IN THE SUPREME COURT OF FLORIDA

CORBBLIN BUSH,

Petitioner,

v.

Case No. SC 04-2306
L.T. No. 5D04-42
Circuit Court 90-3798-CFA

JAMES V. CROSBY, JR.,
Secretary of the
Florida Department of Corrections,

Respondent.

ON APPEAL FROM
THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Appellee's independent statement of the case and relevant facts follows:

State prisoner Corbblin Bush filed a petition in his criminal case (Case no. 90-3798-CFA) challenging the number of provisional credits he was awarded by the Department of Corrections ("Department").[1] R. 6-22; R. 1-2. This happened after a circuit court judge in Leon County told him to do so because of Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003). S. 8-9.

Judge Francis of the Second Judicial Circuit dismissed Bush's petition after determining the case as a "collateral criminal proceeding" and finding the circuit court in Leon County did not have jurisdiction to entertain Bush's case pursuant to Schmidt. S. 8-9. The dismissal was without prejudice to Bush filing a petition for appropriate relief in his **sentencing court**. S. 8-9. However, Bush's criminal sentencing court in Seminole County wanted no part of the petition either. R. 23. Judge Stevenson of the Eighteenth Judicial Circuit stated in his order of dismissal that:

[1] The Department declines to further address the substance of Bush's provisional credit claim in that the lower tribunals did not adjudicate the case on the merits. The Department reserves the right to raise any available defense to the provisional credit claim.

> 1. Defendant has filed an initial Petition for Writ of Mandamus in a criminal case filed by the State ion 1990. The Court cannot entertain a civil petition in a criminal case.
>
> 2. If the Defendant would like to refile this Petition, he should do so in accordance with Fla. Rules of Civil Procedure 1.630. Additionally, the Court would note that Seminole Count is not the appropriate venue for this cause of action. *See Curry v. Wainwright*, 419 So. 2d 744 (Fla. 5th DCA 1982).

R. 23.

The Fifth District agreed with the Seminole County Court, observing that "[a] petition for writ of mandamus is a civil action." The Fifth District affirmed the lower tribunal's ruling because Bush's petition was filed in the wrong venue. Bush v. State, 886 So. 2d 339 (Fla. 5th DCA 2004).

The instant appeal follows.

STANDARD OF REVIEW

The issues of this case concern decisions of law subject to de novo review. Sarkis v. Pafford Oil Co. Inc., 697 So. 2d 524 (Fla. 1st DCA 1997).

SUMMARY OF THE ARGUMENT

This case well illustrates how Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003, has created confusion regarding the proper forum for Bush's mandamus petition and scores of others. Respectfully, Schmidt was wrongly decided and should be reconsidered. In addition to the venue issue seen here, Schmidt has encouraged inmates to expansively label challenges to DOC administrative actions as "collateral criminal," or to otherwise pursue less than marginally sufficient petitions for extraordinary relief related to disciplinary action or gain time calculations. Accordingly, Respondent asks this Court to hold that prisoner petitions challenging the Department's administrative actions are not collateral criminal proceedings.

In any event, the Fifth District correctly affirmed Bush's sentencing court which dismissed Bush's petition without prejudice. Venue over Bush's petition does not lie in Seminole County. Moreover, a criminal case is not the appropriate vehicle for bringing petitions challenging gain time or provisional credit decisions. While it is unfortunate that Bush misfiled his petition in his sentencing court, the Fifth District was not required to direct the transfer of Bush's case to Leon County. Any argument of procedural bar against further litigation of the merits of Bush's claims is speculative.

ARGUMENT

ISSUE I

Schmidt v. Crusoe should be reversed as urged by Judge Padovano of the First District.

