IN THE SUPREME COURT OF FLORIDA

OLLIE JAMES GOAD

Petitioner,

v. **CASE NO. SC00-785**

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

_____

On Discretionary Review from the District Court of Appeal, First District of Florida

_____

ANSWER BRIEF OF RESPONDENT

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STATEMENT CERTIFYING TYPE SIZE AND STYLE

I certify Courier New 12-point, non-proportionately spaced type is used in this brief, in accord with this Court's administrative order of July 13, 1998.

STATEMENT OF THE CASE AND FACTS

Appellee, the Florida Department of Corrections (DOC), accepts Goad's statement of the case with this addition: DOC moved for summary judgment as to Goad's negligence claim. The motion was granted (R:141-3 & 144-6).[1] Goad did not appeal.

DOC objects to Goad's statement that this Court's discretionary jurisdiction was invoked under Art. V, §3(b)(3), Florida Constitution. (initial brief, p.4). Goad's notice and amended notice relied only on certification of conflict, which is a jurisdictional ground under Art. V, §3(b)(4). For the first time, Goad suggests an alternative ground for review--that the opinion below expressly declares a statute to be valid. DOC objects to Goad retroactively amending his notice to invoke.

DOC accepts Goad's statement of the facts with these clarifications: Goad was convicted for ten non-capital, non-life felonies in October 1990. He entered DOC's custody in February 1991. (*See* R:38, ¶¶22 & 23). In his negligence suit, he alleged DOC failed to protect him from another inmate known to be violent, leading to an injurious attack. (*See* R:20-22, par. 6-11).

Goad asserts he is potentially liable to the State for $107,500 as of the filing date of his brief. (initial brief,

[1]The record on appeal is cited as (R:[page no.]).

p.2). DOC's counterclaim sought $50/day in liquidated damages, without specifying a total amount. (R:38). By granting judgment on the pleadings for Goad, the trial court denied recovery by DOC. Any particular amount of liability will arise only if DOC obtains a judgment against Goad, who did not win damages in his negligence action. His claim of liability in the amount of $400,000 (initial brief, p.6-7) is misleading.

SUMMARY OF THE ARGUMENT

Issue I: Although the decision below certified conflict with decisions by two other district courts; such conflict does not actually exist, and thus cannot be "direct." This Court lacks jurisdiction on the only ground timely invoked.

If review is had, this Court should uphold application of §960.297, Florida Statutes, to Goad. The statute specifically authorizes recovery of incarceration costs in the form of liquidated damages at $50 per day. Recovery is expressly limited to costs arising on or after July 1, 1994. The statute does not operate retroactively; instead, it relies on the antecedent event of imprisonment to trigger prospective recovery.

Section 960.297 is not punitive. It speaks in terms of a "civil lien," and has no attributes of a criminal law. It does not impose a criminal sanction, or impose a civil sanction so

harsh it must be deemed criminal. If held retroactive as applied, §960.297 does not punish, and does not violate the Ex Post Facto Clause of the U.S. or Florida Constitution.

Issue II: Section 960.297 expressly cross-references §960.293; both sections were enacted in the same legislation. They must be construed together. Consequently, Ilkanic v. City of Fort Lauderdale, 705 So.2d 1371 (Fla. 1998), controls. Section 960.297 does not facially violate substantive due process.

If Goad has a substantive due process right against application of §960.297, such right is specifically protected by the Ex Post Facto Clause. He cannot expand his right against ex post facto legislation into a broad substantive due process claim against any alteration of the status quo as it existed when he committed his crime.

Otherwise, Goad's substantive due process argument assumes both retroactivity and that the "expectation" of not paying incarceration costs is both settled and reasonable. As urged in DOC's ex post facto argument, §960.297 does not operate retroactively. Goad's expectation of not paying future incarceration cost is not based on a legally protected interest, and is but a desire that the law not change in a way he opposes.

Goad's only protected interest is that of not being further punished for his pre-statute crimes. Since §960.297 does not impose punishment, Goad's substantive due process argument fails.

ARGUMENT

ISSUE I

WHETHER APPLICATION OF §960.297, FLORIDA STATUTES, TO INMATES WHOSE CRIMES PRECEDED THAT LAW, VIOLATES THE EX POST FACTO CLAUSE OF THE FLORIDA OR U.S. CONSTITUTION.

