ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THOMAS SOLOMOS AND LUCAS PITTERS,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,

Petitioners,

vs.

SHERIFF KEN JENNE,

Respondent.
_____/

CASE NO. SC01-510

AMENDED INITIAL BRIEF OF PETITIONERS

ON DISCRETIONARY REVIEW
FROM THE FLORIDA FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

A. Nature of the Case and Jurisdictional Statement

This case is before the Court on discretionary review of an opinion of the Fourth District Court of Appeal expressly declaring *Fla. Stat.* § 951.033 constitutionally valid and upholding the Sheriff's administrative program for collecting fees from inmates under the authority of *Fla. Stat.* § 951.033. The court of appeal upheld the circuit court's grant of summary judgment for the Sheriff, rejecting Petitioners' class claims for declaratory and injunctive relief.

Jurisdiction for review is conferred upon this Court by *Fla.R.App.P.* 9.030(a)(2)(A)(i)-(iii).

B. Course of Proceedings and Disposition Below

Named plaintiffs (petitioners in this court) Thomas Solomos and Lucas Pitters filed a class action complaint for declaratory and injunctive relief challenging the Sheriff's assessment of fees. R1:1. The Sheriff answered with affirmative defenses. R1:13. Plaintiffs moved for and were granted class certification. R1:85. Defendant appealed class certification, and the court of appeal affirmed. *Jenne v. Solomos*, 707 So.2d 1203 (Fla. 4th DCA 1998).

In the circuit court, each side moved for summary judgment. R2:153, R2:195. The cross motions for summary judgment were briefed and heard on oral argument. The judge ruled from the bench, granting Defendant's motion for summary judgment and denying Plaintiffs' cross motion for partial summary judgment on

liability. R2:281.

The court then entered Final Judgment for the Sheriff. R2:283. Plaintiffs appealed to the Fourth District Court of Appeal. R2:285. After oral argument, the court of appeal affirmed, holding, *inter alia*, that *Fla. Stat.* § 951.033 was valid. *Solomos v. Jenne*, 776 So.2d 953 (4th DCA 2000). Petitioners timely filed a notice invoking this Court's discretionary jurisdiction. The parties filed briefs on jurisdiction. This Court accepted jurisdiction by order of October 25, 2001 (Table, No. SC01-510).

C. Statement of the Facts

Undisputed facts were presented to the trial court on motion and cross-motion for summary judgment based on the pleadings and pretrial discovery materials introduced into the record: the deposition and affidavit of Linda Kristofik, the Sheriff's expert witness in charge of administering the Sheriff's program herein challenged, the Sheriff of Broward County Department of Corrections Standard Operating Procedures, and the Inmate Handbook.

These facts may be summarized as follows. Plaintiffs are/were inmates of the Broward County Jail, as determined by the Court's amended order certifying the case as a class action. R1: 103. Pursuant to Broward County Jail Standard Operating Procedure (hereinafter "SOP") 1.2.12, R2:170, Plaintiffs were assessed subsistence fees at the rate of $2.00 per inmate per diem. In addition, a $10.00 flat fee per inmate was assessed

upon admission to the jail; this fee is described by the Inmate Handbook as a "processing fee" and by the SOP as a fee for uniforms.

In 1996, the Sheriff adopted SOP 1.2.12 in order to implement *Fla. Stat.* § 951.033. The statute provides as follows:

> (1) There is an urgent need to alleviate the increasing financial burdens on local subdivisions of the state caused by the expenses of incarcerating prisoners. In addition to the prisoner's cash account on deposit in local detention facilities, *many prisoners have sources of income and assets outside of the facility, which may include bank accounts, inheritance, real estate, social security payments, and other types of financial resources.*
>
> (2) The local detention facility *shall determine the financial status of prisoners* for the purpose of paying from their income and assets all or a fair portion of their daily subsistence costs. In determining the financial status of prisoners, any income exempt by state or federal law shall be excluded. *Consideration shall be given to the prisoner's ability to pay,* the liability or potential liability of the prisoner to the victim or guardian or the estate of the victim, and his or her dependents.
>
> (3) The chief correctional officer of a local subdivision may direct a prisoner to pay for all or a fair portion of daily subsistence costs. *A prisoner is entitled to reasonable advance notice of the assessment and shall be afforded an opportunity to present reasons for opposition to the assessment.*

[emphasis added].

