IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 00-2166

**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/APPELLANT ON JURISDICTION

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STATEMENT CERTIFYING TYPE SIZE AND STYLE

Appellee's Brief on jurisdiction is certified as being typed in 12 point Courier New, a font that is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Respondent Pearson is an inmate in the custody of the Department of Corrections. On March 29, 1996, Pearson was sentenced in Case No. 95-164 to five (5) years for an offense committed on July 14, 1995. The sentence was run concurrent to other active sentences-l On November 6, 1996, Pearson was sentenced in Case No. 96-20 on 26 counts. Of relevance here, he was sentenced to terms of 13 years on several counts, all counts concurrent with one another and with all other active cases. All offenses in Case No. 96-20 were committed after October 1, 1995, and are therefore subject to the 85% service requirement in § 944.275(4)(b)3, Fla. Stat. (1999).

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. Since running Case No. 96-20 co-terminous with the other active sentences would require the department to grant the benefit of court ordered gaintime to Case No. 96-20 in an amount that would reduce it below 85% service, or require release before service of less than 85% of the sentence by time physically incarcerated, the department could not structure Case No. 96-20 coterminous to the other active sentences. (See, §944.275(4)(b)3). Thus, Pearson's

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[1] Pearson has other sentences not relevant to this action.

tentative release date was established based on the 13 year term in Case No. 96-20.

On November 12, 1998, Pearson served a Petition for Writ of Mandamus in the Second Judicial Circuit seeking to compel the Department of Corrections to structure his sentences co-terminously. The court issued an order to show cause, and on April 19, 1999, the department filed a response to the Petition indicating that could not structure Pearson's 85% 13-year sentence coterminously with his pre-85% 5 year sentence since to do so would allow the 13 year sentence to expire prior to service of the 85% minimum required by section 944.275(4)(b)3. On June 17, 1999, the circuit court denied Pearson's petition. Pearson filed a petition for writ of certiorari in the First District Court of Appeal seeking review of the circuit court's order. The department filed a response, and oral argument was held on June 28, 2000.

On August 14, 2000, the district court granted the petition for certiorari with an opinion. The department filed a motion for rehearing, which was denied on September 25, 2000. The department also filed a motion for stay of the mandate which was denied on October 10, 2000. Subsequently, the department filed a timely notice to invoke the jurisdiction of this Court and a motion for stay of the opinion pending review. The motion for stay is currently pending in this Court.

SUMMARY OF THE ARGUMENT

Pearson raises important separation of powers issues which should be resolved by this Court. Pearson holds that the department must "execute a sentence exactly as imposed" (Id. at 1[2]), meaning for Pearson, that his 13 year sentence must be structured coterminously even though he avoids serving the 85% minimum under section 944.275(4)(b)3. The court reasoned that sentencing is within the realm of the judiciary and the department cannot alter sentences, even if they are illegal, due to the separation of powers principle.

Pearson has construed the separation--of powers doctrine without regard to that fact that the Legislature has delegated to the executive (DOC) exclusive authority over certain aspects of the execution of sentences which cannot be encroached upon by the judiciary, even if part of a plea.

The Court should also accept jurisdiction because Pearson is in direct conflict with opinions from the Second and Third Districts which recognize that coterminous structuring conflicts with the 85% statute in certain instances, and that as a result, it is a legal impossibility to give effect to the coterminous provision. Turner v. State, 689 So.2D 1107 (Fla. 2d DCA 1997); Nieves v. State, 24 Fla. L. Weekly D591 (Fla. 3d DCA, Feb. 24, 1999) Since the department processes sentencing orders issued throughout the state, the department respectfully

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[2] Citations are to the Westlaw cite at 2000 WL 1140023 (Appendix A)

requests that this Court accept jurisdiction in order to resolve this conflict and promote the uniform and orderly administration of justice.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY CONSTRUES THE SEPARATION OF POWERS DOCTRINE IN ART, II, § 3, FLA. CONST.

This Court should accept review of this case based upon the important separation of powers issues involved, which have implications beyond the factual context of the Pearson case. Pearson holds 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 imposed in violation of section 944.275(4)(b)3. The Pearson court stated that failure to execute a coterminous provision violated separation of powers because sentencing is within the realm of the judiciary. Pearson at 2. The court expressly construed the sentencing powers of the judiciary under the separation of powers doctrine so as to override the authority delegated by the legislature to the executive (DOC) regarding the execution of sentences; authority which the department submits the judiciary cannot circumvent through imposition of a specific sentencing provision.

It is the department's position that where the sentencing court has imposed an 85% sentence coterminous to a shorter sentence, such that the inmate will avoid serving 85% of the sentence imposed, the judiciary has interfered with the department's obligation to give effect to section 944.275(4)(b)3, as well as its authority to calculate release

dates under section 944.275.[3] Thus, the Pearson opinion construes the separation of powers doctrine to allow the judiciary to encroach upon functions of executive branch, through DOC, in violation of Art. II, § 3, Fla. Const.

The Pearson decision is premised on a misperception that by not giving effect to the coterminous provision, the department is attempting to correct an illegal sentence. Id. at 1. Pearson states that the DOC has no authority to correct illegal sentences, and that only limited power exists to alter a sentence to the defendant's disadvantage, and that power belongs solely to the state attorney. Id.

Contrary to the statement in Pearson, 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", as Pearson reports. Id. The opinion overlooks a critical distinction between illegal sentences in general and sentences

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[3] This Court has clearly indicated that it is not the function of the sentencing court to establish the date a sentence will expire.