In the words of Judge Padovano, "this case is but one example of the many problems the courts will face in the wake of the Schmidt decision." Burgess v. Crosby, 870 So. 2d 217, 221-222 (Fla. 1st DCA 2004)(Padovano, J., dissenting). In urging his brethren to advocate for reversal of Schmidt, Judge Padovano stated:

> *. . .[a] proceeding designed to afford appellate review of an administrative decision cannot be compared to a postconviction proceeding in a criminal case. The differences are both conceptual and mechanical.*
>
> The Florida courts have held that an inmate may file a petition for writ of mandamus in the circuit court to review a decision by the Department of Corrections or the Parole Commission because an appeal is not available under the Administrative Procedure Act. See Sheley v. Florida Parole Commission, 703 So. 2d 1202 (Fla. 1st DCA 1997), aff'd, 720 So. 2d 216 (Fla. 1998). Although styled as a petition for writ of mandamus, the proceeding in the circuit court is essentially a review proceeding. I do not think that a petition for writ of mandamus that is used to review a decision by an administrative agency should be treated as though it were a collateral proceeding in a criminal case.

Burgess, 870 So. 2d at 221-222 (Padovano, J., dissenting) (emphasis added). Accordingly, Respondent urges this Court to reverse Schmidt.

For a considerable time period, the Second Judicial Circuit Court determined that it did not have jurisdiction over inmate petitions it perceived to be implicated by Schmidt. See e.g. Burgess, 870 So. 2d 217; see also Davidson v. Crosby, 883 So. 2d 866, 867 (Fla. 1st DCA 2004); Fla. Dep't of Corr. v. Hanson, 903 So. 2d 282 (Fla. 1st DCA 2005). The Second Circuit initially dismissed, and then later transferred, countless cases to be filed with the criminal sentencing courts.[2] At least one other circuit court took similar action. See e.g. Massey v. Crosby, 860 So. 2d 529 (4th DCA 2003)(quashing the order of the Fifteenth Judicial Circuit Court, in and for Palm Beach County, which dismissed a mandamus petition on the grounds that gain time

[2] See e.g., McGee v. State, Case No. 1D03-5431, 2004 Fla. App. LEXIS 7776 (June 3, 2004); Reed v. Crosby, Case No. 1D03-4968, 2004 LEXIS 7054 (May 21, 2004); Miller v. State, Case No. 1D03-5090, 2004 Fla. App. LEXIS 6747 (May 17, 2004); Henriquez v. Crosby, Case no. 1D04-0161, 2004 Fla. App. LEXIS 6748 (May 17, 2004); Anderson v. Fla. Dep't of Corr., Case No. 1D04-1190, 2004 Fla. App. LEXIS 6750 (May 17, 2004); Spencer v. Crosby, Case No. 1D03-4029, 2004 LEXIS 6752 (May 17, 2004); Pate v. Crosby, Case No. 1D03-4565, 2004 LEXIS 6753 (May 17, 2004); Conley v. Crosby, Case No. 1D03-3962, 2004 Fla. App. LEXIS 6754 (May 17, 2004); Wombles v. Gladish, Case No. 1D03-3948, 2004 Fla. App. LEXIS 6756 (May 17, 2004); Nose v. Crosby, Case No. 1D03-5280, 2004 Fla. App. LEXIS 6667 (May 13, 2004); Krause v. Crosby, Case No. 1D03-3860, 870 So. 2d 962 (April 28, 2004).

challenges must be brought by a motion for post-conviction relief).

The district courts have attempted to resolve the forum issue in published opinions, holding that Leon County is the appropriate venue for gain time challenges. See Burgess, 870 So. 2d at 219; Eastman, 883 So. 2d at 891 (holding that venue for prison disciplinary report contest did not lie in Hillsborough County); Ruiz v. Crosby, 888 So. 2d 154, 155 (Fla. 5th DCA 2004) (holding that the proper venue for the mandamus petition was Leon County because the Department is headquartered there). Nevertheless, contention among the circuit and district courts emerged and persisted. See e.g. Hanson, 903 So. 2d at 284 (describing the transfer of case between the circuit courts as a "ping pong game"); see e.g. Davidson, 883 So. 2d at 867 (noting that on rehearing the circuit court adhered to its conclusion regarding the forum but transferred the petition, rather than dismissing it); Henriquez v. Crosby, 887 So. 2d 428, 429 (Fla. 1st DCA 2004)(illustrating that, due to the circuit court's resistance, it was necessary for the inmate to move to enforce the mandate in case number 1D04-0161).