The collection of fees by the Sheriff from jail inmates commenced on or about August, 1996, as established by the "Daily Subsistence Process Fees Printout" produced by Sheriff on pretrial discovery. R2:213. This document shows the total fees collected from inception through November 30, 1999, as follows:

Uniform fees collected = $ 497,290.00

Subsistence fees collected = $1,228,741.00

TOTAL FEES COLLECTED = $ 1,726,031.00

With respect to determining "the financial ability of each inmate to pay," the Sheriff adopted a bright-line test: an inmate has "the ability to pay" if he or she has more than a zero balance in the inmate's account:

> To determine an inmate's financial status, the Sheriff reviews whether there is a balance in the inmate's escrow account.[1] If an inmate has a zero balance in his or her escrow account, the Sheriff deems those inmates indigent and does not assess or charge costs against them. If the inmate has a positive balance in the escrow account, then the Sheriff deems them financially able to pay for subsistence costs.

R2:166 [Affidavit of Linda Kristofik]. Fees are assessed and charged simultaneously if there is a positive balance in an inmate's account and the monies are not subject to the superseding obligations recognized by the Sheriff. R2:170.

With respect to the statute's command to exclude "exempt" income, the Sheriff's procedure is to exempt social security and other government checks by refusing to deposit them. R2:258. The Sheriff also exempts funds needed to comply with court-ordered restitution.

The Sheriff has no procedure to consider the source of the inmate's funds on deposit and had never examined the source since

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[1] "Inmate Escrow Account" is defined by SOP 1.2.12 as "Individual banking account held in trust for inmates incarcerated in DCR [Department of Corrections]." R2:170. "Indigent Inmate" is defined by the same SOP as "An inmate with a zero balance in their [sic] escrow account."

the inception of his subsistence fee program. R2:233. No other procedure exists to exclude any income exempted by federal or state law from the Sheriff's assessments. R2:241. The official charged with administering the program did not know what was exempt by state or federal law. R2:232.

§ 951.033(3) requires that inmates receive "advance notice of the assessment and an opportunity to present reasons for opposition to the assessment." The Sheriff provides notice by posting throughout the jail. R2:168. The Inmate Handbook issued to each inmate upon admission to the facility states that the daily subsistence fee "will be automatically deducted each day from your commissary account." R2:264.

The first opportunity for inmates to oppose an assessment is after the assessment has already been made. The Inmate Handbook provides for filing a grievance "concerning a facility operations, procedure, or staff." R2:266. This section of the Handbook makes no mention of assessments for subsistence. The Inmate Handbook section explaining assessments for subsistence makes no mention of the grievance procedure. R2:264.

After Mr. Solomos was booked into the jail, a friend supplied his account with $75.00 so that he could buy personal hygiene items. R1:9-10. Because he had funds in his account, the Sheriff determined that he was able to pay the assessment and deducted subsistence fees and the uniform or processing fee. R1:10. As of the date of the Sheriff's Answer, $22.00 had been deducted. R1:16. After learning of this deduction, Petitioner

Solomos objected in writing to the Sheriff's assessment. R1:10. The same day, he received notice that his objection was denied R1:10.

Mr. Solomos was indigent and was represented by counsel pro bono. R1:9. Under the Sheriff's program, a judicial declaration of indigency does not bar the Sheriff from imposing his subsistence assessments. R1:90, 135.

SUMMARY OF ARGUMENT

The district court of appeal erroneously interpreted the statutory law and constitutional principles that govern this case. Given the undisputed material facts, Plaintiffs were entitled to judgment as a matter of law on both their statutory and constitutional claims.

