**IN THE SUPREME COURT OF FLORIDA**

CORBBLIN BUSH,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

Supreme Court Case No.: SC04-2306

DCA Case No.: 5D04-42
L.T. Case No.: 90-3798-CFA

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# Petitioner Corbblin Bush's Initial Brief

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## STATEMENT OF THE CASE AND FACTS

Corbblin B. Bush ("Mr. Bush") pled guilty to second degree murder and attempted robbery in case number 90-3798. R. 1,7.[1] The Eighteenth Judicial Circuit Court (Seminole County) sentenced Mr. Bush to 45 years in prison and 15 years probation to run concurrently, less 398 days jail time credit. R. 7. Mr. Bush committed these crimes on December 1, 1990, in Seminole County. R. 1-2.

### 1. The Grievance Requesting Additional Provisional Release Credits.

While at the Hamilton Correctional Institution-Annex,[2] Mr. Bush filed a grievance, claiming that he was entitled to additional provisional release credits, which if granted would reduce the length of time he spent in prison. R. 16. His grievance was denied. R. 16. Mr. Bush exhausted his administrative appeals within the Department of Corrections ("the Department"). R. 17-22.

### 2. The "Original Mandamus Petition" filed in Leon County.

Mr. Bush challenged the Department's denial of his grievance by filing a pro se petition for writ of mandamus in the Second Judicial Circuit Court in Leon

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[1] Citations to the Record on Appeal before the trial court shall be in the form R. x, with x being the page number. Citations to the Appendix to this Initial Brief shall be in the form A. x., with x being the tab number.

[2] This facility is in Hamilton County, which is within the territorial jurisdiction of the Third Judicial Circuit. See § 26.021(3), Fla. Stat. During these proceedings, the Department moved Mr. Bush to the Madison Correctional Institution, where he is currently housed. That facility is in Madison County, which is also within the territorial jurisdiction of the Third Judicial Circuit. See § 26.021(3), Fla. Stat.

County (the "original mandamus petition"). Judge Francis, for the Leon County Circuit Court, dismissed the petition for lack of jurisdiction.[3] S. 8-9; A. 4. Specifically, the court ruled that, based on Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003), a "challenge to the computation of [Mr. Bush's] criminal sentence in this case is a collateral criminal proceeding to the judgment and sentence which resulted in [Mr. Bush's] incarceration." S. 8-9; A. 4. In so ruling, Judge Francis concluded that the Leon Count Circuit Court did not have subject matter jurisdiction to alter the conviction and sentence entered by the Seminole County Circuit Court and therefore the correct venue for Mr. Bush's challenge was the Seminole County Circuit Court. S. 9; A. 4.[4]

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[3] The petition for writ of mandamus filed by Mr. Bush in the Leon County Circuit Court (Corbblin Bush v. James V. Crosby, Secretary, Florida Department of Corrections, 2003 CA 002268) is not in the Record on Appeal. Judge Francis's dismissal order, however, is in the record. That dismissal order discusses Mr. Bush's original mandamus petition. That order was attached to the pro se Petition for Certiorari Mr. Bush filed at the Fifth District in this case and is in the Fifth District's record. The Fifth District's record was sent to this Court in this case; therefore, the information contained in Judge Francis's order is properly before this Court. Citations from the Fifth District's record shall be in the form S. x, with x being the page number. That order was also attached to Mr. Bush's Second Amended Initial Brief at the Fifth District.

[4] Appointed counsel for Mr. Bush recognizes the unusual nature of discussing an order in this section of the brief which technically is not the order under review. Counsel does so, however, because that order (and many similar others issued by the Leon County Circuit Court) is the genesis of this case, and because that order illustrates why inmates' petitions ping-ponged between circuit courts post-Schmidt.

Judge Francis rendered this order on November 24, 2003. S. 9; A. 4. The record does not indicate that Mr. Bush appealed this order to the First District.[5]

**3. The "Pending Mandamus Petition" filed in Seminole County.**

Eight days after the Leon County Circuit Court dismissed Mr. Bush's original mandamus petition, Mr. Bush filed a new pro se petition for writ of mandamus, this time in the original sentencing court, the Seminole County Circuit Court (the "pending mandamus petition"). R. 6-22; A. 3. Mr. Bush contended in this mandamus petition that the Department erred in denying his grievance, which claimed that he is entitled to additional days of provisional release credits. R. 8. Mr. Bush filed this mandamus petition against the Secretary of the Department using the case number from his original conviction and sentence proceeding, case number 90-3798. R. 6.

Without ordering a response from the state, Judge Stephenson, for the Seminole County Circuit Court, dismissed Mr. Bush's mandamus petition. R. 23; A. 2. That court ruled that Mr. Bush's filing was a "civil petition" which was not cognizable in "a criminal case." R. 23. Judge Stephenson thus ruled that venue

[5] The record does demonstrate that Mr. Bush challenged Judge Francis's dismissal order in his Petition for Certiorari filed at the Fifth District, which court obviously does not have appellate jurisdiction over the Leon County Circuit Court. S. 2-9. The Fifth District did not transfer the certiorari petition to the First District, nor did the it. Instead, the Fifth District denied Mr. Bush's certiorari petition challenging Judge Francis's order without prejudice to raise the issue in Mr. Bush's Initial Brief challenging the Seminole County Circuit Court's dismissal of his new mandamus petition filed in Seminole County. S. 10; A. 5.

was inappropriate in the sentencing court according to existing precedent on this issue. R. 23. Mr. Bush, still pro se, timely appealed this order to the Fifth District. R. 25.

