)3 is nothing more than a "limitation on the

[6] The court stated: "[w]e begin our resolution of this case with an examination of section 944.275(4)(b)3 which is the critical underpinning of the appellant's claim for relief". Id. at 1109.

department's authority to grant gaintime". Id. at n.2; 1237.

The department contends that, contrary to Pearson, section 944.275(4)(b)3 is relevant to this case because a coterminous provision allows Pearson to serve less than 85% of his 13 year sentence through the application of gaintime, since a coterminous provision essentially results in the application of court ordered gaintime. That is, the unserved balance of a longer coterminous sentence expires by virtue of court ordered credit (regardless of whether the sentencing court calls it credit). It does this in two ways. First, when the sentencing court ordered the 13 year sentence to run coterminous to the 5 year term, it synchronized expiration of the 13 year term with expiration of the 5 year term, thereby giving the 13 year term benefit of gaintime earned on the 5 year term. That is, the more gaintime Pearson earns on the 5 year term, the sooner he will be released from the 13 year term. This gaintime benefit causes Pearson to be released from the 13 year sentence well before serving 85%, and, pursuant to section 944.275(4)(b)3, the department is prohibited from allowing this to occur.

Second, the 8 year gap between the 13 year sentence and the 5 year sentence is essentially comprised of court ordered credit used to expire the sentence. That is, the sentencing court has allowed for an award of credit to the 13 year sentence in an amount that would cause it to expire when the 5 year sentence expires. The department must view the time not served on the 13 year sentence as gaintime in order to reconcile service of less than 5 years on a 13

year sentence, and in order to provide for the effectuation of other statutory provisions.

For example, section 947.1405 provides that certain serious offenders must serve a term of conditional release supervision upon release from prison. The term of supervision is based on the inmate's maximum release date for the term imposed (which means he serves a term of supervision equal to the amount of gaintime he earned on the sentence). (§ 947.1405(6)) If a coterminous provision is an award of credit for the time not served (as the department contends), Pearson's term of supervision would be based on the maximum release date for the 13 year term. If supervision is later revoked, gaintime applied on the 13 year term would be forfeited under section 944.28(1). The amount of gaintime would be the amount of time not served on the 13 year sentence due to his early release upon expiration of the shorter 5 year term.

If the coterminous provision is not viewed as an award of credit for time the inmate does not serve on the 13 year sentence, (as Pearson contends), serious offenders will completely avoid conditional release. To illustrate, under Pearson, Pearson's 13 year term expires upon completion of the shorter 5 year term. Pearson views the 13 year coterminous sentence as a sentence imposed for a length of time equal to the balance of the 5 year term (at least for DOC purposes). Pearson states that the 13 year term is only a "nominal" sentence, and not the true, or "effective" sentence. The true sentence, according to Pearson, is determined upon expiration of the 5 year term. At that time, it

will be known how much time was served on the nominal 13 year sentence, and that amount of time will be deemed the true sentence the court imposed. Id. at n.1, 1237 Under this view, Pearson serves 100% of that "true" sentence and therefore, has physically served up to his maximum release date of that term. Consequently, there is no term of supervision to be served.[7]

Therefore, if the most serious offenders are to have a term of post-release supervision as directed by section 947.1405, then the term of supervision must be calculated based on the actual (so-called "nominal") term imposed (13 years). In Pearson's case, this creates an 8 year gap which can only be comprised of credit, (i.e., gaintime, or time the inmate did not have to physically serve).[8]

---

[7] To further explain, Pearson states that a coterminous provision means that the sentence terminates when the shorter sentence terminates and that coterminous has nothing to do with gaintime or the department's duty to not apply gaintime in an amount that would result in less than 85% service. Id. at n. 2. Accordingly, under Pearson, Pearson's "nominal" 13 year term does not end by virtue of the application of any gaintime, but rather is served out by 100% physical time served, concurrent with time on the 5 year sentence. Id. at n.1.

It should be noted that Pearson provides conflicting interpretations as to what a court intends by imposing a coterminous sentence. It states that by imposing a 13 year term in case no. 96-20 coterminous to a 5 year term, the court effectively imposed a 5 year term in case no. 96-20. Id. at 1237(by refusing to effectuate the coterminous provision, "DOC has transformed what was effectively a 5 year term [the 13 year term] into a term of incarceration more than twice as long"). This statement could be interpreted to mean that DOC should treat the 13 year sentence as a 5 year sentence and calculate a release date as if it were a 5 year term, as opposed to synchronizing the 13 year term with the 5 year term.