While Schmidt stands, jurists and litigants will continue to be drawn to other conclusions. Jurists such as Judge Padovano and Judge Thomas agree that the criminal sentencing court is the

appropriate forum for cases deemed "collateral criminal" given the peculiar language of Schmidt. See Fuster-Escalona v. Fla. Dep't of Corr., 891 So. 2d 1163, 1164 (Fla. 1st DCA 2005) (Thomas, J., concurring)(opining that the dissenting opinion in Burgess was the correct assessment of Schmidt). Further, very recently, in Rankin v. State, 910 So. 2d 387 (Fla. 5th DCA 2005), the Fifth DCA cited Schmidt v. Crusoe in the context of determining appellate indigency for an appeal of the denial of a 3.850 motion. The Court in Rankin stated:

> The supreme court has concluded that the Prisoner Indigency Statute was enacted to discourage the filing of frivolous civil lawsuits, but not to prevent the filing of *claims contesting the computation of criminal sentences*. See Schmidt v. Crusoe, 878 So. 2d 361, 365-66 (Fla. 2003). Our sister courts have held that a trial court has no authority to order a defendant to pay any court costs and fees associated with a collateral criminal proceeding, *such as for postconviction relief*. See Cason v. Crosby, 892 So. 2d 536 (Fla. 1st DCA 2005); Small v. Crosby, 877 So. 2d 911 (Fla. 4th DCA 2004); Pace v. State, 763 So. 2d 375 (Fla. 2d DCA 2000).

910 So. 2d at 387 (emphasis added). By associating a 3.850 post-conviction relief with Schmidt, even if only for purposes of adjudicating appellate indigency claims, the Court in Rankin unfortunately fuels the confusion over the proper forum of gain time claims.

Adding to this is the emerging problem of inmates filing their petitions as post-conviction remedies or, in other instances, "mixing" their prison treatment claims with claims they perceive to be "collateral criminal." See Bernard v. State, 2005 Fla. App. LEXIS 15471, 1-2 (Fla. 5th DCA 2005)(observing that while the petitioner was asserting that his sentence is illegal, the petitioner sought compensatory and punitive damages for alleged physical and mental abused in jail because of a civil suit against DOC in which he is a witness).

Finally, petitions of less than marginal merit for extraordinary relief related to disciplinary reports or gain time calculations are re-emerging, apparently as a result of the "free" filing opportunity. Frivolous, abusive, and trivial pleadings occur across the entire spectrum of prisoner cases, from constitutionally protected habeas corpus petitions to those most easily comprehended by the general public, to wit: pancake and peanut butter petitions. See Thomas v. State, 904 So. 2d 502 (Fla. 4th DCA 2005)(stating that Thomas was not entitled to relief as his claims have been fully litigated more than once and are without merit); see also Knox v. State, 873 So. 2d 1250 (5th DCA 2004)(third attempt to litigate ex post facto challenge to forfeiture of gain time due to control release revocation). Without the "stop-and-think" (not chilling) measures of section

57.085, inmates are free to file disciplinary and gain time challenges with little regard to their merit.

Schmidt's underpinnings re-examined

The holding in Schmidt, that a challenge to a prisoner disciplinary report is a "collateral criminal" proceeding, was arrived at by likening Florida's Prisoner Indigency Act to the federal Prisoner Litigation Reform Act ("PLRA"). While there is no dispute that the PLRA inspired the Prisoner Indigency Act, the two statutes are not identical.