**4. The Decision Under Review.**

On appeal, the Fifth District affirmed Judge Stephenson's order. Bush v. State, 886 So. 2d 339, 339 (Fla. 5th DCA 2004); S. 11-12; A. 1. The Fifth District held that Mr. Bush's pending mandamus petition was, in fact, a civil action and that the proper venue for a petitioner seeking additional provisional release credits was Leon County, Florida, where the Department is headquartered. Id. The Fifth District agreed with the Seminole County Circuit Court's decision that venue was improper in the original sentencing court. Id.

Mr. Bush, pro se, timely petitioned this Court to review the Fifth District's decision on venue, stating that the Fifth District's decision directly conflicts with this Court's decisions in Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003), and Baker v. State, 878 So. 2d 1236 (Fla. 2004). This Court accepted jurisdiction, ordered a briefing schedule, and appointed undersigned counsel to represent Mr. Bush before this Court on a pro bono basis.

This brief is filed pursuant to the Court's order.[6]

[6] Undersigned counsel wish to express their appreciation to FSU law student and Carlton Fields' summer associate Blaise Huhta, who ably assisted them with the drafting of this Initial Brief.

## SUMMARY OF ARGUMENT

In 2003, this Court in Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003), held that an inmate's writ of mandamus petition challenging the Department of Correction's decision regarding the award of sentence-reducing credits was a "collateral criminal proceeding" and therefore exempt from the Prisoner Indigency Statute, section 57.085, Florida Statutes. This decision did not address the proper venue for bringing such mandamus petitions.

Since this Court released Schmidt, some circuit courts, including the Leon County Circuit Court, took the position that Schmidt implicitly overruled the existing case law that provided that such petitions are to be filed in Leon County because that is the location of the Department of Correction's headquarters. That court concluded that it no longer had jurisdiction over these petitions and that venue was now proper in the sentencing court. Other courts, however, disagreed. Cases thus began to ping pong between circuit courts.

The Leon County Circuit Court began dismissing these petitions completely or transferring them to the sentencing court. Upon receipt of these mandamus petitions, the sentencing courts either dismissed the petitions or attempted to transfer them back to the Leon County Circuit Court, because the sentencing courts took the position that venue was not proper in the sentencing courts to consider these petitions.

Mr. Bush, the petitioner here, is a casualty of this phenomonen. He originally filed a mandamus petition in the Leon County Circuit Court only to have it dismissed in favor of the sentencing court, the Seminole County Circuit Court. That court, too, dismissed his mandamus petition, noting venue was proper in Leon County Circuit Court. The Fifth District affirmed that dismissal in the decision under review.

Nothing in Schmidt, however, changed the well-established jurisprudence that provided venue for these mandamus petitions was appropriate in the Leon County Circuit Court by virtue of section 47.011, Florida Statutes, and the common law home venue privilege state agencies enjoy. This Court has been abundantly clear that courts are the examine the nature of filing instead of applying a one-size-fits-all label, such as "civil," "criminal," or "collateral criminal."

These mandamus petitions, including Mr. Bush's pending mandamus petition, challenge administrative decisions made in Leon County by the Department regarding the award or non-award of certain sentence reducing credits. These petitions do not challenge the validity of the judgment and sentence for which inmates like Mr. Bush are incarcerated. When examining these mandamus petitions in this light, it is clear that the sentencing court has no role in reviewing the Department's decisions on sentence reducing credits. Accordingly, venue continues to be proper in the Leon County Circuit Court.

While the Fifth District reached this conclusion in the decision under review, that court erred by affirming the sentencing court's dismissal of Mr. Bush's mandamus petition. The Florida Constitution provides that an action pending in the wrong court or one that seeks an incorrect remedy must not be dismissed based on those defects. This Court has by rule implemented that constitutional command. The Fifth District failed to adhere to that command.

Because of the confusion that abounded after this Court released Schmidt, and because Mr. Bush correctly filed his original mandamus petition in the Leon County Circuit Court challenging the Department's denial of his grievance, this Court in the interest of justice must permit the merits of Mr. Bush's mandamus petition to be reached without facing a procedural bar. This Court should quash the decision under review, clarify Schmidt and hold that venue is still proper in the Leon County Circuit Court, and instruct the Seminole County Circuit Court to transfer Mr. Bush's petition to the Leon County Circuit Court.

## STANDARD OF REVIEW

Issue I in this case involves the question of whether venue is proper in a particular forum. Whether venue is proper in a particular forum is not a matter of judicial discretion but is instead a matter determined by law subject to de novo review. Kerr Constr., Inc. v. Peters Contracting, Inc., 767 So. 2d 610, 612 n.2 (Fla. 5th DCA 2000); Dave Bimini, Inc. v. Roberts, 745 So. 2d 482, 483-84 (Fla. 1st DCA 1999).

Issue II relates to whether the Fifth District erred in dismissing Mr. Bush's petition for writ of mandamus, as opposed to transferring it to the proper forum in the Leon County Circuit Court. This is also a question of law subject to de novo review. Mazer v. Orange County, 811 So. 2d 857, 859 (Fla. 5th DCA 2002).