[8] It will actually be more than an 8 year gap because Pearson had already served some time on the 5 year sentence when the 13 year sentence was imposed, and the 5 year sentence continued to

Such credit would then be subject to forfeiture upon revocation of conditional release.

To further illustrate why the coterminous provision must amount to an award of court ordered gaintime, consider that Pearson has probation to follow his 13 year term. Unless the time not served on the 13 year sentence is gaintime, the fiction created by the coterminous provision provides no direction as to what constitutes the prison credit he is to be awarded if probation is revoked, and what portion of that, if any, must be forfeited as gaintime. The intent of the forfeiture statute is to create an incentive for offenders to comply with the terms of their supervision, or else they will suffer the penalty of losing credit for time they did not have to serve on their original term. Eldridge v. Moore, 760 So.2d 888, 891 (Fla. 2000) (gaintime encourages good behavior both in prison and while on supervision). Having received the benefit of a very early release, Pearson's incentive to comply with his probationary term should include the threat of the gaintime forfeiture if he were returned to prison, as it does all for all other offenders.[9]

---

be reduced by awards of gaintime. Thus, under Pearson, he would serve less than 5 years on the 13 year sentence.

[9] Moreover, when a court imposes a new term upon revocation of probation, it must consider the length of the original term, which according to sentencing documents would be 13 years. However, because the original term was coterminous to a shorter term, it may be open to interpretation as to what that original sentence was for purposes of bumping up for the new sentence. This issue is not a function of DOC, but it bears mentioning since it has been the experience of the department in receiving sentencing orders that courts do not interpret such sentences

Thus, the department disagrees with Pearson's conclusion that a coterminous provision has nothing to do with gaintime and the 85% statute. A coterminous provision causes an award of gaintime in the amount of days that the inmate does not have to serve on the sentence imposed. Accordingly, a coterminous provision interferes with the Department's statutory obligation to ensure that no inmate who offended after October 1, 1995 is awarded gaintime in an amount that would cause his sentence to expire prior to service of at least 85% of the term imposed.[10]

It is a well established rule that specific statutory authority governs over general authority. Fla. Dept. Of Health and Rehabilitative Services v. Gross, 421 So.2d 44,45 (Fla. 3rd DCA 1982)(statute specifically dealing with treatment for offenders governs over "general discretionary powers afforded trial judges") There is no specific statutory authority for the imposition of a coterminous sentence. Rozmestor v. State, 381 So.2d 324, 326 (Fla. 5th DCA 1980)(in holding that a sentencing court can impose a concurrent or consecutive sentence, but not a hybrid of both, court stated that "unless there is specific statutory authority to impose a sentence, it cannot stand"). There is also no specific authority directing DOC to expire a sentence at the direction of the court

---

uniformly.

[10] Depending on the length of two sentences imposed, a coterminous provision will not always interfere with the 85% requirement. But it does in this case.

rather than in accordance with section 944.275.[11] Further, there is nothing in the law which directs the manner in which a coterminous sentence is to be construed when it conflicts with other statutory directives. The law is clear, however, that gaintime is an award of credit for time the inmate does not have to serve on a sentence (gaintime is a "sentence deduction" (§ 944.275); Eldridge at 891 ("gain time is time not served")). There is also specific authority for DOC to calculate a release date based on the term imposed. (§ 944.275(2)(a); (3)(a), Fla. Stat.) There is further specific statutory authority prohibiting the department from applying gaintime to the term imposed in an amount that would cause it to expire prior to 85% service. (§ 944.275(4)(b)3, Fla. Stat.) Given the specific governing authorities, a coterminous provision must be construed as an award of court ordered gaintime credit (time not served) which the department cannot apply if it interferes with the provisions of section 944.275 the department has been charged with administering.

