FLORIDA SUPREME COURT

CASE NO: **SC06-1224**

O R I G I N A L

RICK BARNETT, as Bay County Property Appraiser, etc., et al.,

Petitioner,

vs.

FLORIDA DEPARTMENT OF MANAGEMENT SERVICES,

Respondent.

_____/

Lower Tribunal No. **1D05-1731**

REPLY BRIEF OF PETITIONER RICK BARNETT, BAY COUNTY PROPERTY APPRAISER

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PRELIMINARY STATEMENT

Petitioner, Rick Barnett, Bay County Property Appraiser, will be referred to herein as the "property appraiser." Peggy Brannon, Bay County Tax Collector, will be referred to herein as the "tax collector." Respondent, Department of Management Services, will be referred to herein as "DMS." References to the record on appeal from the First District Court of Appeal will be delineated as (R-page #). References to the record on appeal from the circuit court will be delineated as (R-volume #-page #). References to DMS' answer brief will be delineated as (AB- page #).

STATEMENT OF THE FACTS

In its answer brief, DMS disputes the property appraiser's statement relating to the original acquisition of the subject land when the prison facility was constructed. (AB-3) The land was originally acquired by the contractor, Corrections Corporation of America (CCA) by contract and the contract was transferred by it to the Bay County Correctional Facilities Finance Corporation, the non-profit financing corporation which still holds title and which was comprised of three persons residing in Minnesota, facts DMS chose to ignore. (R-IV-8-9) Moreover, this is consistent with the controlling statutes. See § 957.04(2)(c), Fla. Stat. (1995)

> Section 957.04(2)(c) states:
>
> > (2) Each contract entered into for the design and construction of a private correctional facility or juvenile commitment facility must include:
> >
> > * * * * *
> >
> > (c) A specific provision requiring the contractor, and not the commission, to obtain the financing required to design and construct the private correctional facility or juvenile commitment facility built under this chapter.

(Emphasis added.) Section 957.03(4)(a), Florida Statutes (1995), states:

> > (a) The commission shall enter into a contract or contracts with one contractor per facility for the designing, acquiring, financing, leasing, constructing, and operating of that facility or, if specifically authorized by the Legislature, separately contract for any such

> services. The commission shall not enter into any contract to design, acquire, finance, lease, construct, or operate more than two private correctional facilities without specific legislative authorization.

(Emphasis added.)

CCA's initial acquisition of the land and assignment to the paper entity, the financing corporation, are entirely consistent with section 957.04(2)(c), because it was the contractor who was required to "design and construct a private correctional facility built under this chapter." (Emphasis added.)

SUMMARY OF ARGUMENT

In its answer brief, DMS states that the property appraiser "implies" that chapter 957, Florida Statutes (1995), addresses ad valorem taxes and that this statement is somehow not correct. (AB-12) The property appraiser relies on the language in section 957.07, Florida Statutes (1995), which stated that:

> The commission may not enter into a contract or series of contracts for the designing, financing, acquiring, leasing, constructing, and operating of a private correctional facility unless the commission determines that the contract or series of contracts in total for the facility will result in a cost savings to the state of at least 7 percent over the public provision of a similar facility. Such cost savings as determined by the commission must be based upon the actual costs associated with the construction and operation of similar facilities or services as certified to the commission by the Auditor General. In certifying the actual costs for the determination of the cost savings required by this section, the Auditor General shall calculate all of the cost components that determine the inmate per diem in correctional facilities of a

> substantially similar size, type, and location that are operated by the department, including all administrative costs associated with central administration. Services that are provided to the department by other governmental agencies at no direct cost to the department shall be assigned an equivalent cost and included in the per diem. Reasonable projections of payments of any kind to the state or any political subdivision thereof for which the private entity would be liable because of its status as private rather than a public entity, including, but not limited to, corporate income and sales tax payments, shall be included as cost savings in all such determinations. In addition, the costs associated with the appointment and activities of each contract monitor shall be included in such determination. In counties where the Department of Corrections pays its employees a competitive area differential, the cost for the public provision of a similar correctional facility may include the competitive area differential paid by the department. The Auditor General shall provide a report detailing the state cost to design, finance, acquire, lease, construct, and operate a facility similar to the private correctional facility on a per diem basis. This report shall be provided to the commission in sufficient time that it may be included in the request for proposals.