The federal judicial system and Florida's system are different. In the Federal system, prisoner cases fall within two broad and statutorily created categories, to wit: habeas corpus actions (28 U.S.C. § 2241, 28 U.S.C. 2254, 28 U.S.C. 2255), and conditions cases filed under the civil rights statutes.

Cases in Florida do not divide along the same lines. Florida has more gradations. Florida provides for habeas corpus when the relief of ***immediate release*** is implicated. Stovall v. Cooper, 860 So. 2d 5, 7 (Fla. 2nd DCA 2005). Rule 3.850 was created to provide a procedural mechanism for raising collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of

habeas corpus. Baker v. State, 878 So. 2d 1236, 1239 (Fla. 2004).

Cases involving gain time, however, are generally made by mandamus petition in the circuit court, filed as an appellate remedy. Sheley v. Florida Parole Commission, 703 So. 2d 1202, 1204-05 (Fla. 1st DCA 1997, aff'd, 720 So. 2d 216 (Fla. 1998); see also Stovall, 860 So. 2d at 7 (a petition for writ of mandamus is the proper method for review of the Department's denial or forfeiture of gain time).

At the federal level, Florida habeas corpus petitions and rule 3.850 proceedings progress to review under federal habeas corpus statute 28 U.S.C. § 2241 and § 2254. While gain time challenges and some disciplinary report challenges also progress to § 2241 and § 2254 actions,[3] this does not mean that the Florida Legislature intended state cases to be divided in the same manner for purposes of the Prisoner Indigency Statute.

The Florida Legislature enacted the Prisoner Indigency Statute operating against the backdrop of Florida's congested "civil

[3] See Medberry v. Crosby, 351 F.3d 1049 (11th Cir. 2003)(holding that the disciplinary report challenge was moot when filed where the state prisoner had already completed his term of disciplinary confinement within the prison and where the disciplinary proceeding did not affect the length of his prison custody); cert. denied, Medberry v. Crosby, 124 S. Ct. 2098, 2004 U.S. LEXIS 3276 (U.S. May 3, 2004).

court dockets" which were inundated by frivolous actions filed at "public expense." Ch. 96-106, preamble, at 92-93, Laws of Fla. Though not as publicly intriguing as cases involving prisoner requests for things like satellite television, frivolous claims are also raised in cases involving gain time. Just because examples of these types of frivolous civil actions were not contained in the legislative preamble to section 57.085 does not mean that the Legislature did not intend to include them. The Legislature recognized the **detrimental effect** of such cases in its preamble clause, stating, "under current law frivolous inmate lawsuits are dismissible by the courts only after considerable expenditure of precious taxpayer and judicial resources." Ch. 96-106, preamble, at 92-93, Laws of Fla. In a similar vein, when the Legislature recognized the burdens of adjudicating untimely prison disciplinary report cases, it took action to limit the time available to bring disciplinary report challenges.[4] See § 95.11 (8), Fla. Stat. 1994; see Ch. 95-283, §2, Laws of Fla.

[4] The fact that the Legislature treated petitions challenging prisoner disciplinary actions as **civil** petitions in legislation just one year before enactment of section 57.085 undermines Schmidt's holding that petitions challenging prisoner disciplinary proceedings where gain-time is forfeited are collateral criminal.

What about Access to Courts?

Prior to the Schmidt decision, section 57.085 was applied to gain time and prisoner disciplinary report cases for nearly seven years. The statute provides "for a partial payment 'up front' if the court determines that the inmate is unable to pay the entire filing fee at the time of filing but **is able** to pay some portion of it at that time." Geffken v. Strickler, 778 So. 2d 975, 976, n. 3 (Fla. 2001)(emphasis added)(explaining § 57.085(4), Fla. Stat.); see Drayton v. Moore, 807 So. 2d 819, 821 (Fla. 2nd DCA 2002)("Subsections 57.085(2), (4), and (5) allow prisoners *who qualify* to be granted a full or partial waiver of prepayment of court costs and fees and to thereafter make payment in installments if and when funds are deposited into their inmate accounts."). "An indigent prisoner is one who does not have sufficient funds to pay in full for a lawsuit upon filing." Johnson v. Burns, 804 So. 2d 345, 347 (Fla. 4th 2001)(citing Geffken, 778 So. 2d at 976). Accordingly, when properly applied, prisoners will not be denied access to the courts as a result of the partial prepayment provision. See Geffken, 778 So. 2d at 976.[5]