Although Pearson does not suggest that there is statutory authority for the imposition of a coterminous sentence, it should be noted that section 921.16(3) mentions "coterminous" in the context of directing DOC detainers. However, it confers no sentencing authority; section 921.16 only grants sentencing courts

[11] A co-terminous sentence in no way resembles a suspended sentence as Pearson suggested in the circuit court. The sentencing court did not put Pearson on probation for the 8 year balance, or retain any jurisdiction over him once the 5 year term expires, as would be the case if the sentence were suspended.

the authority to impose a concurrent sentence or consecutive sentence. Section 921.16(3) was added in 1995 and was directed to the DOC. It provides that *"in the event"* a court orders a sentence to run coterminous and concurrent with a sentence in another jurisdiction, the department will place a detainer with the other jurisdiction. It also indicates that the detainer should not interfere with the inmate's program participation, parole, etc. while in the other jurisdiction's custody. This subsection did not confer authority to impose coterminous sentences, but because it had been the longstanding practice for sentencing courts to impose them anyway, the department requested direction as to the execution of such sentences as it pertained to the detainer and the effect the detainer would have on the inmate's program and parole eligibilities while in the other jurisdiction. Nor is section 921.16(3) a recognition of an inherent power to impose sentences coterminous. Bateh v. State, 101 So.2d 869 (Fla. 1st DCA 1958), *opinion approved in,* State v. Bateh, 110 So.2d 7 (Fla. 1959)("[l]egislative recognition of a judicial practice does not serve to establish such practice as being within the court's inherent powers.")

Given the substantial conflict a coterminous provision creates with statutes relating to sentences, (including, statutory maximums and minimums, section 944.275, conditional release, gaintime forfeiture statutes and firearm mandatories), plus the uncertainty, (the shorter sentence may be modified, vacated, etc.), the imposition of a coterminous provision would certainly require clear

statutory authority, and no such authority exists. Moreover, it would seem incongruous that the Legislature would mandate that all inmates serve at least 85% of the sentence imposed, but at the same time, allow sentences to expire simultaneously with a much shorter sentence. Compare, for example, that the sentencing court's authority to vacate a release order of the Parole Commission was conferred through specific legislation. Section 947.16(4), Florida Statutes (2000). Although the Parole Commission, as a branch of the executive, has been granted authority to set parole dates, specific statutory authority exists for the judiciary to override that authority in limited situations. See, Borden v. State, 402 So.2d 1176 (Fla. 1981) No such authority exists in this case.[12]

In sum, a coterminous provision encroaches upon DOC's statutory obligations in two ways. One, it interferes with the department's duty to calculate a release date under section 944.275. And two, a coterminous provision results in the application of gaintime in an amount that reduces the sentence below 85% service in violation of section 944.275(4)(b)3. It does this in two ways; one, service of the 13 year 85% sentence is reduced by virtue of gaintime earned on the 5 year sentence; and two, because the time not served on the 13 year sentence by virtue

[12] Although a few court opinions have acknowledged the existence of coterminous sentences, no Florida case was found which addressed the issue of whether there is authority to impose it. Only one appellate court attempted to defined coterminous. Madden v. State, 535 So.2d 636 n.1 (Fla. 5th DCA 1988) ("'coterminous'" is used by the parties to refer to the termination of the state sentences at the same time as the federal sentences).

of the coterminous provision is comprised of gaintime credit.[13]

Pearson holds to the contrary and states that by not giving effect to the coterminous provision, DOC has encroached upon the authority of the sentencing court. Pearson accuses the department of "assert[ing] authority to review the legality of sentences and alter[ing] them as it deems fit", (Id. at 1237), and poses Pearson's issue as "rais[ing] the question whether DOC has the authority to declare a sentence illegal". Id. at n.2. The sweeping language of Pearson also appears to instruct that under the principle of separation of powers, the department must "execute a sentencing order exactly as imposed by the sentencing court", and states that "DOC cannot undo a bargain the state attorney's office has struck". Id. at 1237, 1238.