## ARGUMENT

Approximately two years have elapsed since Mr. Bush originally filed for mandamus relief in an article V court challenging the Department's determination of his ineligibility for certain provisional release credits. Since that time, no court has addressed the merits of his mandamus petition; instead, Mr. Bush has bounced between courts like a ping pong ball. In this time, Mr. Bush effectively has been denied access to the courts, contrary to the express guarantee of article 1, section 21, Florida Constitution ("The court shall be open to every person . . . and justice shall be administered without . . . denial or delay.").

Before this Court decided Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003), the well-established case law provided that venue was proper in the Leon County Circuit Court to consider an inmate's mandamus petition challenging the Department's decision regarding the award of sentence reducing credits. Thus, the vast majority of these petitions were filed in the Leon County Circuit Court. That court, however, read Schmidt as an implicit, fundamental change in the law that divested subject matter jurisdiction over these petitions from that court. Thus, that court began dismissing the petitions or transferring them to the inmate's sentencing court.

Regardless of the uncertainty about venue that appears to have resulted following the release of Schmidt, Mr. Bush is entitled to have his day in court, as he has been diligently pursuing. Consistent with his original pro se arguments, Mr. Bush posits here that venue is appropriate in the Leon County Circuit Court to resolve his petition for writ of mandamus. As also discussed below, the Fifth District erred by not ordering the Seminole County Circuit Court to transfer the pending mandamus petition to the Leon County Circuit Court.

## I. THE PROPER VENUE FOR MR. BUSH'S PENDING MANDAMUS PETITION IS THE SECOND JUDICIAL CIRCUIT COURT IN LEON COUNTY, FLORIDA.

The conflict issue before this Court concerns the correct venue, post-Schmidt, for mandamus actions filed by prison inmates challenging the

Department's determination regarding the failure to award or the forfeiture of sentence-reducing credits such as gain time or provisional release credits. Before addressing the effect of Schmidt though, it is necessary to set forth the well-established law that existed prior to Schmidt. After reviewing Schmidt, Mr. Bush addresses why Schmidt did not alter that well-established Florida law regarding the venue question now pending at this Court.

Notably, Mr. Bush's ultimate agreement with the Fifth District's conclusion that the Leon County Circuit Court is the proper venue for his pending mandamus petition should not be read as approving the Fifth District's decision below. As explained in Issue II, the Fifth District should have reversed the trial court's dismissal and instructed that the trial court transfer Mr. Bush's pending mandamus petition to the Leon County Circuit Court. The failure to do so expressly and directly conflicts with the Second District's decision in Griffith v. Crosby, 898 So. 2d 212 (Fla. 2d DCA 2005), that requires transfer, not dismissal, in this situation.

Mr. Bush requests that this Court be sensitive to the fact that should it approve the Fifth District's decision below without qualification, Mr. Bush will never receive a ruling on the merits of his mandamus petition – that he is entitled to additional provisional release credits, a species of sentence-reducing credits. It is imperative that this Court's decision permit Mr. Bush an opportunity to advance the merits of his mandamus petition without facing any sort of procedural bar.

### A. Pre-*Schmidt*: Mandamus Petitions Challenging Gain Time Decisions Are Civil Actions and Venue Properly Lies in Leon County Circuit Court.

It has long been established by this Court that a petition for writ of mandamus is the proper vehicle to challenge gain time decisions (or similar sentencing reducing credit decisions) because the Legislature eliminated review of such decisions under the Administrative Procedure Act. Parole & Probation Comm'n v. Fuller, 491 So. 2d 275, 275 (Fla. 1986); Griffith v. Fla. Parole & Probation Comm'n, 485 So. 2d 818, 820-21 (Fla. 1986). It has also long been established by this Court that a writ of mandamus seeking to redress a private wrong is a civil action. E.g., Bd. of Public Instruction of Lake County v. State, 172 So. 859, 860 (Fla. 1937); City of Bradenton v. State, 160 So. 506, 507 (Fla. 1935).

Accordingly, Florida's district courts of appeal have repeatedly held that an inmate's mandamus petition challenging the Department's or the Parole and Probation Commission's computation of a sentence is sufficiently akin to a civil action. The proper venue for these actions was therefore in the Leon County Circuit Court pursuant to the general venue statute, section 47.011, Florida Statutes, and the common law home venue privilege.

Because no specific venue statute exists for petitions for writ of mandamus, courts have applied the general venue statute, section 47.011, Florida Statutes. See, e.g., Stovall v. Cooper, 860 So. 2d 5, 7 (Fla. 2d DCA 2003). This statute

provides that actions are properly maintainable in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located. § 47.011, Fla. Stat. For purposes of this statute, a state agency "resides" where its headquarters is located. Stovall, 860 So. 2d at 7.

The common law home venue privilege is a similar concept. It has long been the established common law of Florida that venue in civil actions brought against the state or one of its agencies or subdivisions, absent statutory waiver or exception, properly lies in the county where the state, agency, or subdivision maintains its principal headquarters. Carlile v. Game & Freshwater Fish Comm'n, 354 So. 2d 362 (Fla. 1977); Fla. Dep't of Children & Families v. Sun-Sentinel, Inc., 865 So. 2d 1278 (Fla. 2004). The purpose of this rule is to promote orderly and uniform handling of litigation against governmental entities and to help minimize expenditures of public funds and manpower. Carlile, 354 So. 2d at 364; see also Sch. Bd. of Osceola County v. State Bd. of Education, 30 Fla. L. Weekly D1050 (Fla. 5th DCA Apr. 22, 2005). A trial court does not have discretion in its application of the home venue privilege. To the contrary, a trial court must apply the home venue privilege, unless one of the exceptions is satisfied.[7] Id.