A. No Conflict

This Court's order of April 14, 2000, postponed a decision on jurisdiction. Under Art. V, §3(b)(4), Fla. Const., a district court of appeal must certify "direct conflict with a decision of another district court of appeal." The decision below certified the following conflict:

> [T]he Fourth District Court of Appeal has decided that the Florida Civil Restitution Lien and Crime Victims' Remedy Act cannot be applied retroactively. See Gary v. State, 669 So.2d 1087 (Fla. 4th DCA 1996). Although perhaps in dicta, the Second District Court of Appeal has also suggested that the Act cannot be applied retroactively. See Alberts v. State, 711 So.2d 635 (Fla. 2d DCA 1998). For the reasons expressed in this opinion, we certify conflict with these decisions.

(slip op., p. 3 n.1).

Carefully read, the decision below does not so establish conflict jurisdiction. Gary and Alberts involve retroactive application of different provisions in §§960.29-.296, Florida Statutes, which impose restitution liens upon criminals in favor of victims. In contrast, §960.297 imposes incarceration cost liens in favor of the government.

More important, §960.297 is expressly made prospective only, by authorizing recovery of incarceration costs arising on or after July 1, 1994. *See* §960.297(2). The statutes in Gary and Alberts lacked this language, and also lacked clear legislative intent for application to prior crimes. There is no direct conflict between those cases and this one.

The First DCA's certification of conflict does not posit jurisdiction in this Court. *See* 84 Lumber Co. v. Cooper, 656 So.2d 1297, 1298 (Fla. 2d DCA 1994) ("[S]ubject matter jurisdiction cannot be created by ... the exercise of power by the court; it is a power that arises solely by virtue of law." [internal quote omitted]). This Court lacks subject matter jurisdiction.

Neither Goad's first nor amended notice sought review on the ground the decision below upheld §960.297 against an ex post facto claim. *See* Art. V, §3(b)(3), Fla. Const. DOC opposes review on this ground, as it was Goad's responsibility to establish this Court's jurisdiction. However, if this Court exercises jurisdiction to reach the merits, it should do so because the First DCA expressly held §960.297 valid; eliminating the need to resolve the perceived, but actually non-existent, conflict with Gary and Alberts.

B. Standard Of Review

The constitutional challenges to §960.297 raise questions of law only. The decision below is reviewed *de novo*. *See* Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So.2d 376, 377 (Fla. 5th DCA 1998). Statutes are presumed constitutional; §960.297 enjoys deference from this Court. *See* State v. Slaughter, 574 So.2d 218, 220 (Fla. 1st DCA 1991) (when trial court holds statute unconstitutional, "the statute, rather than the trial court's ruling, is favored with a presumption of validity").

C. Ex Post Facto

A statute violates the Ex Post Facto Clause of the U.S. or Florida Constitution[2] if it: (1) punishes as crime an act previously committed, which was innocent when done; (2) makes more burdensome the punishment for crime after its commission; or (3) deprives one charged with crime of any defense available under law in effect when act was committed. Collins v. Youngblood, 110 S. Ct. 2715, 2719, (1990); State v. Hootman, 709

[2]Goad does not urge the right against ex post facto laws under the Florida Constitution is substantively different from the same right under the U.S. Constitution. (*See* initial brief, p.11-12). Since it passes muster under the U.S. Constitution, §960.297 passes muster under the Florida Constitution. *See* Cassady v. Moore, 737 So.2d 1174, 1178 n.5 (Fla. 1st DCA 1999) (describing the Ex Post Facto Clause of Florida's Constitution as a "parallel provision" to the Ex Post Facto Clause of the U.S. Constitution).

So. 2d 1357, 1358-1359 (Fla. 1998); *modified*, State v. Matute-Chirinos, 713 So.2d 1006, 1007 (Fla. 1998). *See also,* Gwong v. Singletary, 683 So.2d 109, 112 (Fla. 1996) (applying two part test subsuming the first two circumstances in Collins), *cert. den.* 117 S.Ct. 1018 (1997).

Neither the first nor third type of *ex post facto* violation described in Collins and Hootman is pertinent. DOC will address Goad's contention the statute imposes new punishment for crimes already committed.

1. Section 960.297 Is Not Retroactive

Without analysis or citation to authority, the First DCA concluded: "Section 960.297 applies retroactively to the existing population of prison inmates, but that alone does not make it an ex post fact law." (slip op., p.3). Although the court correctly held the statute was not ex post facto as applied to Goad, it was incorrect in its terse assumption of retroactive application. DOC asks the Court to reverse this much of the First DCA's decision, and hold the statute operates prospectively while relying on the antecedent event of imprisonment.

Section 960.297(2) provides:

> For those convicted offenders convicted before July 1, 1994, the state and its local subdivisions, in a separate civil action or as a

> counterclaim in any civil action, may seek recovery of the damages and losses set forth in s. 960.293, for the convicted offender's remaining sentence after July 1, 1994.