(Emphasis added.) If this statute isn't referring to ad valorem taxes, what is it referring to? This language mentions two governmental entities which are (1) the state and (2) political subdivisions and what does "payment of any kind" which a private entity would have to pay a county mean and include if not ad valorem taxes? That taxes are included is also clear because the language "including, but not limited to, corporate income and sales tax payments" specifically is all inclusion and mentions sales taxes. The reference to the 1999 amendment in

section 957.04, Florida Statutes (1995), as a "clarifying" amendment is purely self-serving because the legislature cannot statutorily decide who owns property. Moreover, the section was replaced in 2004 with a new subsection (8) which deleted that language anyhow, presumably recognizing that the 1999 language was either ill-advised or of no legal efficacy. The legislature cannot lawfully pass a statute declaring that a certain private property shall hereinafter be deemed state owned.

In its answer brief, DMS also disputes the property appraiser's statement that the statutes require the contractor to obtain his own financing citing section 957.03(4)(a). (AB-11) In doing so, DMS ignores section 957.04(2)(c), which clearly states that "each contract entered into shall contain a specific provision requiring the contractor, and not the commission, to obtain the financing required." This is crystal clear legislative direction. DMS chose to ignore this part of chapter 957.

DMS cites Koile v. State, 934 So.2d 1226 (Fla. 2006), apparently asserting that this case had something to do with chapter 957. (AB-12) Koile does not reference or mention chapter 957, but instead, addresses section 775.089, Florida Statutes (2003), a restitution statute.

ARGUMENT

I. THAT THE DISTRICT COURT'S RELIANCE ON HARTSFIELD II IN FINDING SAME TO BE "ESSENTIALLY INDISTINGUISHABLE" FROM THE CASE AT BAR IS MISPLACED.

DMS does not dispute the factual statements made by the property appraiser relating to Leon County Educ. Facilities Auth. v. Hartsfield, 698 So.2d 526 (Fla. 1997). (AB-34-35) Instead, it recites several general statements thus avoiding that which cannot be refuted. With regard to its comment about a lease-purchase agreement shifting the burdens to the lessee, this is commonly done in triple-net leases. Taxes, insurance costs, costs of any improvements, and costs of repairs and maintenance commonly are shifted to the lessee. Where the lessee is building an improvement on leased property, the improvement becomes owned by the lessee upon completion and commonly, at the end of the lease the lessee may have to totally remove the improvement at the lessor's option.

DMS cites First Union Nat'l Bank of Fla. v. Ford, 636 So.2d 523 (Fla. 5th DCA 1993). It does not mention that in Ford the county, a governmental entity, was occupying, possessing, using and controlling the property, and the bank held legal title as security for the construction debt evidenced by the certificates of participation. No ad valorem tax dollars were pledged and, hence, no issue of article VII, section 12, Florida Constitution, infringement existed. That probably is why no mention was made of either State v. School Bd. of Sarasota County, 561

So.2d 549 (Fla. 1980), or State v. Brevard County, 539 So.2d 461 (Fla. 1989). Here, it is Corrections Corporation of America (CCA), a private entity that built and is occupying and using the property.

In Ford, the real property was donated by the owner, and was to be used to build a center which was "being used exclusively for County government functions." Ford, 636 So.2d at 524. The bank was paid a one-time fee of $50,000 to act as trustee and receive the rent payments solely for the individual investor who purchased certificates of participation. Id. The court held that the property was not taxable to the bank as legal title holder, and that no specific revenue source was pledged. Ford, 636 So.2d at 294, n.2. Any sums received by the bank in excess of those needed to repay investors reverted to the county.

In Hialeah, Inc. v. Dade County, 490 So.2d 998 (Fla. 3d DCA), review denied, 500 So.2d 544 (Fla. 1986), the City of Hialeah had obtained title to the subject property from Hialeah, Inc., and leased it back to the corporation for purposes of conducting thoroughbred horseracing on the property. This facilitated tax-exempt financing, and is like Bancroft Inv. Corp. v. City of Jacksonville, 27 So.2d 162 (Fla. 1946), in that the city is holding title as security for debt repayment. Here, the CPC acts as intermediary of the lease-purchase agreement for the sole purpose of obtaining the benefit of the tax exempt financing for the certificates of participation, like in the sale and leaseback situation with option to

purchase in Hialeah, Inc., and the finance corporation holds bare legal title for the same purpose. CCA bought the property and transferred title to the finance corporation for financing purposes only. If default occurred, CCA would reacquire title subject to foreclosure rights in the mortgage.