[7] None of the three exceptions apply here: (1) statutory waiver; (2) state agency as joint tortfeasor; and (3) state agency as "sword-wielder," which applies when the state agency allegedly invaded a fundamental constitutional right within the county where the suit was initiated. Sun-Sentinel, 865 So. 2d at 1286-88; Fla. Dep't of Ins. v. Amador, 841 So. 2d 612, 613-14 (Fla. 3d DCA 2003).

In cases challenging the computation of a prison sentence, the Department is the proper respondent because this is the administrative entity that calculates the sentence reducing credits and applies them to the inmate's sentence. Harris v. State, 713 So. 2d 1106, 1106 (Fla. 4th DCA 1998). The Department "resides" in Leon County, because that is where its headquarters is located. Also, Leon County is the location where the ultimate decision is made regarding the award or forfeiture of these sentence reducing credits, which means the cause of action accrues there. Thus, all of Florida's district courts have repeatedly held that the proper venue for such challenges is in Leon County. See Ruiz v. Crosby, 888 So. 2d 154 (Fla. 5th DCA 2004); Stovall, 860 So. 2d at 7; Harris, 713 So. 2d at 1106; Lewis v. Fla. Parole Comm'n, 697 So. 2d 965 (Fla. 1st DCA 1997); Dep't of Corrections v. Mattress, 686 So. 2d 740 (Fla. 5th DCA 1997); Singletary v. Powell, 602 So. 2d 969 (Fla. 1st DCA 1992); Barber v. State, 661 So. 2d 355 (Fla. 3d DCA 1995); Curry v. Wainwright, 419 So. 2d 744 (Fla. 5th DCA 1982); Lyden v. Wainwright, 307 So. 2d 258 (Fla. 2d DCA 1974).[8]

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[8] Courts have also held that venue in these cases is appropriate in the circuit court that has territorial jurisdiction over the prison where the inmate is housed. See, e.g., Griffith v. Crosby, 898 So. 2d 212 (Fla. 2d DCA 2005); Smith v. State, 785 So. 2d 1237 (Fla. 4th DCA 2001); Johnson v. State, 765 So. 2d 310 (Fla. 5th DCA 2000); Green v. State, 698 So. 2d 575, 576 (Fla. 5th DCA 1997). When an inmate files in such court, the Department may require that the petition be transferred to the Leon County Circuit Court by virtue of the common law home venue privilege.

### B. *Schmidt*: Writ Petitions Challenging Gain Time Are Collateral Criminal Proceedings.

In the years leading up to this Court's decision in Schmidt, this Court in several cases examined the nature of extraordinary writ petitions seeking to collaterally attack a criminal judgment and sentence. These decisions attempted to better classify extraordinary writ petitions. In these decisions this Court emphasized the importance of viewing the substance of the petition when classifying it instead of attempting to label it civil or criminal based on the caption. This Court noted that while these writs generally are labeled civil actions they are, in reality, "quasi-criminal" or "collateral criminal" because they attack the judgment and sentence. See Saucer v. State, 779 So. 2d 261, 262 (Fla. 2001); Geffken v. Strickler, 778 So. 2d 975, 976-77 (Fla. 2001); Allen v. Butterworth, 756 So. 2d 52, 62 (Fla. 2000); State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 409-10 (Fla. 1998).

In the context of this then-recent background, this Court released its decision in Schmidt in 2003. In Schmidt, the inmate filed a petition for writ of mandamus in Leon County Circuit Court challenging a loss of gain-time, a type of sentence-reducing credit. Before considering the inmate's petition, the circuit court sought a filing fee or an affidavit of indigency and a printout of the inmate's account pursuant to the Prisoner Indigency Statute, section 57.085, Florida Statutes. The inmate argued that he was not subject to the requirements of this statute because

his petition was not a civil action (which would be governed by the statute), but instead was a collateral criminal proceeding which is exempt from the statute. 878 So. 2d at 362.

This Court agreed with the inmate, reasoning as follows:

> Initially, we note that it is apparent that an action affecting gain time does in fact affect the computation of a criminal defendant's sentence, because the length of time the inmate will actually spend in prison is directly affected. As noted in many of the federal decisions, such a conclusion is also suggested by those decisions of the United States Supreme Court that have treated gain time issues. Long ago, that Court made clear that "[a] prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. . . . [Instead of being bound to the variations in terminology used in the various challenges to the computation of an inmate's sentence, that Court] has looked to the effect the challenged action had on the amount of time an inmate has to actually spend in prison. We think we should do the same; thus, we conclude that a gain time challenge is analogous to a collateral criminal proceeding because the end result is the same – the inmate's time in prison is directly affected.

Id. at 366-67 (citations omitted) (emphasis added).