The Statutory Claim

The Sheriff's policy, SOP 1.2.12, as written and as enforced, violates *Fla. Stat.* § 951.033. The Sheriff charges inmates who are in fact and law indigent based solely on the possession of $2.00 or more in an inmate's escrow account. By contrast, the statute recites that "many prisoners have sources of income and assets outside of the facility . . . ." This is a clear indication of the legislative intention that these sources be considered in determining an inmate's actual "financial status." The Sheriff's test of ability to pay is not a determination of "financial status" within the meaning of the statute but a mechanistic computation that undermines the legislative purpose. It is not a bona fide compliance with the

statutory mandate that "consideration shall be given to an inmate's ability to pay."

The mechanical approach of SOP 1.2.12 is also contrary to the requirement of Section 951.033(2) to consider an inmate's "potential liability" to the victim or others. This aspect of the statute is completely ignored. Likewise, the Sheriff's policy violates § 951.033(2) by failing to consider (except for court-ordered restitution and government checks) whether an inmate's funds may be subject to exemptions under state or federal law. The exemption would apply to any income earned by a head of a household under Florida law, § 222.11. Likewise, monies obtained under a disability income benefits policy of insurance are exempt. § 222.18.

Finally, the Sheriff charges both a $2.00 per day subsistence fee and, as stated in the Inmate Handbook, a separate one-time fee of $10.00 for "processing." Processing is not by any definition an item of subsistence. Consequently, the $10.00 charge by the Sheriff for "processing, as stated in the Inmate Handbook is not authorized by the statute but is *ultra vires*. To the extent that SOP 1.2.12, which labels the $10.00 fee a uniform fee, may be deemed to override the Inmate Handbook, there is a lack of adequate notice to the class of inmates of that charge.

The Constitutional Claims

A. SOP 1.2.12 violates procedural due process.

The Sheriff's standard operating procedure, SOP 1.2.12, as written and as enforced, denies plaintiffs procedural due process

of law under the Fourteenth Amendment. There is no reasonable opportunity to oppose an assessment or to demonstrate indigency *in advance* of the deprivation of an inmate's property. The Sheriff's post-deprivation procedure is untimely (and also inadequate). Although there are circumstances in which a post-deprivation hearing may pass constitutional muster, they involve emergencies or other extraordinary circumstances not present here. Thus, SOP 1.2.12 violates the rule of *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Even if a post-deprivation hearing is deemed adequate process in the circumstances of this case, the Sheriff's procedure fails to meet constitutional standards for the simple reason that it does not provide fair notice of the opportunity to be heard. On the contrary, the process is illusory. First, the notice printed in the handbook states that such fees "will" be charged "automatically." This is not language reasonably calculated to convey to inmates that grounds for opposing it and a procedure for opposing it may exist.

Second, the grievance procedure in the Inmate Handbook does not mention subsistence fees at all; and the statement in the Inmate handbook concerning fees does not mention the grievance procedure. It takes a lawyer's skill to synthesize the two passages, separate by two plus pages of text, into the conclusion that the assessment of fees may be the subject of a grievance. Again, this is not language reasonably calculated to bring to the attention of the inmates that they have the right to be heard in

opposition to the assessment of fees. On the contrary, the Sheriff's procedures are effectively hidden and fail to give inmates meaningful notice of their right to be heard, as required by due process of law.

Third, even if the inmate is skillful enough to divine that the grievance procedure may be harnessed to challenge an assessment of fees, there are no grounds that the inmate could invoke in his behalf except for court orders. R2:237-38. No grounds are recognized by SOP 1.2.12. None are stated in the Inmate Handbook. The statute, which might provide a clue to the inmate, is not printed in the Handbook. And even if it were, it could make no difference.

The Administrator reviewing the grievance would have to reject all claims except for those based on a pre-existing court order. Following SOP 1.2.12, he or she would be obligated to deny the grievance so long as the inmate had a positive balance in his account. This is not "a meaningful, full and fair" opportunity to be heard but rather one that is "merely colorable" or illusory. *Rucker v. City of Ocala*, 684 So.2d 836, 841 (Fla. 1st DCA 1996). The *Rucker* standard was applied to invalidate an administrative hearing process as not offering a "full and fair opportunity to challenge" a water bill in *Miami-Dade County v. Reyes*, 772 So.2d 24, 29 (Fla. 3d DCA 2000).