[5] It is noted that the First District recently adjudicated as case involving the Department's rule charging inmates for photocopies. See Smith v. Fla. Dep't of Corr., 2005 Fla. App. LEXIS 7670 (Fla. 1st DCA 2005). As currently codified, rule 33-501.302 establishes the basic copying charge and provides that

Any inmate who believes he has been erroneously denied indigency or that the indigency statute has been erroneously applied to him may avail themselves of appellate review. In Saba v. Bush, 883 So. 2d 858, 859 (Fla. 1st DCA 2004), the First

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inmates may not be denied copies if they are unable to pay for them but sets forth the process to be followed to place a hold on an inmate's account to recoup the institution's expense. R. 33-501.302(3)(4) & (5). The First District held the photocopy lien rule exceeded the Legislature's grant of rulemaking authority. Nevertheless, the Court's observations indicate it considers the photocopy lien rule constitutional under Florida's access to courts provision. According to the First District:

> "[w]hile the federal courts declined to interpret the federal right of access to the courts, as described in Bounds, as requiring the provision of free and unlimited photocopies to inmates for the purposes of litigation, the federal courts nonetheless interpreted the right, as described in Bounds, as requiring that the inmate be provided access to photocopying services, for which the inmate could be charged a fee, to the extent required to present his or her claims in court."

Smith, 2005 Fla. App. LEXIS * 4. The First District further observed that:

> "[e]ven though this court recently recognized that a Florida inmate's implicit federal right of access to the courts, as described in Bounds, is "narrower" than his or her explicit right of access to the courts set forth in article I, section 21, of the Florida Constitution, see Henderson v. Crosby, 883 So. 2d 847, 850-54 (Fla. 1st DCA 2004), it appears unlikely that inmate access to photocopying services would need to be greater than that required by the federal right in order to conform to the broader state constitutional right of access to the courts. See id. at 857."

Smith, 2005 Fla. App. LEXIS * 4, n. 1.

DCA explained that if an inmate is assessed a fee that he is unable to pay, his circuit court action will be dismissed and he may appeal that final order. See also Brown v. Campion, 757 So. 2d 535, 536 (Fla. 1st DCA 2000)("an order denying a plaintiff's request to proceed as indigent in a civil case *does not result in irreparable harm which cannot be remedied on appeal*") (emphasis added); but see Knod v. Moore, 805 So. 2d 50, 51 (Fla. 4th DCA 2001)(utilizing certiorari jurisdiction to remedy to remedy orders denying ifp requests in civil cases). If the inmate is also found not to be indigent for the appeal, his remedy is a motion for review in accordance with rule 9.430.[6] Saba, 883 So. 2d at 859.

In Drayton v. Moore, the Court instructed:

> If indigency status [under section 57.085] is denied, the trial court should give written reasons. If a prisoner is denied leave of court to obtain indigency status because of prior qualifying adjudications of indigency, the trial court should attach documentation to support this factual determination together with its written reasons for denying leave of court. When a trial court dismisses a case under section 57.085, it must retain all original pleadings necessary to effectuate appellate review.

[6] On the procedural history of the Schmidt case itself, Petitioner Schmidt had not suffered any dismissal of his action before bringing his case to the Florida Supreme Court. 878 So. 2d at 363. The Court in Schmidt intervened at the point at which Schmidt would have normally had review available under rule 9.430.