First, contrary to the court's opinion, the department does not endeavor to correct illegal sentences, nor has the department "asserted authority to review the legality of sentences imposed by the courts and alter them as it deems fit." Id. at 1237. Pearson does not make the critical distinction between illegal sentences in general and sentences that impose provisions that violate statutes the DOC is charged with administering. If, for example, a sentence

[13] It should be noted that the department used to give effect to coterminous sentencing provisions rather than calculate a release date in accordance with section 944.275. However, with the enactment of the 85% statute, the direction from the legislature was so clear and specific that the department's application of a coterminous provision can no longer be countenanced. Not only does a coterminous provision interfere with the calculation of the release date in general, but also with the clear directive of the 85% provision.

is imposed in excess of the statutory maximum, it is not for DOC to challenge, and the sentence will be executed as ordered. If however, a sentence is imposed with a provision that DOC will not cut the defendant's hair, or will house him in a facility near his home, or will apply gaintime at a specified rate not authorized by section 944.275, or will release him on a certain date, the sentencing court has usurped the department's authority to maintain custody and care of inmates and to calculate sentences in accordance with § 944.275. In these instances, it is within the department's authority to not give effect to the objectionable portion of the order, even if it was a term of the plea to which all sides agreed at sentencing. State attorneys cannot bargain away powers that have been granted to the DOC.

Numerous cases in a variety of contexts agree, and hold that DOC cannot execute the sentence exactly as imposed with respect to provisions that violate duties the DOC has been charged with executing. See, Shupe v. State, 516 So.2d 73 (Fla. 5th DCA 1987)(striking portion of sentence ordering that no gaintime shall apply to sentence until restitution is paid, court held that "[i]t is well settled that a trial court is without authority to prevent gain time and that the award of gain time is solely within the province of the Department of Corrections"); Hall v. State, 493 So.2d 93 (Fla. 2d DCA 1986)(a sentencing court order directing matters within the exclusive purview of the department, such as the application of gaintime, are essentially "surplusage", or without effect); Singletary v. Coronado, 673 So.2d 924 (Fla. 2d DCA

1996)(trial court erred by ordering an award of gaintime the authority to award gaintime is within the exclusive authority of DOC); Prangler v. State, 470 So.2d 105 (Fla. 2d DCA 1985)(holding that ("any waiver of gaintime was ineffective and the portion of the trial court order referring to gaintime was surplusage"); George v. State, 651 So.2d 180 (Fla. 1st DCA 1995)(reversing order of trial court which prohibited award of early release credit because the county commissioners, not the court has authority to grant commutation of time for good conduct of county prisoners); Schlosser v. Singletary, 597 So.2d 304 (Fla. 2d DCA 1991)(in mandamus action against DOC, court held that where state statute grants the DOC authority to decide which jurisdiction inmate will serve sentence, portion of sentencing court's order directing a state sentence run concurrent with federal sentence need not be given effect); Doyle v. State, 615 So.2d 278 (Fla. 3d DCA 1993); Colon-Morales v. State, 743 So.2d 101 (Fla. 1st DCA 1999); Riley v. State, 743 So.2d 148 (Fla. 1st DCA 1999)(where defendant was promised boot camp sentence, but was statutorily ineligible for boot camp, it was not possible to carry out the sentence as bargained for); Glenn v. State, 2001 WL 38008 (Fla. 4th DCA 2001)(trial court cannot order DOC to allow defendant to serve his state sentence in federal custody, and if that was part of the plea, the remedy is to fashion a new sentence which effectuates the plea or withdraw the plea); Singletary v. Evans, 676 So.2d 51, 52 (Fla. 5th DCA 1996); (trial judge's attempt to compel DOC to not cancel provisional credits and gain time was a usurpation of DOC's

executive authority as DOC had a statutory and administrative duty to cancel credits); Davis v. Singletary, 659 So.2d 1126, 1127 (Fla. 2d DCA 1995)(finding that the trial court was without authority to direct DOC as to how the credits were to be applied and/or cancelled). Moore v. Lowery,758 So.2d 737 (Fla. 3rd DCA 2000)(trial court was without authority to require the DOC to refrain from cutting inmate's hair even though it was a term of the plea agreement); Causey v. State, 504 So.2d 34 (Fla. 1st DCA 1987); Corley v. State, 586 So.2d 432 (Fla. 1st DCA 1991). These cases hold that certain sentencing provisions imposed by the court, and agreed to by the state attorney, could not be executed as ordered because they interfered with DOC functions.

Contrary to all of these cases, Pearson states that DOC has no authority to object to a sentencing provision which the state attorney has elected not to appeal. Pearson states:

> The state's limited statutory authority to appeal sentences is exercised by the office that prosecutes the convict who is sentenced. DOC cannot rescind the state attorney's office's decision not to appeal by stating at this juncture objections to a sentence which was not appealed during the time allowed. DOC is not authorized to appeal the imposition of a sentence.