This Court held that because the inmate's gain time challenge should be considered a collateral criminal proceeding, it was therefore exempt from the Prisoner Indigency Statute. "To hold otherwise would result in an unlawful 'chilling' of a criminal defendant's right to appeal or otherwise challenge the

propriety or constitutionality of the conviction or sentence," and raise a serious issue as to criminal defendants' constitutional rights of access to the courts to challenge their sentences. Id. at 367 (quoting Geffken, 778 So. 2d at 977 n.5).

This Court's seemingly broad statement in Schmidt that a "gain time challenge should be considered a collateral criminal proceeding" has caused confusion in the trial courts, especially the Leon County Circuit Court, because it appears to implicitly reject the long-standing view that a petition for writ of mandamus is a civil action. See Bd. of Public Instruction of Lake County, 172 So. at 860; City of Bradenton, 160 So. at 507. The reasoning goes that if these mandamus petitions are no longer civil actions, but are instead collateral criminal proceedings, the rules applicable to mandamus petitions should no longer apply.

### C. Post-*Schmidt*: Confusion Regarding the Proper Venue for Mandamus Petitions Challenging Computation of Sentence.

Following Schmidt, circuit courts across Florida have battled with whether mandamus petitions challenging the Department's award of sentence reducing credits are now to be filed in the sentencing court, which, they believe, is the proper venue for a collateral criminal proceeding, or whether they are to continue to be filed in Leon County Circuit Court. This has caused a "judicial ping pong" effect in which sentencing courts and the Leon County Circuit Court are transferring these cases back and forth; the merits of those petitions left

unaddressed. See Fla. Dep't of Corrections v. Hanson, 903 So. 2d 282, 284 (Fla. 1st DCA 2005).

The Leon County Circuit Court read Schmidt as requiring an inmate's petition for writ of mandamus challenging the Department's decisions on awarding sentencing reducing credits to be filed like a rule 3.850 postconviction motion attacking the judgment and sentence, i.e., in the sentencing court. Certainly, Judge Francis so ruled with respect to Mr. Bush's original mandamus petition. S. 8-9.

Indeed, the Leon County Circuit Court in a host of other similar cases involving prison inmate mandamus petitions dismissed or transferred those petitions to the inmates' sentencing court.[9] Plainly, the Leon County Circuit Court read Schmidt as a fundamental change to the well-established jurisprudence set forth above providing that venue is proper in Leon County Circuit Courts for these mandamus petitions.

The First District, in a litany of decisions reviewing the Leon County Circuit Court's orders in this type of case, disagreed that Schmidt changed the law and disagreed with Judge Francis's interpretation of Schmidt. See, e.g., Burgess v.

[9] See, e.g., Fuster-Escalona v. Fla. Dep't of Corrections, 891 So. 2d 1163 (Fla. 1st DCA 2005) (reversing dismissal order); Davidson v. Crosby, 883 So. 2d 866 (Fla. 1st DCA 2004) (reversing transfer order); Cason v. Crosby, 892 So. 2d 536 (Fla. 1st DCA 2005) (reversing dismissal order). The First District has released at least thirty-five written decisions with citation to Burgess that reversed the Leon County Circuit Court's orders dismissing or transferring these inmate mandamus petitions.

Crosby, 870 So. 2d 217 (Fla. 1st DCA 2004) (reversing dismissal of mandamus petition and rejecting view that such petitions challenging the Parole Commission and Department's decision relative to gain time credits must be filed in the sentencing court).[10] Other district courts have agreed with Burgess, concluding that Schmidt did not affect the proper venue of these petitions. See, e.g., Eastman v. State, 883 So. 2d 889 (Fla. 2d DCA 2004). The reasoning of the district courts post-Schmidt is instructive.

In Burgess, the First District noted that nothing in Schmidt required these mandamus petitions to be filed in the sentencing court even though the petitions may be viewed as a "collateral criminal proceeding." 870 So. 2d at 220. In viewing the subject matter of the petition, the First District noted that the mandamus petition challenged the revocation of conditional release and forfeiture of gain time decisions made by the Parole Commission and Department, respectively. Id. The court explained that the petition really involved the behavior of the inmate in prison, which neither implicates the original offense for which the inmate was sentenced nor the sentencing court that imposed the sentence. Id. Thus, venue was still proper in Leon County.

The Second District in Eastman followed the reasoning of Burgess. The inmate in Eastman originally filed the mandamus petition in Leon County Circuit

[10] See previous footnote, ibid.

Court only to have that court dismiss it for lack of subject matter jurisdiction. The inmate then filed a new mandamus petition in the sentencing court, which dismissed the petition for technical defects. On appeal of that order, the Second District noted that venue was not appropriate in the sentencing court; instead, venue was appropriate in Leon County or the circuit court that had the territorial jurisdiction over the prison where the inmate is located. 883 So. 2d at 891.[11]

The Fourth and Fifth Districts, post-Schmidt, likewise reject the view that Schmidt required these mandamus petitions to be filed in the sentencing court. See Massey v. Crosby, 860 So. 2d 529 (Fla. 4th DCA 2003); Ruiz v. Crosby, 888 So. 2d 154 (Fla. 5th DCA 2004); Bush, 886 So. 2d at 339.

