IN THE SUPREME COURT OF FLORIDA

Case No. SC 00-2166

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BY

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

Petitioner, Appellant,

vs.

STEVEN PEARSON,

Respondent, Appellee.

ON PETITION FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT OF FLORIDA, FIRST DISTRICT.

BRIEF OF RESPONDENT/APPELLEE, STEVEN PEARSON, ON JURISDICTION

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PRELIMINARY STATEMENT

The petitioner, appellant, Michael W. Moore, Secretary, Florida Department of Corrections, will be referred to by his agency, "the DOC." The respondent, appellee, Steven Pearson, will be referred to as "Mr. Pearson."

Reference to the decision in Pearson v. Moore, 25 Fla.L.Weekly D1940 (August 14, 2000), will be made as that case appears and is paginated in the DOC's appendix to its brief on jurisdiction.

All emphasis in bold type is added by the undersigned.

STATEMENT CERTIFYING TYPE SIZE AND STYLE

The undersigned hereby certifies that this brief on jurisdiction is typed using a 12 point Courier, a font that is not proportionally spaced.

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 and 2 of its brief on jurisdiction, except as noted below.

The DOC does not fully nor correctly reflect the course of the proceedings in the trial court in its statement of the case and facts. It also improperly injects legal arguments on pages 1 and 2 of its brief on jurisdiction. For example, on page 1, it notes that

> "(a)ll 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)."

Whether these sentences are "subject to the 85% service requirement" obviously begs the question presented for judicial review. The DOC adds on page 1 that "(o)n July 16, 1997, the department received an 'Order Granting Motion to Correct Clerical Mistake in Case No. 96-20..." This is somewhat misleading because it suggests that the trial court did not **initially** impose a **coterminous** sentence upon Mr. Pearson. In fact, the original plea agreement, adhered to by the sentencing judge when Mr. Pearson was initially sentenced in Case No. 96-20, specifically provided that the sentences imposed in Case No. 96-20 were to be served conterminously with a previously imposed 5 year prison sentence. See ***Pearson v. Moore,*** Fla. Law weekly D591 (Fla. 1st DCA, Aug. 24, 2000), the DOC's Appendix to Jurisdictional Brief,

Document "A," page 3. Thus, the July 16, 1997 "Order Granting Motion to Correct Clerical Mistake," referred to by the DOC on page 1 of its brief on jurisdiction was just that -- an Order from the sentencing judge correcting the mistake the clerk made in not specifying the **coterminous** nature of the sentences that the court ordered **initially.**

The DOC includes additional legal argument in the second sentence of the second paragraph on page 1 of its jurisdictional brief when it describes the effect of "running Case No. 96-20 coterminous with the other active sentences." According to the DOC, this would require it to "grant the benefit of court ordered **gaintime** to Case No. 96-20 in an amount that would reduce it below 85% service," and, therefore, the DOC could not structure the sentence in that manner. This is completely off the mark. Mr. Pearson does not seek to have the DOC grant him any gaintime. He asks only that it honor the letter and spirit of the **coterminous** sentence that the trial judge imposed in Case No. 96-20.

SUMMARY OF THE ARGUMENT

The main question presented here is whether the DOC may refuse to give effect to a sentence imposed by a circuit court. *Pearson v. Moore,* Fla. Law weekly D591 (Fla. 1st DCA, Aug. 24, 2000), page 1. The sentence in question is a coterminous 13 year sentence which, by operation of law, expires when a previously imposed 5 year prison sentence expires.[1] The critical answer to this question must be an emphatic "no" because,

> "(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 supra, the DOC's Appendix to Jurisdictional Brief, Document "A," page 3, citing *Troupe v. Rowe,* 283 So. 2d 857 (Fla. 1973). The state did not appeal the coterminous 13 year sentence that was originally set to expire when Mr. Pearson's earlier imposed 5 year sentence expired. The "DOC is not authorized to appeal the imposition of a sentence." *Pearson, supra,* the DOC's Appendix to Jurisdictional Brief, Document "A," at page 3. But this attempt at a "back door" appeal and nullification of Mr. Pearson's coterminous sentence -- is exactly what the DOC is attempting to do.[2]

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[1] A coterminous sentence, defined as a sentence that runs concurrently with another and terminates simultaneously, are recognized and accepted in Florida. See for example, *Madden v. State, 535 So.* 2d 636 (Fla. 1988).