Finally, even assuming *arguendo* that the post-deprivation grievance procedure were reasonably comprehensible to inmates and offered a real opportunity to prevail on some unspecified showing

by the inmate, the procedure would still be invalid under the Fourteenth Amendment. It requires inmates to prove some (unknown) ground of exemption to the assessments rather than requiring the Sheriff to fulfill his duty to make the initial determination that the inmate is subject to an assessment. Instead of putting the burden on inmates to show their inability to pay, the Sheriff's staff must make the affirmative finding that the inmate has the requisite "financial status" to be able to pay. This is what § 951.033(2) requires. It is also a requirement of procedural due process. *See Armstrong v. Manzo*, 380 U.S. 545 (1965).

B. § 951.033 violates the Florida Constitution.

Finally, § 951.033 violates Florida constitutional law principles of separation of powers and nondelegation. It is "so lacking in guidelines" as to violate the Florida Constitution, Art. I, sec. 18 and Art. II, sec. 3. *Askew v. Cross Keys Waterways*, 372 So. 2d 913, 924 (Fla. 1978). This results from the vagueness of its operative terms such as "financial status," "exempt" income, "potential liability," and "ability to pay." Because of the elasticity of its key terms, it necessarily confers power upon the Sheriff, an executive branch official, to say what the law is. "The legislature may not delegate the power to enact a law, to declare what a law shall be, or to exercise an unrestricted discretion in applying a law." *Lewis v. State Board of Health*, 143 So.2d 867, 874 (Fla. 1st DCA 1962). Such a statute is unconstitutionally vague and will be stricken. *See*

D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977).

ARGUMENT[2]

I. THE SHERIFF'S PROGRAM FOR COLLECTING FEES FROM INMATES UNDER SOP 1.2.12 VIOLATES FLA. STAT. § 951.033.

The Sheriff's policy, SOP 1.2.12, as written and as enforced, violates § 951.033, Florida Statutes, because it defines inmates' "ability to pay" based solely on the possession of a "positive balance" in their individual escrow accounts. This is contrary to the mandate of Section 951.033(2) that the Sheriff "shall determine the financial status of prisoners for the purpose of paying from their income and assets" toward their subsistence costs. The Sheriff's policy makes no bona fide effort to determine the inmates' actual ability to pay as required by the statute. Most glaringly, it ignores the legislative intention to go after "sources of income and assets outside of the facility" as directed by §951.033(1).

The statute attempts to strike a balance between the State's interest in funding the corrections system and the ability of inmates to shoulder the costs of their upkeep. It directs the Sheriff to determine the "financial status" of inmates in order that they pay "all or *a fair portion*" of their upkeep. Is it conceivable that any inmate with $2.00 to his name is ipso facto able to pay? Merely to pose the question is to answer it.

A positive balance in the inmate's account is simply not a sufficient factual basis on which to impose an assessment.

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[2]All questions presented by this case are issues of law and are subject to *de novo* review.

Indeed, the Legislature mandated further inquiry: the Sheriff must exclude "income exempt by state or federal law"; but the Sheriff complies only to the extent of exempting social security checks, which, ironically, are specifically cited by the statute as a source of outside income. There is no inquiry as to whether an inmate's funds may be exempt because he is, for example, head of a household.[3] The mechanical approach of SOP 1.2.12 is also contrary to the requirement of Section 951.033(2) to consider an inmate's ability to pay taking due account of "potential liability" to the victim or others. This aspect of the statute is completely ignored.

The requirements of the statute cannot possibly be obeyed simply by noting that the inmate has a positive balance in his account. Yet, except for court-ordered restitution and government checks, the Sheriff has no procedure to determine if any exemptions provided in Section 951.033(2) apply.[4] Deposition of Linda Kristofik, R:166.

Additionally, Section 951.033 permits the Sheriff to charge prisoners only for "their daily subsistence fees." But the

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[3]The exemption would apply, for example, to any income earned by a head of a household under Florida law, § 222.11. Likewise, monies obtained under a disability income benefits policy of insurance are exempt. § 222.18.