Although the district courts uniformly hold that Schmidt does not require or authorize these mandamus petitions to be filed in the sentencing courts, Judge Padovano disagreed in Burgess. While he believes that Schmidt was wrongly decided, Judge Padovano, stated that he believed Schimidt applied and explained that he would hold that this Court's characterization of these mandamus petitions as "collateral criminal proceedings" in Schmidt means that these petitions should

[11] The Second District held that the inmate in Eastman was time barred because the inmate did not appeal the Leon County Circuit Court's dismissal order, instead relying on it to file a new mandamus challenge in the sentencing court. Instead of finding a procedural bar, the Second District should have concluded that the interests of justice required that the merits of the inmate's petition be addressed in view of the confusion that abounded after the release of Schmidt. Similarly, as explained later, Mr. Bush should not face a procedural bar argument for complying with Judge Francis's Order.

be treated as such for all purposes. See Burgess, 870 So. 2d at 221 (Padovano, J., dissenting). Judge Padovano, therefore, would not view the context of the petition, instead he would conclude that the "collateral criminal proceeding" label means that the existing postconviction rules would now govern such petitions. See id. Judge Thomas agreed with Judge Padovano's reasoning. See Fuster-Escalona v. Fla. Dep't of Corrections, 891 So. 2d 1163, 1164 (Fla. 1st DCA 2005) (Thomas, J., concurring).

Neither Judge Padovano nor Judge Thomas in their respective opinions cited this Court's decisions in Saucer, Geffken, Allen, or Kenny. As explained below, however, these opinions require the judiciary to view the context of these petitions when deciding how to proceed.

### D. *Schmidt*: No applicability to Mr. Bush's Pending Mandamus Petition.

Mr. Bush seeks the award of additional provisional credits in his pending mandamus petition. Because Schmidt did not alter long-standing precedent regarding the venue of these petitions, the proper venue for Mr. Bush's pending mandamus petition continues to be the Leon County Circuit Court, where he filed his original mandamus petition.

#### *1. The label of the petition does not affect its proper venue.*

It is true that under the reasoning of Schmidt, Mr. Bush's pending mandamus petition is "an action affecting gain time." The award of those

provisional release credits will "affect the computation of [Mr. Bush's] sentence, because the length of time [Mr. Bush] will actually spend in prison is directly affected." Schmidt, 878 So. 2d at 366. Provisional release credits, like gain time credits, are a part of the sentence under the Court's Schmidt decision. Id. at 367 (rejecting argument that gain-time decisions are not technically part of the sentence). Accordingly, Mr. Bush's pending mandamus petition is a "collateral criminal proceeding," as that term is used in Schmidt.[12] That label, however, does not address the issue of the proper venue for this challenge.

Being labeled a "collateral criminal proceeding" (or a "quasi-criminal case") does not mean that such a proceeding is a postconviction challenge to the judgment and sentence, which must be brought under Florida Rule of Criminal Procedure 3.850 in the sentencing court. It is important to note that nothing in Schmidt held or implied that these mandamus writs were being converted into rule 3.850 motions that must be filed in the sentencing court. Instead, the lesson from this Court's Schmidt decision as well as other recent decisions analyzing the nature of the extraordinary writs – Saucer, Geffken, Allen, and Kenny – is that a court is to examine the "nature" of the writ instead of affixing a one-size-fits-all label to it.

[12] As this Court is well aware, Schmidt concerned the Prisoner Indigency Statute, which exempted "collateral criminal proceedings" from its application. Mr. Bush's case does not implicate the Prisoner Indigency Statute; indeed, that statute is not applicable to his pending mandamus petition.

True to that directive, examining the nature of the writ petition is precisely what the First District did in its well-reasoned Burgess decision. There, the First District identified that the inmate was challenging an administrative decision regarding forfeiture of gain-time related to the inmate's behavior while in prison. 870 So. 2d at 220. Even though such decision by the Department did affect the length of the sentence, the First District explained that the Department's decision had nothing to do with challenging the validity of the judgment and sentence imposed by the sentencing court for the original offense. Thus, the First District concluded that the sentencing court was not the proper venue to bring the mandamus petition.

So too here, Mr. Bush's pending writ petition challenges the Department's administrative decision made in Leon County regarding its failure to award certain provisional release credits that would reduce the amount of time he serves in prison. Nothing in Mr. Bush's pending mandamus petition challenges in any respect the validity of the underlying judgment and sentence. Thus, like in Burgess, Mr. Bush's mandamus petition should not be considered by the sentencing court.

***2. The rules relating to postconviction motions and criminal venue do not apply here.***

Mr. Bush is sensitive to Judge Padovano's dissent in Burgess and the rulings made by Judge Francis post-Schmidt. Certainly, Judge Padovano's position that

courts should not examine deeply the nature of the writ petition because the result is the "nature of the legal action" changes "like a chameleon." Id. at 221 (Padovano, J., dissenting). With due respect to Judge Padovano – and Judge Francis – the error in this position is that this Court's case law expressly requires the judiciary to examine the nature of a petition instead of affixing a pre-set label.

Interestingly, neither Judge Padovano nor Judge Francis identifies a legal basis other than Schmidt for the proposition that venue is proper in the sentencing court to consider the merits of these mandamus petitions. That is not surprising, though, because there is no legal authority that confers venue on a sentencing court to consider the merits of a mandamus petition that does not attack the judgment and sentence. For example, courts have not held that rule 3.850 is applicable.