[2] The cases of Wallace *v. State,* 41 Fla. 547, 26 So. 713 (Fla. 1899) and *Brooke v. State,* 128 So. 814 (Fla. 1930) are not applicable. This is so because, in the case at bar, the trial court was not performing an administrative function and did not order a certain end-of-sentence date. Instead, the trial court simply imposed a coterminous sentence -- and the

The critical factor in this case is the "separation of powers between the judicial and executive branches." (*Id.*) Circuit Court judges, not the DOC, have the constitutional power to sentence persons convicted of crimes. The "DOC lacks the power to adjudicate the legality of a sentence or to add or delete sentencing conditions." (*Id.*)

The *Pearson* decision does not directly conflict with *Turner v. Singletary,* 689 So.2d 1107 (Fla. 2d DCA 1999), and *Nieves v.* State, 24 Fla. L. weekly D591 (Fla. 3d DCA 1999). In *Turner* and *Nieves,* the district courts were faced with the issue of whether the defendants should be allowed to withdraw their plea subsequent to the DOC refusing 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 whether DOC has the authority to declare a sentence illegal, although it was duly pronounced by the trial court and never appealed."

Pearson, supra, the DOC's Appendix to Jurisdictional Brief, Document "A," page 5.

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law with regard to coterminous sentences took over from there.

MR. PEARSON'S ANSWER TO THE DOC'S ARGUMENT

This Court should not accept review of the decision in Pearson v. Moore, 25 Fla. L. weekly D1940 (Fla. 1st DCA, Aug. 14, 2000) under Art. V., §3(b)3 of the Florida Constitution.

A. As to the DOC's First Argument

Admittedly, the decision of the District Court of Appeal expressly construed the separation of powers doctrine in Article I, Declaration of Rights, Section 3, Florida Constitution, but this is not controlling since the District Court correctly interpreted the Florida Constitution.

> "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law."

Article I, Declaration of Rights, Section 18, Florida Constitution.

For more than three decades, the DOC has far too often violated the liberty interests of Florida prison inmates by, among other things, ignoring and/or misapplying statutes enacted by the Florida Legislature and decisions rendered by our appellate courts, including those of this Honorable Court. See for example *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. *See Gwong, supra.*[3] In so doing, the DOC often avoids the substantive issues by unnecessarily disparaging[4] the inmate personally in lieu of advancing a valid legal argument and keeping inmates behind bars far longer than the law allowed by seeking unnecessary judicial review of court decisions rendered against it. That is exactly what the DOC is doing to Mr. Pearson. Thus, in seeking a stay in the case at bar, the DOC conveniently fails to even mention the fact that Mr. Pearson should have been released from prison many months ago. This is so because, as the district court stated so plainly in *Pearson,* the DOC may not

> ". . .refuse to give effect to a sentence imposed by a circuit court."

Pearson v. Moore, 25 Fla. L. weekly D1940, (August 14, 2000, rehearing denied, September 25, 2000), Appendix to the DOC's Jurisdictional Brief, "Document A," page 2. The sentence in question is a 13 year post-85% law **coterminous** sentence imposed by a circuit judge on November 8, 1996. That sentence, rendered pursuant to a plea bargain entered into between Mr. Pearson and the State of Florida[5], by the DOC's own admission, was imposed by the circuit court,

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[3] This court is asked to recall that, in attempting to justify its flawed legal position in Gwong, supra, the DOC essentially indicated that it simply did not agree with this Court's earlier controlling decision in *Waldrup,* supra.

[4] See the DOC's brief on jurisdiction, page 1. ("On November 6, 1996, Pearson was sentenced in Case No. 96-20 on 26 counts.")

". . .concurrent and 'coterminous' to a pre-existing 5 year term that had been imposed for an offense committed prior to October 1, 1995."

(See the DOC's Motion for Stay Pending Review dated October 12, 2000, filed in this cause, page 2.) The validity of a coterminous sentence is recognized in Florida, and has

". . .been defined as a sentence that runs concurrently with another and terminates simultaneously."