[4] Consequently, an inmate is required to pay the Sheriff before reserving funds to pay an alleged victim in a criminal case. In many situations, defendants who would otherwise be able to receive early terminations of their probations because they have completed restitution are prevented from doing so because the Sheriff had earlier failed to take into consideration that prisoner's obligations and seized the monies in the escrow account which could otherwise have gone for restitution.

Sheriff also charges an additional one-time fee of $10.00 for "processing." R2: 262. Processing is not by any definition an item of subsistence. Consequently, the $10.00 charge by the Sheriff for "processing" as stated in the Inmate handbook is not authorized by the statute but is *ultra vires*. To the extent that SOP 1.2.12, which labels the $10.00 fee a uniform fee, may be deemed to override the Inmate Handbook, there is a lack of adequate notice of that charge to the class of inmates.

II. THE SHERIFF'S PROGRAM FOR THE COLLECTION OF FEES FROM INMATES UNDER SOP 1.2.12 VIOLATES PROCEDURAL DUE PROCESS OF LAw UNDER THE FOURTEENTH AMENDMENT.

A. Due Process Requires a Pre-Taking Opportunity for Hearing

The Sheriff's procedure is to charge first and field questions later. But no questions arise unless the inmate is legally astute enough to parse the Inmate Handbook to infer that a post-deprivation challenge to fees may be made via the grievance procedure. Under SOP 1.2.12 the inmate suffers an immediate loss when the Sheriff charges him for "processing" and subsistence costs. Assuming *arguendo* that a valid post-deprivation remedy exists, inmates first suffer the loss of their funds and then must wait through the Sheriff's grievance process before the inmate could possibly obtain the return of the funds. To the indigent inmate with a few dollars on account, this is unfair and harsh, potentially denying him access to funds that may be essential to his well being.

The process that is due in this non-emergency circumstance is "at a minimum notice and opportunity to be heard *before*" funds

are taken from the inmate. *County of Pasco v. Riehl,* 635 So.2d 17, 18-19 (Fla. 1994). The Sheriff does not have any greater power than a court to take property without timely notice and hearing.

In *Fuentes v. Shevin,* 407 U.S. 67 (1972), the Supreme Court overturned Florida and Pennsylvania laws that authorized the summary seizure of goods and chattels in a person's possession under a writ of replevin. The Court held that the laws were constitutionally defective in violation of procedural due process in failing to provide for hearings at "a meaningful time." The Florida replevin process guaranteed an opportunity for a hearing after the seizure of the goods, and the Pennsylvania process allowed a post-seizure hearing if the aggrieved party shouldered the burden of initiating one. But neither statute provided for notice or opportunity to be heard before the seizure. Both statutes were stricken.

Likewise the Sheriff's procedure does not provide for an opportunity to be heard before the seizure. In the instant situation, the Sheriff assesses and charges simultaneously. In other words, at the moment of assessment, the Sheriff seizes the monies from the inmate's escrow account. Then, as in the Pennsylvania procedure, the inmate must shoulder the burden of initiating a post-seizure hearing, which is illusory in any event.

In order to satisfy the requirements of due process, notice and opportunity to be heard must precede the taking:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."
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> [This] Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

Fuentes v. Shevin, 407 U.S. at 81-2 [Internal citations omitted]. *Accord, K.M.T. v. Dept. of H.R.S.,* 608 So.2d 865, 870 (Fla. 1st DCA 1992).

The statute itself appears to be consistent with these basic principles of procedural due process. It provides for "reasonable advance notice of the assessment and ... an opportunity to present reasons for opposition to the assessment." The word "advance" should be construed to modify "opportunity to present reasons." Where a statute is ambiguous and there is a choice between a construction that renders the statute invalid and one that saves it, the court should choose the constitutional construction. "We are conscious of our duty to interpret a legislative Act so as to effect a constitutional result if it is possible to do so." *Cassady v. Consolidated Naval Stores, Co.,* 119 So. 2d 35, 37 (Fla. 1960). This may be accomplished by

applying the guideline of *reddendo singula singulis.* *See Roberts v. State*, 677 So.2d 309, 312 n.4 (1st DCA 1996).