Id. at 1238.

This finding in Pearson is also contrary to another First District case which acknowledges DOC's right to object to a sentencing provision, even though DOC is not a part of the criminal prosecution. In Dept. Of Juvenile Justice v. J.R., a child, 710 So.2d 211 (Fla. 1st DCA 1989), the DJJ appealed an order adjudicating a juvenile as a delinquent and committing him to a

specific treatment program. DJJ argued that the court had exceeded its statutory powers of disposition by specifying where the juvenile was to be placed. The juvenile moved to strike the appeal, claiming that only the state attorney could file an appeal. The court denied the motion and held that although DJJ was not the prosecuting authority, it had a right to appeal the portion of the order directing DJJ as to the specific place of treatment, based on DJJ's specific statutory authority to select the appropriate placement. The court's decision relied, in part, upon DOC cases where a sentencing court had included a provision directing the placement of an adult defendant in violation of DOC's statutory authority, and in violation of the separation of powers. The court stated:

> In fact, the Florida Department of Corrections (DOC) has been allowed to appear in district courts to challenge similar orders which attempt to direct placement of adult defendant's in specific facilities. Clearly DOC is not a party to a state prosecution. When a trial court attempts to specify placement for an adult defendant, such orders have been reviewed when DOC challenged the judge's authority as an infringement on DOC's executive right to determine the placement of inmates. See, Singletary v. Acosta, 659 So.2d 449 (Fla. 3d DCA 1995). In Acosta, the Third DCA held that a trial court wholly lacks authority to regulate the placement of a sentenced defendant in the prison system, citing Article II, Section 3, Florida Constitution (1968) [*case citations omitted*].

J.R., a child at 213. Although the Pearson case proceeded as a mandamus action against DOC as opposed to an appeal by DOC, the relevant point is that Pearson's finding that DOC has no authority to challenge a provision in a sentencing order because the state

attorney agreed to it, and decided not to appeal, is not supported by existing case law.

This Court has recognized that the sentence imposed upon an defendant is independently subject to, and may be greatly altered by, actions of the DOC through the application of statutes directing DOC functions. See, Forbes v. Singletary, 684 So.2d 173,174 (Fla. 1996); State v. Green, 547 So.2d 925 (Fla. 1989); Eldridge v. Moore, 760 So.2d 888 (Fla. 2000) In such instances, the DOC has not tried to correct an illegal sentence or usurp judicial authority, but rather has given the sentencing order effect to the extent it can while still meeting its obligations regarding sentence structure, release date calculations and execution of the sentence in general. For instance, a court may award credit for a full prior term following revocation of probation, with the intention that the inmate receive benefit of his previously earned gaintime. However, if the original offense was committed on or after October 1, 1989, the department will forfeit the gaintime pursuant to its independent authority under section 944.28(1). In such case, the department has not taken the stance that its function is to correct illegal sentences, but rather, has properly exercised its statutory authority pursuant to the legislature's intent that an inmate who violates his probation will not have the benefit of previously earned gaintime. Forbes v. Singletary, 684 So.2d 173, 174-5 (Fla. 1976).

In State v. Green, 547 So.2d 925 (Fla. 1989), this Court recognized that certain functions regarding the execution of a

sentence are within the exclusive authority of department. It quoted the district court's statement that

> 'the awarding of statutory gain time is solely a function of the [department], and the trial court is without authority to prevent such award or order its waiver'. (Green at 926, 927, citing, Green at 539 So.2d at 485). The statute places in the hands of the department the ability to award, forfeit and restore gain time.

Id. at 926-927.

Most recently, in Eldridge, the Court instructed district court's that when presented with a case where an inmate's final release date appears to "countermand the will of the sentencing court" due to the department's forfeiture of gaintime upon revocation of probation, the appellate court should not try to "go beneath" the sentencing court's order and the gain time statutes in an attempt to fix things, so that the final release date will comport with what was the apparent intent of the sentencing court. Id. at 892. The Court stated:

> The courts should assume that the trial court knew and understood the statute affecting the inmate's final release date and apply the statutes as they are without trying to determine whether the final effect was what the trial court had in mind.