> 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. 713 (Fla. 1899)

Brooke v. State, 128 So. 814 , 816 (Fla. 1930). The Court stated that to remedy a sentencing order attempting to set the beginning and end of a sentence, that part of the order "can be treated as surplus-age and as having no effect upon the valid portion". Id.

that impose provisions that violate statutes the DOC is charged with administering. If, for example, a sentence is imposed in excess of the statutory maximum, it is not for DOC to challenge, and the sentence will be carried out as ordered. If, however, a sentence is imposed with a provision that DOC will apply post-sentence jail credit, or will not cut the defendant's hair, the sentencing court has usurped the department's authority to maintain custody of inmates, and to calculate sentences in accordance with § 944.275. In these instances, it is within the department's authority to contest the objectionable portion of the order, even if it was part of the plea to which all sides agreed at sentencing.[4] State attorneys cannot bargain away powers that have been granted to the DOC, and courts have repeatedly held that in these circumstances, the department is not bound to "execute the sentence exactly as imposed" as Pearson directs. Id. at 1.

Because the sweeping language of the Pearson opinion fails to distinguish between sentencing orders imposing illegal sentences, which the DOC has no authority to correct, and

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[4] See e.g, Brown v. State, 427 So.2d 821 (Fla. 2d DCA 1983)(award of post-sentence credit is a matter within DOC's purview, not the sentencing court's) Moore v. Lowery, 758 So.2d 737 (Fla. 3d 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). See also, Shuoe v. State, 516 So.2d 73 (Fla. 5th DCA 1987) Sinuletary v. Coronado, 673 So.2d 924 (Fla. 2d DCA 1996); Riley v. State, 743 So.2d 148 (Fla. 1st DCA 1999); Singletary v. Evans, 676 So.2d 51, 52 (Fla. 5th DCA 1996); Davis v. Singletary, 659 So.2d 1126, 1127 (Fla. 2d DCA 1995).

sentencing orders imposing provisions which encroach upon duties the DOC has been charged with administering, it is of great necessity that this Court accept review in this case in order to clarify and/or correct this matter. The proper execution of sentencing orders affects virtually all defendants sentenced throughout the State of Florida, and because statutory sentencing provisions are becoming more numerous and complex, clarity in this area of the law is a essential. The Pearson opinion prevents the department from applying section 944.275(4)(b)3, and allows defendants to avoid serving 85% of their sentence. The opinion has further implications any time a sentencing court imposes a provision which is in conflict with a statute the DOC has been charged with administering, since the broad language of the opinion does not limit its application to provisions falling under the authority of the judiciary.[5]

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND AND THIRD DISTRICTS IN TURNER V. STATE, 689 So.2D 1107 (Fla. 2d DCA 1997)AND NIEVES V. STATE, 24 Fla. L. Weekly D591 (Fla. 3d DCA, Feb. 24, 1999)

Pearson is in direct conflict with opinions of the Second and Third Districts in Turner v. State, and Nieves v. State.

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[5] A sentencing order that imposes a coterminous sentence in violation of section 944.275(4)(b)3 not only usurps the executive's authority to effectuate 85% service, but also the legislature's authority to enact this statutory requirement. Moore v. State, 392 So.2d 277 (Fla. 5th DCA 1980)(the Legislature has authority over "the particular means and methods of execution of sentences").

There, the inmates sought relief from the trial court. The Second and Third Districts held that it is not legally possible to execute a post-October 1, 1995 sentence coterminous to a shorter sentence that would result in less than 85% service, therefore, the inmates were entitled to withdraw their pleas. Turner at 1108, 110; Nieves at D591.[6]

Pearson directly conflicts with Turner and Nieves as to whether coterminous sentencing conflicts with the application of section 944.275(4)(b)3. The Second and Third Districts found that coterminous structuring does conflict with the 85% statute and expressly approved the DOC's actions. Turner at 1109 ("it is clear that the Department of Corrections must apply [the 85% provision]" to the exclusion of the coterminous provision. (emphasis supplied)).

Pearson, on the other hand, holds that coterminous structuring does not conflict with the 85% statute[7] and held that the department cannot apply the 85% provision to the exclusion of the coterminous provision. Id. at 2-3. Since the department structures sentences of inmates sentenced throughout the State, this conflict must be resolved, as it is highly

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[6] Pearson noted that although Turner and Nieves found that it was legally impossible to carry out the coterminous provision where it would result in less than 85% service, those cases addressed the different issue of whether the inmates could withdraw their plea. Id. at n.2. This distinction does not dispel the conflict or aid the department in the proper execution of sentences and the calculation of release dates.

[7] See, Pearson at n.2.

important to the orderly and uniform administration of justice. For example, a sentencing order recently received by the department illustrates the problems resulting from Pearson. There, an inmate subject to the 85% statute was sentenced last May to **life** for first degree murder, **coterminous** to a New Jersey sentence from which the inmate had already been paroled. According to Pearson, this inmate should be released immediately. The inmate's attorney has even written the department claiming that Pearson requires that his client be released. (Appendix B) This is just one of predictably many examples of the peculiar and unjust results stemming from Pearson, unless the Court accepts the case for review.

WHEREFORE, based on the foregoing, the Department respectfully requests that the Court accept discretionary review of the Pearson case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Baya Harrison, III, Attorney for Respondent, P.O. Box 1219 Monticello, FL 32345 this 23rd day of October, 2000.

Sheron Wells

SHERON WELLS