Pearson, Appendix to the DOC's Jurisdictional Brief, "Document A," page 5, citing Madden ***v. State, 535 So.*** 2d 636 (Fla. 5th DCA 1998). The state attorney did not appeal the sentence. Mr. Pearson has now maxed-out the earlier imposed 5 year sentence. Since it is undisputed that the sentencing court ordered that the 13 year sentence was to be served concurrently and end coterminously with that earlier 5 year sentence, Mr. Pearson "simultaneously" has maxed-out the 13 year sentence as well by operation of law.

Why then is Mr. Pearson still in prison? Because once again the DOC has demonstrated its disdain for the rule of law and the judicial branch of Florida's government. As the district court eloquently noted in Pearson,

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5 The district court noted that the State did not appeal Mr. Pearson's 13 year coterminous sentence. See Pearson, page 6. The district court added in this regard:

"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."

> "The 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."

Pearson, supra, Appendix to the DOC's Jurisdictional Brief, "Document A," page 3. Thus, the real question should be: How can the DOC continue to keep Mr. Pearson behind bars despite the fact that he has terminated the sentences which a circuit judge imposed upon him?

The DOC relies on Section 944.275(4)(b)3, Florida Statutes, (that is, the so called "85% law") to justify its supposed inability to structure Mr. Pearson's sentences so that they can be served coterminously, as the sentencing court ordered. Section 944.275(4)(b)3, which sets forth the DOC's authority regarding the awarding of gain-time for offenses committed on or after October 1, 1995, provides 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."

This statute makes it clear that the DOC cannot award "gain-time" that would cause an inmate's release prior to serving 85% of the sentence imposed. However, in the case at bar, Mr. Pearson did not ask the DOC to award him "gain-time" on his 13-year post October 1, 1995 sentence. Gain-time is totally irrelevant to the issue in this case. The trial

court ordered Mr. Pearson's sentences to run coterminously, gain-time notwithstanding. The utilization of gain-time plays no part in fulfilling the court's order. Therefore, the DOC's reliance on Section 944.275(4)(b)3, Florida Statutes, fails.

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 sentence imposed, Mr. Pearson's 13 year **coteminous** sentence would not violate that law. This is so because the sentence Judge Bryan imposed upon Mr. Pearson was not just for 13 years -- it was for 13 years concurrent and **coterminous** with an earlier imposed 5 year sentence. That is a major distinction. Thus, by sentencing him to 13 years concurrent and coterminous with the 5 year sentence, the sentencing court knowingly sentenced Mr. Pearson to no more time in prison than the time he would actually serve on his 5 year sentence. The DOC must honor that sentence. As the Pearson court noted, "DOC is an executive branch charged with faithfully implementing sentences imposed **by the courts."** *Pearson, supra,* Appendix to the DOC's Jurisdictional Brief, **Document **A,"** page 4. (Emphasis supplied.) The district court added, again at page 4: **"As** part of the executive branch, DOC lacks the power to adjudicate 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 a little 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 not what the sentencing court intended, not what Mr. Pearson bargained for[6] 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,* at page 3. The *Pearson* court added:

> "Under 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. See Troupe v. Rowe, 283 So. 2d 857, 860 (Fla. 1973). The state's limited statutory authority to appeal sentences is exercised by the office that prosecutes the convict who is sentenced (Citations omitted.) 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."

Pearson, supra, Appendix to the DOC's Jurisdictional Brief,

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[6] We point out that if the DOC's interpretation regarding the 85% law was extended to other situations, it would become clear that the DOC is wrong, For example, certainly the DOC would not attempt to apply the 85% law to multiple, concurrent sentences in a fashion that would require the inmate to serve 85% of each individual sentence separately. That sentence structure is obviously wrong as that would be essentially changing the multiple, concurrent sentences to multiple, consecutive sentences. The same logic applies to a sentence that is ordered to run coterminously. For example (and as is the case here), a 13 year sentence running concurrent and coterminous to a 5 year sentence means that the sentence imposed equals the amount of time served on the 5 year sentence. Thus, since Mr. Pearson has expired his 5 year sentence, his 13 year coterminous sentence has also expired and that means he would have served 100% of the 13 year coterminous sentence imposed. Certainly, this satisfies the 85% law.