Thus, the statute limits recovery of incarceration costs to those arising on or after its effective date of July 1, 1994. Goad cannot be liable for the cost of incarcerating him from February 1991 to July 1994.

Rather than operate retroactively, §960.297 draws upon the antecedent fact Goad was already incarcerated. Reliance on antecedent facts does not make a statute retroactive. Landgraf v. USI Film Products, 114 S.Ct. 1483, 1499 (1994):

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment[.] ... Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. [e.s.]

See Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d 494, 499 (Fla. 1999) (same).

Had it authorized recovery of pre-enactment incarceration cost (here, from February 1991 to July 1994), §960.297 indeed would have been operating retroactively. Instead, the statute prospectively authorizes recovery of incarceration cost, including recovery when incarceration results from a pre-statute crime.

Therein lies the mistake in Goad's analysis. Section 960.297 does not focus on pre-enactment crimes. It focuses on imprisonment which continues after its enactment. Goad's imprisonment was not over as of July 1, 1994; and thus was not a completed event before the statute became law. Liability for incarceration cost attaches to imprisonment after July 1, 1994; not to earlier crime.

Recidivist statutes loom large in the landscape of criminal sanctions. Early, such statutes were challenged on ex post facto grounds, when the predicate crimes were committed before the recidivist statue took effect. These challenges were readily rejected. *See* Reeves v. State, 612 So.2d 560 (Fla. 1992) ("This court has also rejected ex post facto challenges to the habitual offender statute in Reynolds v. Cochran, 138 So.2d 500 (Fla.1962); Washington v. Mayo, 91 So.2d 621 (Fla.1956); and Cross v. State, 96 Fla. 768, 119 So. 380 (1928).").

Enhanced punishment for repeat felony convictions attaches only to the "new" crime. A recidivist felon is not made to serve additional prison time for the "old" offense. Nevertheless, a lengthier recidivist sentence could not be imposed but for the pre-statute crime.

Goad is liable for incarceration costs because of on-going imprisonment. While he would not have been in prison but for

the crime he committed before §960.297 was enacted, he is no different from recidivist felons whose eligibility to receive lengthier sentences depends on pre-statute crimes. Just as a recidivist felon cannot evade a longer sentence on ex post facto grounds, Goad cannot avoid prospective liability for incarceration costs. *See also*, Jackson v. State, 729 So.2d 947, 950 (Fla. 1st DCA 1998) (upholding, against ex post facto attack, application of statute prohibiting possession of firearms by persons convicted for certain felonies, when those felonies were committed before statute took effect), *rev. den.* 727 So.2d 906 (Fla. 1999).

The analogies between this case and Reeves or Jackson are strong. Reeves received a longer sentence, for a post-enactment crime, under a recidivist law which relied on certain antecedent felonies. Jackson was convicted for post-enactment violation of a statute which prohibited possession of firearms by persons convicted for specified prior felonies.

Goad was held liable for post-enactment incarceration costs based on continued imprisonment for an antecedent crime. The statute was triggered by his ongoing incarceration, not the pre-enactment crime. He had no choice but to remain in prison, and could not avoid the statute's operation.

Similarly, the challengers in Reeves and Jackson could not avoid the operation of the statutes affecting them. Reeves could not escape the possibility of a longer sentence if he later committed a new crime. More similar to Goad, Jackson was prohibited from possessing a firearm based on a prior felony. He was not statutorily allowed to commit one of the enumerated felonies in the future, only then to be prohibited from possessing a firearm.

Goad's liability for costs attends his continued imprisonment, not his 1990 crime. Section 960.297 has no affect on the length of time he could spend in prison. It does not change the legal consequence of his imprisonment before July 1, 1994. Goad's reliance on Weaver v. Graham, 101 S.Ct. 960 (1981) and citation to other prisoner gaintime cases (initial brief, p.14) is misplaced.

2. §960.297 Does Not Expressly Impose "Punishment"

If §960.297 is found retroactive as applied, Goad's ex post facto claim must still fail; as the statute is civil and does not impose punishment. The first determination, then, is whether §960.297 is overtly civil in character. *See* Kansas v. Hendricks, 117 S.Ct. 2072, 2081-2 (1997) ("We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings.").

A constitutional line is drawn "between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." United States ex rel Marcus v. Hess, 63 S.Ct. 379, 386 (1943). The nature of a statute may be discovered in either express or implied legislative intent: has the Legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *See* Hudson v. United States, 118 S.Ct. 488, 493 (1997), *quoting* United States v. Ward, 100 S.Ct. 2636, 2641 (1980).