Id. Eldridge recognized that DOC, as part of the executive branch, must fulfill legislative mandates directed to it, and that such action by DOC does not encroach upon the powers of the sentencing court, even if it results in a release date beyond what the trial court appeared to anticipate when it imposed the sentence. Id. At 892. See also, Singletary v. Evans, 676 So.2d 51 (Fla. 5th DCA

1996). In Evans, the sentencing court intended for the inmate to serve a certain number of years in prison following revocation of probation, and sought to compel the department to not cancel overcrowding credits or forfeit gaintime in order to accomplish that end. The Fifth District Court of Appeal granted the department's petition for writ of prohibition and held as follows:

> [The trial judge's] attempt to compel DOC not to cancel [the inmate's] provisional credits and gain time was a usurpation of DOC's executive authority. DOC had a statutory and administrative duty to cancel provisional credits and forfeit gain time when [the inmate] was returned to prison.

Id. at 52. See also, Davis v. Singletary, 659 So.2d 1126, 1127 (Fla. 2d DCA 1995)(court found that the trial court was without authority to direct DOC as to how the credits were to be applied and/or cancelled). Thus, the sentencing court cannot directly or indirectly require the department to expire a sentence through what is essentially an award of court ordered gaintime, such that the Department's statutory obligations to calculate a release date and impose the 85% requirement are circumvented.

Pearson notes that because the department agrees it has no grounds to object to the imposition of a 5 year term (or less) in case no. 96-20, it therefore has no grounds to object to the sentencing court ordering the expiration of the 13 year term in 5 years (or less). Id. at n.1. The Pearson court views Pearson's sentence as a "truth in labeling" situation, and an ambiguity which must be resolved in Pearson's favor. Id.

Clearly the discretion with regard to the length of a sentence

lies with the judiciary. The department does not challenge a coterminous sentence on grounds that it is an illegal sentence, but rather, that it interferes with the execution of DOC's delegated duties under section 944.275, as described above. If a 5 year term were imposed in Pearson's case, the department would be able to calculate a release date, and an 85% date in accordance with the directive in section 944.275, and there would be no grounds for DOC to object, even if 5 years were illegal under the sentencing statutes. The 13 year sentence is not a meaningless fiction as Pearson contends when it states that DOC must executive the "effective" sentence and not the 13 year sentence. The 13 year sentence was presumably imposed under the statutes directed to the court with regard to sentencing guidelines and statutory maximums and minimums. There is no authority under which the sentence loses that meaning and takes on a different meaning for the DOC. That is, the sentence cannot be a 13 year sentence for some purposes, but for other purposes, be an indefinite sentence to be determined at the time another sentence ends.

Moreover, the department does not view Pearson's sentencing order as ambiguous. The department views the order as it viewed all the orders received in the cases listed at page 28 where the court imposed a sentence (a term of years or life), and then attached a provision, (often part of the plea), which could not be carried out by DOC due to its independent legislative directives. The department executes the sentence imposed, absent the objectionable provision, even if that provision has a substantial

effect on the amount of time the inmate will ultimately spend in prison. In these instances, there is recourse depending on the situation. The DOC may file a petition for writ of certiorari, (assuming the order is received within time limit), or the inmate can challenge the DOC's actions through a mandamus petition, or move to withdraw his plea in order to have a sentence fashioned which will better fulfill the intent of the court and/or the plea.

Pearson also relies on a statement made in a footnote in Hudson v. State, 682 So.2d. 657 (Fla. 3rd DCA 1996) that the court "[knew] of no authority for the Department of Corrections to add conditions to a sentence" and that sentencing provisions are a function of the court. Id. This quoted statement was made in a completely different context than the present case. At the time the Hudson opinion was issued, there was a split in the districts as to whether or not a mandatory term was automatic under section 775.084 when a defendant was sentenced as a habitual violent felony offender.[14] If it was automatic, then DOC did not improperly incorporate a mandatory term in the sentence of offenders sentenced as habitual violent felony offenders. However, the Third District held that a mandatory term was discretionary with the trial court, and since the trial court elected not to impose the mandatory on Hudson, DOC's incorporation of a mandatory term was viewed as "adding a condition". In contrast, to the situation in Hudson, the 85% law is not a matter of discretion for the sentencing court. It

[14] The conflict was later resolved by this Court in State v. Hudson, 698 So.2d 831 (Fla. 1997).

is a legislative mandate that inmates physically serve a minimum of 85% of any sentence imposed for an offense committed on or after October 1, 1995. Thus, all such sentences are automatically subject to the 85% requirement and the department is not "adding conditions".