Rule 3.850 sets forth specific criteria for a postconviction challenge. By its express terms, however, that rule applies to "claims for relief from judgment or release from custody." Mr. Bush's mandamus petition does not fit into that mold. The state has conceded this point in at least one case, post-Schmidt. See Massey, 860 So. 2d at 530 (recognizing that state conceded that circuit court in that case misapprehended the focus of Schmidt when it concluded that gain time challenges must now be brought by means of a motion for postconviction relief). Baker v. State, 878 So. 2d 1236, 1245 (Fla. 2004) (Rule 3.850 is mechanism used to challenge judgment and sentence).

Moreover, the criminal venue provision does not apply. That provision, article I, section 16(a), Florida Constitution, provides the criminal defendant the right to have the criminal trial in the county where the crime was committed. Mr. Bush's administrative challenge to the Department's failure to award him certain provisional release credits does not qualify as a criminal trial. Indeed, this Court has previously held that the only pure criminal proceedings are those initiated by the state charging a defendant with a criminal act and criminal contempt proceedings initiated by the court. Saucer, 779 So. 2d at 262 n.5. Because Mr. Bush's pending mandamus petition is not a pure criminal proceeding, the constitutional criminal venue provision is inapplicable.

This Court in Schmidt did not authorize a sentencing court to consider the merits of these mandamus petitions challenging the Department's administrative decisions. Neither rule 3.850 nor article I, section 16(a), Florida Constitution confers venue upon a sentencing court to consider an inmate's mandamus petition. Accordingly, there is no legal authority for the proposition that the sentencing court is an appropriate venue to consider these mandamus petitions.

### *3. Even in the light of Schmidt, venue remains proper in Leon County.*

It remains, therefore, to address the appropriate venue for Mr. Bush's pending mandamus petition, as there must be a forum to address these petitions. The well-established case law pre-Schmidt construing section 47.011 and the home

venue privilege held that venue was proper in either the Leon County Circuit Court or the circuit court with territorial jurisdiction over the prison where the inmate is housed (subject to the Department's right to transfer it to Leon County Circuit Court). Nothing in Schmidt altered this case law. By virtue of section 47.011 and the home venue privilege, therefore, venue is proper in those two circuit courts.

Having inmates continue to bring these mandamus petitions in Leon County Circuit Court (or the circuit court with territorial jurisdiction over the prison where the inmate is located) furthers the judicial policy of promoting a more uniform and efficient administration of these claims, which reduces the drain on the public treasury. See Carlile, 354 So. 2d at 363-64. If this Court were to now require inmates to bring their challenges in the sentencing courts, such an action would create an overflowing basket of practical problems. For instance, as concisely set forth by the First District:

> What is the proper vehicle for bringing such a collateral challenge? Is this an original proceeding rather than a review proceeding? Who are the proper parties? What is the appropriate location for bringing the action? What is the appropriate time limitation, if any, for bringing such an action?

Burgess, 870 So. 2d at 219-20.

Moreover, this Court's decision in Puryear v. State, 810 So. 2d 901 (Fla. 2002), bolsters the conclusion that this Court did not implicitly reject its long standing precedent holding that these challenges are to be brought via writ of

mandamus in the Leon County Circuit Court. In Puryear, this Court expressly held that it did not intentionally overrule itself sub silentio. Id. at 905. Indeed, this Court commanded that courts were to apply an express holding from its earlier cases where a subsequent decision leaves doubt on the issue of whether this Court intended to overrule such earlier precedent. Id. at 905-906. Thus, the lower courts should not have concluded that Schmidt rejected this Court's decisions in Fuller, Griffith, Carlile, and Sun-Sentinel.

For all of these reasons, venue to consider Mr. Bush's pending mandamus petition is appropriate in the Leon County Circuit Court, not the Seminole County Circuit Court. While the Fifth District reached this conclusion, as explained in Issue II, Mr. Bush contends that the Fifth District erred in permitting the dismissal of his writ petition, instead of transferring it.

It must be noted that, alternatively, if this Court were to conclude that Schmidt was a fundamental change in the law and that these mandamus petitions must be brought in the sentencing court, then the Fifth District's decision under review is erroneous, and Mr. Bush would be entitled to a remand for the sentencing court to consider the merits of his pending mandamus petition.

## II. THE FIFTH DISTRICT ERRED WHEN IT FAILED TO ORDER THE TRIAL COURT TO TRANSFER MR. BUSH'S WRIT OF MANDAMUS PETITION TO THE SECOND JUDICIAL CIRCUIT COURT IN LEON COUNTY.

Florida's Constitution commands that an action pending in the wrong court or one that seeks an incorrect remedy must not be dismissed based on those defects. See art. V, § 2(a), Fla. Const. This Court adopted Florida Rule of Civil Procedure 1.060 among others to effectuate this constitutional command.

The Fifth District erred in the decision under review because that court permitted a dismissal of Mr. Bush's action instead of requiring a transfer to the correct court as required by the Florida Constitution and this Court's rules. In doing so, the Fifth District's decision created express and direct conflict with the Second District's decision in Griffith v. Crosby, 898 So. 2d 212 (Fla. 2d DCA 2005), on this issue. The Griffith decision correctly articulated the rule of law that a mandamus petition challenging the Department's decision regarding sentencing reducing credits that is filed in the wrong court should be transferred, not dismissed. Id. at 213.