807 So. 2d at 821; see also Osterback v. Turner, 837 So. 2d 604, 605 (Fla. 1st DCA 2003). In sum, the district courts of appeal are well suited to monitor the application of the state's indigency statutes (whether 57.085 or 57.081) to ensure constitutional access to courts **based on the pertinent and particular facts of each situation**. See e.g. Huffman v. Moore, 778 So. 2d 411, 412 (Fla. 1st DCA 2001)(correcting error in dismissing action for failure to make partial payment provision); Harper v. Moore, 737 So. 2d 1232 (Fla. 1st DCA 1999); Pace v. State, 763 So. 2d 375 (Fla. 2d DCA 2000). Even inmates who do not comply with procedural requirements of section 57.085 are given reasonable opportunity to correct deficiencies. See e.g. Masiello v. Moore, 739 so. 2d 1196 (Fla. 1st DCA 1999)(holding that the inmate's petitions challenging *prison disciplinary proceedings* should not have been dismissed without an opportunity to either correct the deficiencies or to pay the filing fees); see also Tooma v. Moore, 743 So. 2d 1189 (Fla. 1st DCA 1999). Additionally, inmates who prevail in appellate review on indigency issues have been successful in recouping their costs. See e.g. Osterback v. Turner, 855 So. 2d 1237 (Fla. 1st DCA 2003); Huffman, 778 So. 2d at 411-12.

The requirement that an inmate pay filing fees in subsequent installments when able to do so does not "chill" inmate access

to courts. Quite simply, filing fees are not a penalty for filing a court action - they are user fees. Even when a court cannot recoup all of its costs for processing an action, some payment helps defray its costs. The Florida Legislature considers the pay-as-able provisions of the Prisoner Indigency Statute to be one way to assist courts in managing the cost and burdens of court operations.

Inmates, therefore, should be required to prioritize their spending like any citizen when seeking review of Department of Corrections administrative actions. Litigants who are not imprisoned are required to weigh the costs associated with bringing an action. Free persons must weigh the potential benefit of a successful action against the cost of bringing an action, while paying for shelter, medical care, food and clothing. **Prisoners do not pay for these necessities.**

The basic needs of inmates - food, clothing, shelter, and essential hygiene supplies (soap and toothbrush), are provided for **by the State of Florida**, as well as a good number of recreational, literary, and educational resources available through accessible prison libraries, chapels, recreation departments, and visiting parks. See Rule 33-602.101, Fla. Admin. Code. Inmates are provided three meals a day, two of which are required to be hot meals. See R. 33-204.003(1), Fla.

Admin. Code. The prison canteen merely provides "extras" like cola drinks, candy, potato chips, board games, and radios. R. 33-203.101(1), Fla. Admin. Code ("Canteens are to be operated primarily to provide items of convenience to inmates."). Canteen privileges are not constitutionally required. Inmates in Florida are not deprived of basic needs when they contribute to the costs of their litigation. Requiring an inmate choose how he will spend his money -- that is, between a snack or court fees -- hardly chills his access to court.

ISSUE II

Bush's sentencing court in Seminole County is not the proper forum for Bush's mandamus petition challenging the Department's award of provisional credits.

Venue for hearing Bush's petition against the Department of Corrections was improper in the Eighteenth Judicial Circuit Court, in and for Seminole County. Ruiz, 888 So. 2d at 155 (holding trial court was correct in ruling the civil mandamus petition was improperly filed in the circuit of prisoner's criminal adjudication and sentence); Stovall, 860 So. 2d at 6(holding that the appropriate venue for a petition for a writ of mandamus challenging the Department's denial of gain time is in Leon County); Harris v. State, 713 So. 2d 1106 (Fla. 4th 1998)(holding "Motion to Correct Written Sentence with Mandamus

Relief" challenging the denial of incentive gain time was improper because it was filed in the wrong venue and did not make DOC a party to the proceedings). The Department is headquartered in Tallahassee, Florida, and venue over Bush's provisional credit action is appropriate in Leon County. See Stovall, 860 So. 2d at 6; Harris, 713 So. 2d at 1106.