The court of appeal rejected the argument that due process requires a pre-seizure hearing, *Solomos,* 776 So.2d at 956, invoking the authority of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974). But the court of appeal misapplied that case. In the first instance, *Grant* is a different case because it involved balancing private competing interests in the same parcel of property, whereas the Sheriff had and has no pre-existing property interest in the funds of inmates. Second, *Grant* allows for postponement of the required hearing only "where a full and immediate post-termination hearing is provided." *Id.* For the reasons shown in I.B. below, the "hearing" provided by the grievance procedure is neither full nor immediate, but is illusory, at best an empty formality.

Most important of all, the *Grant* exception to the *Fuentes* rule does not apply except where there is "a special need for very prompt action" in "extraordinary situations." *Fuentes*, 407 U.S. at 81. Postponement of the hearing is justified only in "exigent circumstances." *Connecticut v. Doehr*, 501 U.S. 1, 3 (1991). Thus, *ex parte* seizure has been upheld during wartime; to remove contaminated food from the marketplace; and to secure payment of tax delinquencies. See cases cited in *United States v. James Daniel Good Real Property,* 510 U.S. 43, 58 (1993).

By contrast, jail assessments are routine matters, not "extraordinary situations." The inmate is in the custody and

control of the Sheriff, as is his escrow account. There is no risk that he will flee with his money and thereby evade whatever obligation he may be found to have for subsistence. By comparison, pre-hearing seizure of the ship in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974), was justified on the ground that the ship "could be removed to another jurisdiction, destroyed, or concealed" if advance notice were given. That exemplifies what the Supreme Court means by "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut,* 401 U.S. 371, 378-379 (1971). Subsistence fees are simply not in that league.

A post-deprivation hearing is not constitutionally adequate. Even if the inmate were to regain all or part of his funds, the loss cannot be undone. Even "temporary or partial impairments to property rights are sufficient to merit due process protection." *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 964 (Fla. 1991); *Connecticut v. Doehr*, 501 U.S. 1, 3 (1991).[5]

The court of appeal contravened this principle. It also denigrated the inmates' property rights as "not a substantial one." *Solomos*, 776 So.2d at 956. But even "nominal" dollar amounts are entitled to constitutional protections. *See Phillips*

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[5]"The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. . . . [I]t is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Fuentes v. Shevin*, 407 U.S. at 87 (footnote omitted).

v. Washington Legal Foundation, 524 U.S. 156 (1998).

B. Even if a Post-Taking Hearing Would Satisfy Procedural Due Process, the Sheriff's Procedure Fails to Give Reasonable Notice to Inmates that Such a Hearing is Available, Fails to Provide Criteria for Granting Relief, and Unconstitutionally Shifts the Burden of Proof.

To satisfy due process, notice must be reasonably calculated to inform those affected that they have a right to be heard. This the SOP does not do. First, the Inmate Handbook simply states:

> Inmates booked into the Broward County jail System will be charged a $10.00 fee to cover the cost of processing. Inmates will be assessed a $2.00 a day subsistence fee. This fee will be automatically deducted each day from your commissary account.

R2:262. "Will be assessed" and "automatically" are not terms that suggest the existence of any remedy at all. The grievance procedure is not mentioned until page 5 and contains no reference to subsistence fees. Likewise, the statement about subsistence fees on the top of page 3 contains no reference to the grievance procedure. There is simply nothing to call an inmate's attention to any connection between the two. By failing to clearly explain that the grievance procedure also applies to objections to assessments for subsistence fees, the Sheriff's procedure places the burden on the prisoners to sniff out the review process and requires them to object in writing after the assessment is made.

Further, the procedure itself is hopelessly confused, appearing to require the inmate to appeal to the same person--the

"Administrator"--who denied his initial grievance.[6] But more fundamentally, the grievance procedure suffers the constitutional vice of shifting the burden from having the Sheriff determine "ability to pay" to having the inmate show that he is exempt from paying. The court of appeal approved the burden shifting by noting that "nothing prevents the inmate from bringing other liabilities to the attention of the administration." *Solomos*, 776 So.2d at 956.