The facts of Griffith are identical to Mr. Bush's plight. In Griffith, the inmate originally filed a mandamus petition in the Leon County Circuit Court challenging the Department's forfeiture of certain gain time credits. Id. at 212. That court dismissed the petition and directed the inmate to re-file the petition in the sentencing court. Id. The inmate complied, apparently without appeal. Id. at

212-13. The sentencing court thereafter dismissed the newly filed petition, concluding that venue was not proper in the sentencing court and ruling that the inmate must file elsewhere. Id. at 213. On appeal, the Second District reversed the dismissal and directed that the sentencing court transfer the inmate's mandamus petition to the correct court (either in Leon County or the circuit court with territorial jurisdiction of the prison housing the inmate). Id.

The Second District's decision in Griffith faithfully adheres to the constitutional command as implemented by rule 1.060 requiring transfer, not dismissal, when an action is filed in the wrong court. See, e.g., Hill v. Fields, 813 So. 2d 212, 213 (Fla. 2d DCA 2002) (reversing dismissal for improper venue with directions that trial court transfer case to appropriate court); see also McClain v. Crawford, 815 So. 2d 777, 778 (Fla. 2d DCA 2002) (correct remedy for improper venue is transfer, not dismissal); Gross v. Franklin, 387 So. 2d 1046, 1048 (Fla. 3d DCA 1980) (same).

Indeed, Judge Francis's dismissal order of Mr. Bush's original mandamus petition was erroneous on this ground, too. Instead of dismissing Mr. Bush's original mandamus petition, the Leon County Circuit Court should have transferred that petition to the sentencing court. (The court would still have been wrong on its reading of Schmidt, but the court would not have erred procedurally.) Had Judge

Francis done so, there would be no potential issue regarding a procedural bar for the merits of Mr. Bush's being considered.[13]

Mr. Bush initially was correct when he filed his original mandamus petition in Leon County. Because of this reason, and because of the extensive confusion that abounded after this Court released Schmidt, the interests of justice dictate that Mr. Bush's petition be considered on its merits and not be procedurally barred as untimely. This Court routinely permits the merits of an argument be reached in these types of situations without regard to a procedural bar. See, e.g., Harvey v. State, 848 So. 2d 1060, 1063 (Fla. 2003). Accordingly, this Court should provide in its decision that the court that ultimately considers Mr. Bush's mandamus petition on its merits should not find a procedural bar.

It remains only to discuss that Mr. Bush requested the correct relief in his pending mandamus petition – an order directing the Department to award him additional provisional release credits which the Department failed to do when responding to Mr. Bush's grievance. R. 6. As explained above, it is well established that challenges to these actions are cognizable by writ of mandamus. See, e.g., Fuller, 491 So. 2d at 275; Griffith, 485 So. 2d at 820-21. Nothing in Schmidt changed that rule.

[13] Mr. Bush's pending mandamus petition was filed within eight days of Judge Francis's order, but more than thirty days after final Department action.

Even if this Court were to hold that the relief sought by Mr. Bush in his pending mandamus petition may no longer be sought in a mandamus petition, this Court and all other Florida courts are duty bound to treat Mr. Bush's pending mandamus petition as if he had filed the correct action. For instance, Florida courts routinely treat actions as if they seek the correct relief. See, e.g., Thomas v. State, 894 So. 2d 126, 127-28 (Fla. 2004) ("We treat Thomas's mental retardation claim as a motion pursuant to Florida Rule of Criminal Procedure 3.203 and relinquish jurisdiction to the circuit court for consideration in accord with rule 3.203(e) of whether Thomas is mentally retarded."). Thus, if this Court determines that Schmidt did result in a change of the law and now requires these challenges to be brought under authority of rule 3.850 or some other procedural vehicle, this Court should require the courts below to treat Mr. Bush's pending mandamus as such.

In all events, the Fifth District erred in affirming the dismissal of Mr. Bush's pending mandamus petition.

## CONCLUSION

The proper venue for Mr. Bush's pending mandamus petition is the Leon County Circuit Court. This Court's decision in Schmidt did not alter the well-established line of cases holding that challenges to the Department's decisions on sentence-reducing credits are to be brought where the Department is headquartered based on the home venue privilege and section 47.011.

Thus, Mr. Bush initially was correct when he filed his original mandamus petition challenge in Leon County. Mr. Bush should not be faulted for complying with Judge Francis's direction that he re-file the mandamus petition in the court that imposed his sentence. This is especially true here, where the Leon County Circuit Court erred in misconstruing Schmidt as well as dismissing Mr. Bush's original petition instead of transferring it to the Seminole County Circuit Court.

This Court should quash the Fifth District's decision, clarify Schmidt by holding that venue continues to be proper in Leon County Circuit Court instead of the sentencing court for mandamus petitions challenging the Department's determinations affecting sentence-reducing credits, reinstate Mr. Bush's pending mandamus petition, and direct the trial court to transfer that petition to the Leon County Circuit Court. The ends of justice also require that this Court prospectively provide that the Leon County Circuit Court shall determine the merits of Mr. Bush's pending mandamus petition without finding any time bar.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner Corbblin Bush as well as the Appendix to Initial Brief of Petitioner Corbblin Bush have been furnished by **U.S. Mail** to

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## CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this ___th day of July, 2005, that the type size and style used throughout Petitioner's Initial Brief is Times New Roman 14-Point Font.

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