Moreover, a prisoner's criminal case is not the appropriate vehicle for challenging the Department's administrative actions affecting gain time. See Department of Corrections v. Mattress, 686 So. 2d 740, 741 (Fla. 5th DCA 1997) (holding action challenging forfeiture of previously earned gain time, whether construed as a 3.850 motion or as a 3.800(a) motion, was not cognizable because prisoner's entitlement to relief, if any, must be obtained through administrative channels first, followed by filing a petition for writ of mandamus against the Department); see also Gaynor v. State, 831 So. 2d 1246 (Fla. 5th DCA 2002)(affirming summary denial of the offender's motion under rule 3.800(a), because the offender who was challenging the calculation of his gain time had pursued the wrong remedy).

A prisoner challenge the Department's denial or forfeiture of gain time is properly made by mandamus petition in the circuit court, filed as an appellate remedy. Sheley, 703 So. 2d at 1204-05. Cf. Boltri v. Singletary, 728 So. 2d 772 (Fla. 1st DCA

1999)(“The proper remedy to correct a sentencing error is with the sentencing court, not a petition for writ of mandamus against the Florida Parole Commission and Department of Corrections.”).

Thus, Bush’s criminal court case is not the appropriate vehicle and the Eighteenth Judicial Circuit is not the proper venue for his provisional credit challenge. See Burgess, 870 So. 2d at 220 (holding the sentencing court was not the appropriate court to review the petition challenging the state prisoner’s conditional release revocation and forfeiture of accrued gain time); Massey, 860 So. 2d 529 (quashing order which dismissed mandamus petition on the grounds that gain time challenges must be brought by a motion for post-conviction relief).

Accordingly, the Seminole County court properly dismissed Bush’s case without prejudice.

ISSUE III

The Fifth District was not required to direct the trial court to transfer Bush’s provisional credit petition to the Second Judicial Circuit.

Bush improperly filed his petition in the Eighteenth Judicial Circuit under his criminal case number. The Fifth District did not err in affirming the dismissal of Bush’s

petition without prejudice. See Ruiz, 888 So. 2d at 155 (affirming dismissal where Ruiz improperly filed his petition in Putnam County where he was adjudicated and sentenced); Jackson v. Fla. Dep't of Corr., 903 So. 2d 198 (Fla. 3rd DCA 2005)(denying the mandamus petition without prejudice to Jackson exhausting his administrative remedies within the Department, and seeking further judicial review in Leon County circuit court); Roth v. Crosby, 884 So. 2d 407, 408 (Fla. 2d DCA 2004)(holding the circuit court correctly denied Roth's petition without prejudice for Roth to file a petition for a writ of mandamus directed against the Parole Commission in the Leon County circuit court, where the Commission is headquartered).

As a practical matter, when an inmate files a gain time claim or petition in his sentencing court, dismissal without prejudice is often the best disposition. The misfiling of an administrative action against the Department in the sentencing court may signal other conceivable defects such as the failure to properly exhaust administrative remedies. See Brinkley v. State, 884 So. 2d 125, 125-126 (Fla. 2d DCA 2004)(affirming denial of claim challenging the forfeiture of gain time without prejudice to any right the 3.850 petitioner had to pursue relief through administrative remedies with the Department and then by way of petition for writ of mandamus in the appropriate circuit

court); Richmond v. State, 876 So. 2d 1277 (Fla. 3rd DCA 2004)(noting that offender who argued she was not being awarded the correct amount of gain time must first exhaust her administrative remedies within the Department of Corrections before seeking judicial review).