But such burden shifting is unconstitutional. It was condemned by the United States Supreme Court in *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965). In that case, the Court held that the hearing subsequently granted to petitioner did not remove the constitutional infirmity of inadequate notice because petitioner was forced to assume burdens of proof which, had he been accorded advance notice of the proceedings, would have rested upon the moving parties. The Court further noted that "where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Analogously, the burden of filing a grievance arises only because the Sheriff seizes funds first. If he carried out his statutory obligation to determine the financial status of the inmate, the statutory burden to find non-exempt income or assets from an inmate with the "ability to pay" would have to be carried

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[6]The procedure described in the Inmate Handbook states that the inmate can file a grievance with the "Facility Administrator's Office" and then may appeal to the "Administrator" if his grievance is denied.

by the Sheriff.

But even if we assume *arguendo* that the burden shifting is not unconstitutional, there is still no light at the end of the inmate's tunnel. Rather, the grievance "procedure" is a kind of a Catch 22. If the inmate has a positive balance, he will be assessed. If he is legally astute enough to divine that the grievance procedure may be harnessed to challenge an assessment of "automatic" fees, he can offer no known grounds of objection that would be recognized by the Sheriff. None are stated in SOP 1.2.12. None are stated in the Inmate Handbook.

The statute, which might conceivably offer some guidance to a grieving inmate, is not printed in the Handbook. And even if it were, what good would it do? Because the SOP recognizes no exemptions beyond court-ordered restitution and government checks, an Administrator faced, for example, with an inmate's claim that the source of his money was income earned as head of a household and therefore "exempt" under *Fla. Stat.* § 222.11 would be obligated to deny the grievance--so long as the inmate had a positive balance in his account. Catch 22. Likewise, monies obtained under a disability income benefits policy of insurance are exempt under Florida law, § 222.18, but the Sheriff has no mechanism in place to protect such exemption, before or after assessment.

This is not a meaningful opportunity to be heard at a meaningful time and in a meaningful manner; rather it is merely an empty formality. "The opportunity to be heard must be

meaningful and not merely colorable or illusive." *Rucker v. City of Ocala*, 684 So.2d 836, 841 (Fla. 1st DCA 1996). "While there is no single inflexible test by which a court determines whether the requirements of due process have been met, the procedure in this case in no way comported with fundamental fairness." *S.B.L. v. State*, 737 So.2d 1131, 1133 (Fla. 1st DCA 1999).

The *McLeod* Case

The court of appeal relied to some extent "for guidance," *Solomos*, 776 So.2d at 956 n.1, upon a federal trial judge's order in *McLeod v. Henderson*, 1999 WL 1427749 (M.D. Fla.). In that case, a prisoner filed a *pro se* "shotgun" complaint alleging numerous civil rights violations against numerous defendants. In challenging the application of § 951.033 and its constitutional validity, McLeod's claims overlap some of those presented in the case at bench.[7] The federal district court dismissed the complaint with opinion.

At first thought, it might seem that the order of a federal trial court judge interpreting a state statute is entitled to respect, even though her opinion is obviously not as weighty as one rendered by a panel of appellate judges who specialize in the interpretation of legal principles. But even that limited deference is not justified in the circumstances of this case.

The federal trial judge had no proper role in construing, as a matter of first impression, a state statute challenged as

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[7]One issue not addressed by *Mcleod* is the $2.00 daily subsistence fee charged by the Sheriff of Broward County; only the booking fee was at issue in *McLeod*.

unconstitutional. That was and is a job for the state courts. A federal court should abstain in such a situation because its interpretation of state law

> is not binding on the state courts and may be discredited at any time thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless.

Moore v. Sims, 442 U.S. 415, 428 (1979). A federal court must take a challenged state statute at face value and cannot find it valid on the basis of a limiting construction that it supplies. *Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).* "Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out ..., we are without power to remedy the defects . . . ." *Hynes v. Oradell, 425 U.S. 610, 622 (1976).* Thus, the district judge should have abstained from finding the "spirit" of the statute, remitting plaintiff to state court remedies, or at least a limiting construction to guide the federal court upon plaintiff's return to the federal forum.