Section 960.297 is codified in Title XLVII of the Florida Statutes, which includes numerous chapters on "criminal procedure and corrections." Such placement, by itself, does not control. *See* Hendricks, 117 S.Ct. at 2082 (recognizing a "civil

label is not always dispositive"). Here, the Legislature itself repeatedly declared the civil nature of the statute. *See* §2, 4-7 & 9, ch. 94-342, Laws of Fla. *See also*, *id.* at §§4-7 (using the term "civil restitution lien(s)"). Moreover, the placement of §960.297 within the statutes was not specified by the Legislature, but done after the fact by administrative staff pursuant to §11.242(2), Florida Statutes. Little weight can be assigned to codification of §960.297 in the "criminal" title of the Florida Statutes.

Section 960.297 was enacted in ch. 94-342, Laws of Florida, and must be read in context with the other parts of that law. Major v. State, 180 So.2d 335, 337 n. 1 (Fla.1965) (observing that the rule for reading statutes pari materia applies "with special force where the statutes in question were enacted by the same legislature as part of a single act"). Accordingly, §2 of ch. 94-342 repeatedly establishes the non-punitive purpose of §960.297:

> ... The Legislature also finds that there is an urgent need to alleviate the increasing financial burdens on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders.
>
> (1) To remedy these problems, consistent with the preservation of all citizens' constitutional rights, the Legislature intends:

> (a) To provide a legal mechanism, in the form of a civil restitution lien, that will enable crime victims, the state, and other aggrieved parties to recover damages and losses arising out of criminal acts[.]
>
> * * *
>
> (c) To ensure that the amount of each civil restitution lien equals the amount of the actual damages awarded in the civil action arising from the crime.
>
> (d) To impose a long-term civil liability for the costs of incarceration, by means of the civil restitution lien, against a convicted offender, regardless of the offender's financial status at the time of conviction.
>
> (2) The Legislature also finds that crime victims, the state, and its local subdivisions are entitled to rough remedial justice and they may demand compensation for damage and losses.
>
> (3) The Legislature declares that:
>
> * * *
>
> (b) This civil restitution lien act rests upon the principle of remediation and not punishment, which is meted out by criminal sanctions afforded by law.

See §960.29, Florida Statutes [e.s.].

Seldom does a legislative body so clearly declare its purpose for enacting a statute, and establish the civil nature of a law. The 1994 Legislature's strong characterization of §960.297 as civil all but precludes Goad's ex post facto claim.

The decision below relied heavily on the "Hudson factors" to resolve Goad's ex post facto claim. (slip op., p.5-8). In

Hudson, the Supreme Court mandated greater emphasis be placed on legislative determination a statute was civil:[3]

> [I]n those cases where the legislature has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect, as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty ...[.]
>
> In making this latter determination, the factors listed in Kennedy v. Mendoza-Martinez, provide useful guideposts[.]
>
> * * *
>
> It is important to note, however, that these factors must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.] [e.s.; internal quotes and cites omitted].

Id., 118 S.Ct. at 493.

Notably, the Hudson Court overruled Halper's emphasis on the potentially punitive nature of a civil statute:

> The analysis applied by the Halper Court deviated from our traditional double jeopardy doctrine in two key respects. First, the Halper Court bypassed the threshold question: whether the successive punishment at issue is a "criminal" punishment. ... In so doing, the Court elevated a single Kennedy factor--whether

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[3]Hudson addressed a double jeopardy challenge. However, the Supreme Court later used criteria substantively similar to the "factors" described in Kennedy v. Mendoza-Martinez, to uphold a statute against an ex post facto attack. *See* Hendricks, 117 S.Ct. at 2085 ("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and ex post facto claims.").

> the sanction appeared excessive in relation to its nonpunitive purposes--to dispositive status.
>
> * * *
>
> The second significant departure in Halper was the Court's decision to "asses[s] the character of the actual sanctions imposed," rather than, as Kennedy demanded, evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction[.] [internal cites omitted].
>
> We believe that Halper's deviation from longstanding double jeopardy principles was ill considered.

Hudson, 118 S.Ct. at 493-94. *See also*, Cutshall v. Sundquist, 193 F.3d 466, 473 (6th Cir. 1999) ("According to the Hudson Court, Halper improperly skipped the first step in the analysis, and focused on whether the sanction was so grossly disproportionate to the harm caused so as to constitute punishment."), *cert. den.,* 2000 WL 36203, 68 USLW 3461 (no. 99-1123) (U.S. April 3, 2000).