To conclude, Pearson conflicts with statutory provisions regarding the execution of sentences. It creates conflict with the conditional release statute, and creates uncertainty when the probationary portion of a split sentence is revoked. Other problems include conflicts with sentencing provisions such a firearm mandatory.[15] Pearson also creates sentencing results that perhaps the trial court did not even intend. For example, the department recently received a sentencing order where a defendant subject to the 85% statute was sentenced to **life** for first degree murder, **coterminous** to a New Jersey sentence from which the inmate had already been paroled. According to Pearson, this murderer should be released immediately. His attorney has even written the department arguing that Pearson requires that he must be released. (Appendix at p. A54) Other examples include sentencing orders received by DOC which imposed two sentences coterminous to each other, which means that sentence A's expiration is controlled by sentence B, but sentence B's expiration is controlled by sentence

[15] If, for instance, a sentence was imposed with a three year firearm mandatory, concurrent and coterminous to a two year term, the sentence could not be executed as ordered because section 775.087(2)(a) specifically directs that a firearm mandatory term cannot be reduced by gaintime awards.

A.

The Second District has warned against these types of sentencing consequences in a quote from this Court:

> It is of great importance to the prisoner that the sentence should be definite and certain, so as to advise him and the officer charged with its execution of the time of its commencement and termination, without being required to inspect records of another court or the record of another case. Wallace v. State, 41 Fla. 547 (Fla. 1899)

Bush v. State, 319 So.2d 126 (Fla. 2d DCA 1975)(trial court impermissibly attempted to impose a sentence where the length of the term was contingent upon whether a separate sentence was set aside on appeal); *see, also*, Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975)("[i]t is our opinion that the formula for computation of a prisoner' sentence should be the same for all prisoners").

CONCLUSION

The intent of the 85% statute was to halt the early release of prisoners and establish some consistency between the length of sentence imposed and the amount of time served so that inmates no longer serve a minor fraction of a lengthy sentence. Unlike most other sentence enhancement-type statutes, the 85% statute is not invoked at the discretion of the prosecutor or the court, nor is it reserved for only certain offenders. It is a rule applicable to all sentences for crimes committed after October 1, 1995. The statute was placed under the authority of the branch of government charged with calculating sentence release dates (DOC), as the

appropriate place for the intent of the Legislature to be given effect.

Numerous cases have held that the sentencing court cannot impose sentences with provisions that encroach upon DOC's authority, even if the provision was part of the plea agreement. These cases recognize that DOC is not usurping the authority of the judiciary and attempting to correct an illegal sentence as Pearson indicates, but rather, that DOC can and must apply the law pursuant to statutes directed to DOC.

Accordingly, this Court should quash the decision of the First District in Pearson and follow the reasoning of the Second and Third Districts in Turner and Nieves, as well as the cases cited herein regarding the separation of powers, and conclude that certain sentencing provisions, including coterminous provisions, encroach upon the duties delegated to the department by the Legislature, and therefore, cannot be given effect.

Respectfully submitted,

SHERON L. WELLS
ASSISTANT GENERAL COUNSEL
Florida Bar No. 0068410
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500
(850) 488-2326

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** has been furnished by U.S. Mail to Baya Harrison, III, P.O. Box 1219, Monticello, Florida 32345-1209, on this 22nd day of January, 2001.

SHERON WELLS

IN THE SUPREME COURT OF FLORIDA

MICHAEL W. MOORE, Secretary,
Department of Corrections,

Petitioner,

v. **Case No.SC 00-2166**

STEVEN PEARSON,

Appellee.
_____/

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

SHERON L. WELLS
ASSISTANT GENERAL COUNSEL
Florida Bar No. 0068410
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500
(850) 488-2326

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S APPENDIX TO BRIEF ON THE MERITS** has been furnished by U.S. Mail to Baya Harrison, III, P.O. Box 1219, Monticello, Florida 32345-1209, on this 22nd day of January, 2001.

SHERON WELLS