III. THE STATUTE IS IMPERMISSIBLY VAGUE AND CONSTITUTES A STANDARDLESS DELEGATION OF LEGISLATIVE POWER TO THE EXECUTIVE BRANCH IN VIOLATION OF THE FLORIDA CONSTITUTION.

Fla. Stat. 951.033 directs the Sheriff to determine the "financial status" of prisoners for the purpose of charging them a "fair portion" of their subsistence costs. It tells the Sheriff to give "consideration" to "ability to pay" (as well as to "potential liability" of the inmate to the victim or to his dependents). It also directs him to exclude income that is exempt by federal or state law. But it fails utterly to define

any of these terms.

It is apparent from such vague terminology that there is no standard at the core of this statute to govern the Sheriff's judgment in the matter of assessing fees for subsistence costs. The legislature might have directed the Sheriff to take a flat fee or a percentage of commissary funds on account. It might have followed its own income and assets criteria (which take account of dependents) set forth in *Fla Stat.* 27.52 for determining the indigency of a criminal defendant.[8] It might have directed the Sheriff to exempt those who are indigent under § 27.52 or, conversely, *not* to exempt those indigents who had a certain level of cash on account.

But the Legislature did none of these things. Instead, it conferred upon the Sheriff a completely unfettered discretion to determine an inmate's "financial status," "ability to pay," "potential liability" and income that is "exempt" by federal or state law. This it cannot do under established principles of separation of powers and nondelegation. See Art. I, sec. 18 and Art. II, sec. 3 of the Florida Constitution.

"The legislature may not delegate the power to enact a law, to declare what a law shall be, or to exercise an unrestricted discretion in applying the law." *Lewis v. State Board of Health,* 143 So.2d 867, 874 (Fla. 1st DCA 1962). Such a statute is

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[8]Fla. Stat. 27.52(2)(b) provides that an accused person is indigent if he has "income equal to or below 250 percent of the then current federal poverty guidelines prescribed for the size of the household of the accused by the United States Department of Health and Human Services . . . ."

unconstitutionally vague, denies due process and will be stricken. *See D'Alemberte v. Anderson*, 349 So.2d 164 (Fla. 1977). Likewise, such a statute, by reason of its vague and indefinite terms, is "so lacking in guidelines" as to confer upon the Sheriff the power to determine what the statute means; it thereby constitutes an unlawful delegation of legislative power to an executive branch official in violation of the Florida Constitution. *See Askew v. Cross Keys Waterways*, 372 So.2d 913, 924 (Fla. 1978).

CONCLUSION

Based on the forgoing points and authorities, Petitioners respectfully request this court to enter an order that (1) vacates the order of the court of appeal; (2) grants Petitioners' motion for partial summary judgment establishing the liability of the Sheriff to them; and (3) remands this cause to the trial court with instructions to conduct further proceedings on remedies, including refunds to the inmate class, of the charges illegally imposed and collected by the Sheriff.

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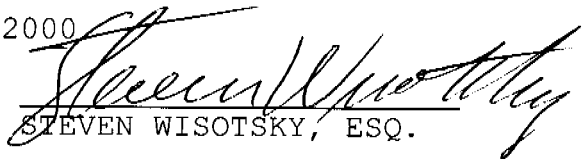
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Bruce Jolly, Esq., 1322 SE 3rd Avenue, Ft. Lauderdale, FL 33316 on 11 December 2000



STEVEN WISOTSKY, ESQ.

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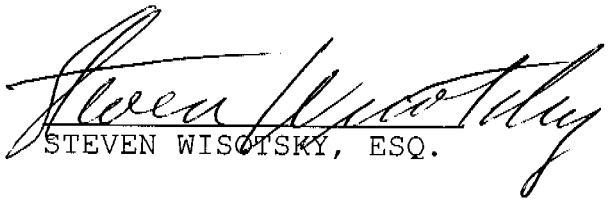

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