Goad correctly cites Hudson for the proposition that express legislative intent to impose a civil remedy is entitled to great weight. (initial brief, p.16). Inexplicably, he then all but ignores Hudson; citing it once more without analysis. (initial brief, p.18). In so doing, he commits the very error the Hudson Court ascribed to Halper--failure to pay more than lip service to repeated, express legislative determination §960.297 is civil

in nature, and elevation of its alleged punitive effect above all other considerations.[4]

This Court's analysis of §960.293 and related statutes in Ilkanic foreshadows the conclusion §960.297 is "civil." Ilkanic raised due process and equal protection challenges to the $50 per diem charge and statutory lien for incarceration costs. Addressing the reasonableness of §960.293, the Court analogized to the lien created by a civil judgment on a debt; and necessarily passed upon the character of the larger act:

> We conclude that imposing a per diem charge on convicted offenders clearly relates to a permissive legislative objective of reimbursing public bodies for the costs expended in incarcerating these persons. Furthermore, we believe that the flat charge of $50 per day is reasonably related to the costs of incarceration.
>
> * * *
>
> There is no provision for holding the prisoner in contempt upon the failure to pay. ... Thus, the lien created upon the imposition of the per diem charge has the same effect as the lien created by the entry of a civil judgment. ... Should the city seek to impose the lien against Ilkanic's property, he retains the same

[4]Goad muses: "the practical effect of §960.297 is to relieve the State ... from its own wrongdoing" by providing for a counterclaim which can exceed the damages cap in the statutory waiver of sovereign immunity. (initial brief, p.15 n.6). This point, not raised below, is frivolous, given he did not appeal from the summary judgment against him. His speculation the State will collect from only a "minuscule" number of inmates goes to the wisdom of the statute, and ignores the fact local governments also can collect incarceration costs.

> protections afforded to any civil judgment debtor.

Id. at 1372-3 [internal cites and quotes omitted].

Regardless of its placement within the Florida Statutes, §960.297 is civil in character. As the Ilkanic Court said of §960.293, the statute at issue here operates "in the same manner" as a statute establishing a civil cause of action, and has the "same effect" as such a statute.

Equally important, §960.297 does not render criminal, prior conduct which was legal when originally done. It does not affect the length of Goad's sentence or accrual of gaintime, or deprive him of a defense available when he committed his crimes. An incarcerated felon unable to satisfy the lien is not held in contempt or placed under more strict confinement; length of sentence and gaintime are not affected. Once released, a felon who cannot pay is not jailed or subjected to stricter supervision.

The statute does not seek recovery beyond a governmental entity's actual costs of incarceration. The liquidated damages amount of $50 per day is the same for all non-capital, non-life felons. It is not higher for inmates requiring greater supervision due to a history of disciplinary problems. Given this, and the stated legislative intent of reimbursement,

§960.297 cannot be viewed as a punitive measure. *See* People v. Rivera, 65 Cal. App.4th 705, 707 & 711 (Cal. 3d App. Dist. 1998) (upholding against ex post facto attack a statute imposing a "booking fee" for crimes committed before its effective date, as the fee was limited to actual administrative costs without regard to nature of offense; the legislature did not have a punitive intent; and effect of statute not penal).

Goad correctly observes §960.297 applies only to criminals, then wrongly concludes the statute is punitive. (initial brief, p.15-16). The fact a statute inherently applies only to criminals does not make it punitive. For example, the U.S. Supreme Court has upheld a statute permitting more time to pass between parole hearings against an ex post facto attack. *See* California Dept. of Corrections v. Morales, 115 S.Ct. 1597, 1602 (1995) (observing the challenged statute, instead of altering the punishment for a crime, altered the "method to be followed" in fixing a parole release date under identical substantive standards).

Since §960.297 applies only to imprisoned criminals, it inherently applies only to those not swayed from crime by the possibility of imprisonment. Those not thwarted by prison sentences are very unlikely to be deterred by possible liability for the cost of their incarceration. The creation of a cause of

action to recover incarceration costs cannot be deemed a real deterrent.

Section 960.297 does not possess attributes of a criminal statute. *See* Hendricks, 117 S.Ct. at 2082 ("As a threshold matter, commitment under the [Kansas] Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence."). It is much like the statute upheld in Taylor v. State of Rhode Island, 101 F.3d 780 (1st Cir. 1996), *cert. denied* 117 S.Ct. 2480 (1997); which applied only to criminals, by imposing a monthly fee to offset government cost of supervising parolees:

> [T]he offender fee statute ... imposes a civil charge. The modest fee authorized by the statute comprises no part of any sentence imposed for the crimes committed by offenders. Rather, it is expressly designed to "reimburse" the Department for costs directly associated with providing goods and services required to supervise probationers and parolees living in the community. ... Finally, the same monthly fee is assessed against all offenders ... without regard to the nature or severity of their respective offenses. In our judgment, so modest a cost-based supervisory fee reasonably cannot be deemed punitive in purpose, especially since any conceivable retributive or deterrent effect could only be inconsequential.