Respondent recognizes that in Griffith v. Crosby, 898 So. 2d 212, 213 (Fla. 2d DCA 2005), the Second District reversed and remanded a case where the court dismissed, rather than transferred, an erroneously filed mandamus petition. As in the instant case, Griffith's petition was initially dismissed by the Second Judicial Circuit with the circuit judge instructing Griffith to re-file his petition in the Highlands county, the situs of Griffith's sentencing court. Id. However, Griffith's case concerned a prison disciplinary action that resulted in the forfeiture of gain time, the challenge of which is subject to the jurisdictional bar of rule 9.100(c)(4), Florida Rules of Appellate Procedure.[7] See also Eastman v. State, 883 So. 2d 889, 890 (Fla. 2nd DCA 2004)(describing impact of statute of limitations applicable to prison disciplinary reports - section 95.11(8), Fla. Stat. - on the case filed in Hillsborough

[7] Rule 9.100(c)(4) provides that a petition challenging an order of the Department entered in a prisoner disciplinary proceeding shall be filed within 30 days of rendition of the order to be reviewed.

county). Mr. Bush's petition concerns the award of provisional credit and is not subject to the procedural bars that apply to prison disciplinary report challenges.

Respondent further does not dispute that there are other cases where transfer is favored over non-prejudicial dismissals. However, the overall trend is to transfer cases in which an extraordinary circumstances or an element of extreme prejudice is present. See Gibson v. Fla. Parole Comm'n, 895 So. 2d 1291 (Fla. 5th DCA 2005)(advocating transfer over dismissal, while observing that "[t]he law governing review of the [Parole] Commission's decisions is arcane and often confusing"); see also Woody v. Florida Parole Comm'n, 752 So. 2d 1273, 1274 (Fla. 4th DCA 2000)(find that the trial court erred in dismissing the petition for habeas corpus and should have transferred the case to the appropriate court); accord Williams v. Moore, 752 So. 2d 574, 575 (Fla. 2000)(explaining that unless an overcrowding credit petition shows an extraordinary circumstance on its face, this Court will no longer transfer such claims but instead will dismiss them without prejudice). It is likely that prison disciplinary report cases are being accorded the treatment of transfer due to the specific procedural bars discussed herein. See Griffith, 898 So. 2d at 213; see also Rodriguez v. Crosby, 2005 Fla. App. LEXIS 15762 (Fla. 3rd DCA 2005)(reversing and

remanding to the trial court with directions to transfer the gain time forfeiture case to a correct venue).

There is no doubt that the Second Judicial Circuit's interpretation of Schmidt has caused significant disruption in the processing of inmate gain time claims. See e.g. Hanson, 903 So. 2d at 284 (describing the transfer of the case between the circuit courts as a "ping pong game"); see supra issue I. However, the ultimate decision to dismiss Bush's provisional credit petition without prejudice was one of discretion by Bush's criminal sentencing court. The Fifth District did not commit reversible error in deferring to the lower tribunal's judgment.

Petitioner's argument that he will be barred from refiling in the Second Circuit is speculative and need not be decided by this Court. The record does not indicate whether Bush has pursued further review from the Second Circuit order (belated or otherwise) in that court or the First District Court of Appeal. The decision before this Court is that of the Fifth District.

CONCLUSION

For the reasons set forth above, Respondent asks this Court to hold that prisoner petitions challenging the Department's administrative actions are not collateral criminal proceedings. In the alternative, Respondent asks that the decisions of the lower tribunal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hunter W. Carroll, Esq., Carlton & Carlton, P.A., PMB 457, 24123 Peachland Boulevard, C-4, Port Charlotte, FL 33954, and Christine R. Dean, Esq., Carlton Fields, P.A., P.O. Drawer 190, Tallahassee, FL 32302-0190 on this 26th day of October 2005.

_____
COUNSEL FOR RESPONDENT

CERTIFICATE OF TYPESTYLE AND TYPESIZE

The undersigned certifies that this motion uses Courier New 12 pt. type.

_____
Joy A. Stubbs