

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL

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CLERK, SUPREME COURT
BY _____

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

Petitioners,
vs.

CASE NO. SC01-510

SHERIFF KEN JENNE,

Respondent.
_____ /

REPLY BRIEF OF PETITIONERS

ON DISCRETIONARY REVIEW
FROM THE FLORIDA FOURTH DISTRICT COURT OF APPEAL

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ARGUMENT

I. THE SHERIFF'S PROGRAM FOR COLLECTING FEES FROM INMATES VIOLATES FLA. STAT. §951.033(2).

One point of puzzlement in the Respondent's Answer Brief is the following circular assertion: "Exempt income is not and cannot be deposited into the account, since once exempt proceeds are converted into cash, they lose their exempt status." Answer Brief [hereinafter "AB"] at 14, citing *Orange Brevard Plumbing & Heating Co., v. La Croix*, 137 So.2d 201 (Fla. 1962). That case deals with the proceeds of a sale of homestead property and holds that the exemption continues if the proceeds are intended for use in buying another one. The connection of that case to this one remains a mystery to Petitioners. First, it is directly contrary to the Sheriff's argument, since the cash in an arrestee's pocket could under that case continue to be exempt if it represented proceeds of the sale of a homestead and was targeted for the purchase of another homestead. Second, § 951.033(2) creates exemptions that do not pertain to the source of the monies at all but depend on whether the monies are needed for certain specific purposes: "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." Thus, the Sheriff's argument that "monies on deposit in the inmate [are] by definition" not exempt is a complete *non sequitur*.

Additionally, the statute speaks not only of exemptions, but of the inmate's ability to pay. In this regard, 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." Conversely, the absence of outside sources should count heavily against a finding of "ability to pay."

This reading of the statute is supported by the fact that in analogous contexts, where ability to pay is at issue, the applicable statutes specifically require inquiry, by in-person questioning or a standardized form, as to the subject's income and assets. For example, Fla. Stat. 27.52(2)(b)(1) 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" Sec. (2)(b)(2)(c)(2) also takes into account whether "defendant owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property."

Likewise, the federal statute allowing a civil litigant to proceed *in forma pauperis*, 28 U.S.C. § 1915(a)(1) requires "an affidavit that includes a statement of all assets such prisoner possesses" Similarly, Fed. R. App. P. Form 4, "Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis" requires the applicant to list sources of income (including

spouse's income), employment history, assets, living expenses and other pertinent information.

By contrast, the Sheriff's exclusive reliance on a "positive balance" in the inmate's account is not a reasonable response to the statutory command to determine the "financial status" of the inmate. The Sheriff's simplistic "test" is not a determination of "financial status" that is faithful to the statute. It does not conform to 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.

II. THE SHERIFF'S PROGRAM FOR COLLECTING FEES FROM INMATES VIOLATES PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

The Sheriff's constitutional argument is equally obtuse: "Petitioners cite no decisional authorities supporting their claim that a pre-deduction hearing or proceeding is necessary before monies are deducted from an inmate account to defray subsistence costs." AB at 18. On the contrary, Petitioners cite at least a half-dozen cases supporting the point that in non-emergency circumstances a pre-deprivation hearing is required by due process

of law, including *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *Rucker v. City of Ocala*, 684 So.2d 836, 841 (Fla. 1st DCA 1996); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *K.M.T. v. Dept. of H.R.S.*, 608 So.2d 865, 870 (Fla. 1st DCA 1992); *Connecticut v. Doebr*, 501 U.S. 1, 3 (1991); and others.

Perhaps the Sheriff's point is that none of these cases deal precisely with the issue of assessing inmate accounts. Well, of course, a case of first impression requires application of standard constitutional law principles to the particular facts of this case.

Further, the Sheriff takes Petitioners to task for failing to specify what process is due. AB at 19. It also invokes the false specter of "asking this court to restructure routine matters of jail operations into some type of more formalized proceeding, presumably warranting submission of evidence, examination of witnesses, etc." Not at all. No formalized proceeding is required by due process. What is required is appropriate and timely inquiry of the inmate's financial status. This can be accomplished, as it is in the federal courts, by the simple expedient of having the inmate fill out a form that asks pertinent questions about income and assets, like Fed. R. App. P. Form 4.

Petitioners do not suggest that a form for inmates need be as detailed, but it is one method that would comport with due process. Parenthetically, a form might also be coded to permit rapid processing by computer, thus eliminating the argument that actual inquiry into income and assets is too burdensome.

III. FLA. STAT. § 951.033 IS IMPERMISSIBLY VAGUE AND CONSTITUTES A STANDARDLESS DELEGATION OF LEGISLATIVE POWER TO AN EXECUTIVE BRANCH OFFICIAL IN VIOLATION OF THE FLORIDA CONSTITUTION.

Petitioners do not contend that delegated authority is *per se* unlawful under the Florida Constitution; there must be some play in the joints in order that a system of government built on separation of powers may function effectively. The "crucial test ... is whether the statute contains sufficient standards and guidelines" of reasonable specificity for the delegated power, or whether the Legislature has abdicated its responsibility by allowing an Executive Branch official to declare what the law is. *Dept of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815, 819 (Fla. 1983).

In the latter case, cited by the Sheriff, the statute was upheld because, *inter alia*, terms such as "sound actuarial basis" were deemed to be "a meaningful standard." *Id.* By contrast, § 951.033 fails to use recognized terms of art and thus fails to give content to its material terms, such as "ability to pay." It does therefore violate the nondelegation principle. See *Askew v. Cross Keys Waterways*, 372 So.2d 913, 924 (Fla. 1978).

CONCLUSION

The Sheriff's exclusive reliance on a positive balance in S.O.P. 1.2.12 unlawfully cuts statutory and constitutional corners. Additionally or alternatively, the statute itself is unconstitutional. The decision and opinion of the court of appeals are wrong and should be reversed, with a remand to the circuit court for further proceedings on remedies.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Bruce Jolly, Esq., Counsel for Respondent, 1322 SE 3rd Avenue, Ft. Lauderdale, FL 33316 on 28 January 2002.



A handwritten signature in black ink, appearing to read 'G. Kollin', is written above a horizontal line.

GARY KOLLIN, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document was produced in Courier New 12-point font.



A handwritten signature in black ink, appearing to read 'G. Kollin', is written above a horizontal line.

GARY KOLLIN, ESQ.