Id. at 783-4. *See* Vickson v. Singletary, 734 So.2d 376, 377 (Fla. 1999) (upholding prisoner indigency statute against ex post facto attack because it did "not directly increase an

inmate's sentence" and "because the statute has neither the intent nor the effect of increasing an inmate's punishment"). Section 960.297 is civil, and does not implicate Goad's rights against ex post facto legislation.

3. The Lien For Incarceration Costs Is Not Punitive

If a statue does not expressly impose criminal punishment, the second component of the Hudson analysis is "whether the statutory scheme was so punitive either in purpose or effect, as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty[.]" *Id.*, 118 S.Ct. at 493. This determination is made by applying the seven criteria used in Mendoza-Martinez, 83 S.Ct. at 567-75 (concluding statute which stripped draft evaders of U.S. citizenship was punitive, based on longstanding legislative history). DOC will address each one separately.

a. No affirmative disability or restraint is imposed by §960.297

An "affirmative disability or restraint" generally is some sanction "approaching the infamous punishment of imprisonment." Hudson, 118 S.Ct. at 496. There, the sanctions were monetary penalties and occupational debarment for violation of banking practices. The Court held the sanctions did not involve an “affirmative disability or restraint” as that term is normally

understood; as occupational debarment does not approach the "infamous punishment" of imprisonment. *Id.* The imposition of a lien for incarceration costs is far less a sanction. It does not increase a sentence, impose more stringent conditions during confinement, impose conditions on supervised release, or affect an inmate's accrual or retention of gaintime.

b. §960.297's sanctions not historically regarded as punishment

As intimated by the first factor, punishment historically has been thought of as "incarceration, incapacitation, and rehabilitation." Cutshall, 193 F.3d at 475. Section 960.297 does not do any of these things. Also, as stated in Hudson, money penalties generally have not been viewed as punishment historically. *Id.*, 118 S.Ct. at 495-496. In such light, Goad's heavy reliance on the use of the word "restitution" in §960.297 (initial brief, p.17) is trivial.

Goad analogizes to In re Thomas L. Maxwell, 229 B.R. 400 (E.D. Ky. 1998). (initial brief, p.18). Maxwell was convicted for DUI, incarcerated, and ordered to pay certain costs, including those for confinement, of about $6,000. Later he filed for protection under ch. 7 of the Bankruptcy Code. The county to which he owed costs petitioned for a determination

such costs were not dischargeable. The question turned on the nature of the debt under §523(a) of the Code.[5] *Id.* at 401-2.

Seeking to avoid the bulk of his $6,000 debt, Maxwell argued his costs were compensation for an actual loss sustained by the county, and therefore could be discharged. *Id.* at 402. The court disagreed, holding the debt was "penal in nature" (*id.* at 405) and could not be discharged.

On this thin reed, Goad urges recovery of incarceration costs is also penal. DOC relies on its larger argument herein, and notes the specific flaws in Goad's analogy.

First, the costs in Maxwell were imposed at sentencing, as part of punishment. The lien sought by DOC arose only after Goad had been in prison for several years, when §960.297 was enacted. Second, the express purpose of the statutes imposing the lien for incarceration cost is "to alleviate the increasing financial burdens on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders"; and to "fully compensat[e]" the state and local governments for "damages and losses incurred as a result of criminal conduct."

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[5]In part, 11 U.S.C. §523(a)(7) provides a specified debt is not discharged: "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss[.]"

See §960.29 & .29(3)(a). The same was not true for the Kentucky statute. *See id.*, 200 B.R. at 403-404.

Next, a federal trial court's interpretation of the Bankruptcy Code brings no weight to bear upon this Court's interpretation of state law, particularly in the face of express statutory language declaring the lien for incarceration costs to be civil. To the contrary, the dictates of federalism would require federal courts to defer to this Court's interpretation of state laws such as §960.297. *See e.g.*, Mullaney v. Wilbur, 95 S.Ct. 1881, 1886 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law[.]"). Maxwell provides no authority for concluding the incarceration costs assessed obtained against Goad are penal in character.

c. §960.297 does not require scienter

The third Mendoza-Martinez factor addresses whether the lien is imposed only on a finding of scienter (guilty knowledge). Although only those persons convicted of crimes are incarcerated and therefore subject to the lien, scienter itself does not trigger the lien. Not all convicted felons are incarcerated. It is only incarcerated felons who place a burden upon the state for their care and upkeep. The amount of incarceration cost lien ($50/day) does not increase with the severity of the crime.