"Document A" at page 3.

As to the DOC's Second Argument

B. The decision of the First District Court of Appeal in Pearson, supra, does not directly conflict with Turner and *Nieves*.

The DOC mistakenly relies on *Turner v. Singletary, 689* So.2d 1107 (Fla. 2d DCA 1999), and Nieves v. State, 24 Fla. L. weekly D591 (Fla. 3d DCA 1999), asserting that those decisions conflict with *Pearson.* (The DOC's Brief on Jurisdiction, pages 8-10.) This is incorrect. Although the courts in *Tuxnex* and *Nieves* addressed the issue of coterminous sentences as they relate to pre- and post-October 1, 1995 offenses, it was only in the context of whether the defendant should be allowed to withdraw his plea subsequent to the DOC refusing to run the sentences coterminously. The courts in *Turner* and *Nieves* did **not** find that the DOC acted properly by refusing to structure the sentences according to the court's order as that issue was neither presented nor considered by the courts in those two cases. Furthermore, in *Turner,* supra, the defendant accepted a plea agreement (and was sentenced according to same) in which he would admit guilt to a post-October 1, 1995 offense in exchange for a 30 month sentence which would run concurrently and coterminously with a pre-October 1, 1995 sentence. Upon entering prison, the DOC advised Turner that, in accordance with Section 944.275(4)(b)3, Florida Statutes, he would have to serve 85% of the post-October 1, 1995 sentence, and, therefore it (the

DOC) would not run his sentences coterminously. The defendant filed a motion to withdraw his plea per the provisions of Florida Rule of Criminal Procedure 3.850 arguing that his guilty plea was involuntarily made without a full understanding of the consequences. The sentencing court denied his motion and Turner appealed. The district court found that, because of the "specific representation made by the trial court in its plea offer that the new sentences would terminate at the conclusion of the previously imposed sentence," and because this was not possible under Section 944.275(4)(b)3, Florida Statutes, the defendant was entitled to withdraw his plea. ***Turner, supra,*** 689 So.2d at 1110.

The facts in the ***Turner*** case are further distinguishable from the facts in the case at bar in that, as noted above, Turner sought to withdraw his plea while Mr. Pearson is merely attempting to have the DOC honor Judge Bryan's sentencing order. As the district court stated in ***Pearson, supra,*** at page 5, footnote 2:

> "We note, however, that, since enactment of the Stop Turning Out Prisoners Act, Ch. 95-294, §§ 1, 2, and 5, at 2717-2718, Laws of Fla., the Second and Third Districts have concluded that coterminous sentences may be legally impossible in certain circumstances. See Obaya v. State, 723 So. 2d 924, 925 (Fla. 3d DCA 1999); ***Turner v. State, 689*** So. 2d 1107, 1110, (Fla. 2d DCA 1997); see also Nieves v. State, 24 Fla. L. Weekly D591 (Fla. 3d DCA Feb. 24, 1999). On this premise, those courts approved defendants withdrawing pleas post-judgment upon DOC's refusal to honor the sentences imposed by the sentencing court. Seed . These opinions do not address the question whether mandamus may lie to compel DOC to implement coterminous sentences.

> **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 whether **DOC** has the authority to declare a sentence illegal, although it was duly pronounced by the trial court and never appealed."

(Emphasis in bold supplied.)

CONCLUSION

"Sentencing is a power, obligation and prerogative of the courts, not DOC." *Pearson, sup-a,* Appendix to the DOC's Jurisdictional Brief, page 4, citing *Thomas v. State,* 612 So. 2d 684 (Fla. 5th DCA 1993). Wherefore, the Supreme Court of Florida is requested to decline to accept discretionary review of the *Pearson* case, deny the relief sought by the DOC and grant Mr. Pearson such other and further relief as is deemed appropriate in the premises.

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, Office of the General Counsel, The Department of Corrections Building, 2601 Blair Stone Road, Tallahassee, Florida, 32399-2500, by U.S. mail delivery, this 7th day of November, 2000.

Respectfully Submitted,

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