It constitutes reimbursement for the typical costs of incarceration, not a penalty for all those who are guilty of offenses.

d. No promotion of punishment, retribution or deterrence

As said above, §960.297 applies only to incarcerated felons, and thus only to those not swayed from serious crimes by the possibility of imprisonment. It is unlikely that imposition of incarceration costs would deter people from crime any more than the threat of incarceration. Moreover, it is recognized "all civil penalties have some deterrent effect, and that deterrence may serve civil as well as criminal goals." Hudson, 118 S.Ct. at 496.

At pages 21-4, Goad offers an array of cases holding fines and penalties cannot be retroactively increased. Such authorities evade the critical question; that is, whether incarceration costs are indeed a fine or penalty. As urged throughout this brief, such costs are not.

Goad's final point is based on Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). He quotes a phrase from that decision out of context, for the proposition any retroactive "disadvantage" to an offender violates the "*ex post facto* prohibition." (initial brief, p.25).

Waldrup involved an ex post facto challenge to gaintime statute amendments, which decreased the maximum amount of gaintime inmates could receive. The reduction effectively increased the proportion of a sentence an inmate had to serve. Directly affecting length of incarceration, retroactive application was found to be ex post facto. There is nothing comparable here. Imposition of incarceration costs has no affect on the length of Goad's sentence or eligibility for gaintime.

e. §960.297 does not apply to behavior which is already a crime

The triggering event for the lien is the fact of incarceration since July 1994, not any particular crime. The lien amount is $50 per day for all non-capital, non-life felonies. It is not made higher for felons whose crimes were more serious, or to inmates requiring greater supervision due to a history of disciplinary problems. It does not apply to felons who are not incarcerated. Therefore, liability for incarceration costs attaches not to the crime itself or post-imprisonment behavior, but to the fact of being in prison. Section 960.297 does not suffer from the infirmity found in Montana's tax on illegal drugs, which was conditioned on commission of a crime. Goad's reliance (initial brief, p.19) on

Department of Revenue of Mont. v. Kurth Ranch, 114 S.Ct. 1937 (1994) is misplaced.

The sex-offender registration statute upheld in Cutshall operated only against persons convicted of crimes. *See id.*, 193 F.3d at 470-1 (quoting and describing the Tennessee Sex Offender Registration and Monitoring Act). That court had no difficulty rejecting the ex post facto challenge. *Id.* at 477. While of some significance, the fact §960.297 operates only when someone is incarcerated after committing a crime is much less important than all the other factors establishing the statute's non-punitive character.

f. §960.297 has a rationally connected alternative purpose, [and]
g. the lien imposed is not excessive in relation to that alternative purpose

The last two factors, as the Cutshall court noted, ask whether a law has a remedial purpose; and, if so, whether the law is excessive in relation to the remedial purpose served. *Id.*, 193 F.3d at 476.

The Florida Legislature expressly declared the lien statute's rational, non-punitive alternative purpose:

> The Legislature also finds that there is an urgent need to alleviate the increasing financial burden on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders.

§960.29, Fla. Stat. (Supp. 1994). This Court has recognized such expression of legislative intent. Ilkanic, 705 So. 2d at 1372-3.

The final consideration is whether the sanction is excessive in relation to the alternative purpose. Section 960.297 does not seek recovery beyond a governmental entity's actual costs of incarceration. This Court specifically found the amount of $50 per day to be "reasonably related to the costs of incarceration." Ilkanic, 705 So. 2d at 1373, n.2. As the per diem charge is reasonably related to the costs of incarceration, and the rational purpose of the lien is for the state to recover such costs; the resultant lien--an accumulation of daily costs--is not excessive.

By committing a felony which carried a substantial sentence, Goad placed himself in prison long enough for incarceration costs to have reached $45,000 when DOC counterclaimed in December 1996. (R:35-9). It is ludicrous for him to imply the resulting lien is excessive. Under such reasoning, any inmate could avoid liability by claiming the lien was excessive due to the lengthy amount of time spent in jail. If the $50 per day amount is reasonable, a lien based on the accumulation of reasonable daily charges is not rendered unreasonable just because an inmate has been in prison for several years.

ISSUE II

WHETHER APPLICATION OF §960.297, FLORIDA STATUTES, TO INMATES WHOSE CRIMES PRECEDED THAT LAW, VIOLATES SUBSTANTIVE DUE PROCESS.

Section 960.297 does not operate in isolation. While it creates a cause of action for recovery of incarceration costs incurred after July 1, 1994, it directs governmental entities to seek such "damages and losses [as] set forth in §960.293." In turn, §960.293(2)(b) establishes liquidated damages of $50 per day for incarcerating non-capital and non-life felons. Goad's motion for judgment on the pleadings, nominally attacking only §960.297, implicates §960.293 as well.

In Ilkanic, this Court rejected procedural and substantive due process challenges to §960.293(2)(b). Addressing Ilkanic's substantive due process challenge to the "flat per diem charge," it said:

> We conclude that imposing a per diem charge on convicted offenders clearly relates to a permissive legislative objective of reimbursing public bodies for the costs expended in incarcerating these persons. Furthermore, we believe that the flat charge of $50 per day is reasonably related to the costs of incarceration.

Id. 705 So.2d at 1372-3.

The same reasoning applies to §960.297. The statute creates a cause of action; that is, the right to seek the $50 per day

incarceration costs. The cause of action expressly relates to the legislative objective of reimbursement. Since the liquidated damages amount of $50 per day does not offend substantive due process, the mechanism for seeking such damages does also does not.

Not only does §960.297 expressly cross-reference §960.293, both sections were enacted and amended in the same legislation. *See* chapters 94-342 and 95-184, Laws of Florida. As statutes enacted in the same laws, they must be construed together. Okeechobee Health Care v. Collins, 726 So.2d 775, 776 (Fla. 1st DCA 1998) ("Especially when enacted into law simultaneously, subsections of the same statute must be construed in pari materia."). Since §960.293 and §960.297 must be construed together, the Ilkanic decision--while nominally addressing only §960.293--controls. The decision below properly recognized this. (*See* slip op., p.3). Facially, §960.297 does not violate substantive due process.

Not able to facially attack §960.297 on substantive due process grounds, Goad's argument takes a subtle turn. He contends he has a substantive due process right against alteration of his allegedly settled or reasonable expectation he would not--at the time of his crimes--pay for future costs of incarceration. Initially, this contention is belied by the

cases he cites, which all involve application of new law to private business or employment relationships, or contracts. None involve a law similar to §960.297.

Furthermore, both of Goad's assumptions are erroneous. First, for the reasons set forth above, §960.297 does not operate retroactively. Second, Goad has no reasonable or settled interest in not paying future incarceration cost. He does not, and cannot, maintain he had a property or contract interest against paying these costs when he committed his crimes. His point is no more than wishful thinking, that the law will not prospectively change in a manner he opposes. *See* Landgraf, 114 S.Ct. at 1510, n.24:

> Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property[.] ... See Fuller 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever"). [internal quote and cites omitted].

Goad's argument effectively transforms his ex post facto claim into a broad substantive due process claim against any alteration of the status quo when he committed his crime. He would use the Due Process Clause to swallow the Ex Post Facto Clause.

By analogy, Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (11th Cir. 1997) is quite helpful. The plaintiff alleged a taking through rezoning of its property to prohibit high-density apartment complexes, and sought relief based on a number of constitutional theories. Parsing those theories, the court listed which were viable, including:

> A substantive due process claim based upon the arbitrary and capricious action of the government in adopting the regulation. ...

Id. at 65. The court then turned to the substantive due process claim actually presented, and said:

> There is no substantive due process "takings" claim that would protect a specific property right not already protected by the Takings Clause. In other words, if the right to the specific use of the property is not protected by the Takings Clause, either as to just compensation or invalidation, it is not protected by the Constitution of the United States, except as set forth above.

Id.

Goad's substantive due process claim challenges application of a facially valid statute to inmates whose crimes preceded its enactment. Such claim is exactly what the Ex Post Facto clauses of the U.S. and Florida Constitutions protect. By analogy to Villas of Lake Jackson, Ltd., Goad has no substantive due process claim apart from the facial challenge resolved against him by Ilkanic.

CONCLUSION

This Court should reverse the decision below as to its conclusion §960.297 is retroactive when applied to Goad. It should approve the First DCA's conclusion §960.297 provides a civil remedy without imposing punishment, reject Goad's substantive due process claim, and affirm the result of the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a true copy of Appellee's answer brief has been furnished by U.S. Mail to **PETER M. SIEGEL**, Attorney for Petitioner, Florida Justice Institute, Inc., 2870 First Union Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2310; this ___ day of _____, 2000.

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