A good question is what happens to the property if the legislature does not appropriate the money to pay the payments. DMS claims that the state simply "walks away" with no further obligation because it is only a lessee and not an owner if that happens. But, there is a mortgage which could be foreclosed in case of default. But who would be sued as a defendant in a mortgage foreclosure? The state would not need to be a party because, according to DMS, the state has no ownership interest in the property. Its interest is only that of a year-to-year lessee. The original owner who contracted for the land and assigned its rights to the financing corporation would have to be a defendant, the property appraiser submits, because the financing corporation holds only bare legal title.

II. THE STATE IS NOT THE EQUITABLE OWNER OF THE FACILITY FROM EXECUTION OF THE DOCUMENTS BECAUSE THE LEASE-PURCHASE AGREEMENT IS A "LEASE."

DMS chooses to avoid addressing Nohrr v. Brevard County Educ. Facilities Auth., 247 So.2d 304 (Fla. 1971), and never addresses it at all. It argues that it became the equitable mortgagee on execution of the documents and hence "no mortgage is involved." But there was a mortgage from the financing

corporation to the trustee, a fact the department never addresses. Nohrr held that if a mortgage was involved in a bond validation case, that a vote of the electors was required if taxes were used to repay the indebtedness. In fact, it was on this basis that the court distinguishes State v. School Bd. of Sarasota County, 561 So.2d 549 (Fla. 1990), from Nohrr.

Moreover, if the document operated to transfer equitable title to the state on execution, then this constituted a mortgage pursuant to section 697.01, Florida Statutes (2005), and it was not a lease.

III. IN ENACTING CHAPTER 957, THE LEGISLATURE SQUARELY INTENDED AND RECOGNIZED THAT ALL FACILITIES CONSTRUCTED PURSUANT TO BIDS RECEIVED FROM PRIVATE CONTRACTORS WOULD BE SUBJECT TO AD VALOREM TAXATION, AND RECOGNIZED AS PRIVATE PRISON FACILITIES.

Under this point, DMS argues that it is "clear" that the legislature intended to create "state owned and financed correctional facilities" and that arguments to the contrary are misplaced. (AB-33) It seizes on an amendment to section 957.04(8), Florida Statutes (1995), in 1999 which included language added to said section which provided for a payment in lieu of taxes to local governmental entities. Previous payments in lieu of taxes had been made to local entities pursuant to language added in the appropriations acts. See Ch. 98-422, § 4-589, Laws of Fla. (1998); Ch. 99-226, § 4-570, Laws of Fla. (1999); Ch. 2000-166, § 4-

654, Laws of Fla. (2000); Ch. 2001-253, § 4-696, 725, Laws of Fla. (2001); Ch. 2002-394, § 4-705, 737, Laws of Fla. (2002); Ch. 2003-397, § 4-657, 672, 683, Laws of Fla. (2003); Ch. 2004-268, § 4-667, 681, 693, Laws of Fla. (2004).

In fact, that is mentioned in the trial court and provided the bases for the tax collector's motion to the court to deposit these funds even though some payments were not in the correct amounts. (R-I-52-54) DMS addresses this in its statement of the case. (AB-2) If the statute always intended that the state was the owner, building its own prisons and then allowing others to operate same, then clearly article VII, section 12 implications existed from the inception because at all times state tax dollars were anticipated being used to pay for same. Such an analysis certainly makes several provisions in chapter 957 totally superfluous. To illustrate, section 957.04(2)(c) specifically requires the contractor and not the CPC to obtain the financing required to "design and construct the private correctional facility." Similarly, section 957.04(2)(g), Florida Statutes (1995), directs that the contractor has the obligation "to provide suitable office space for the contract monitor," and that the contractor shall have "unlimited access to the corrections facility." If it was the state's from inception these provisions are unnecessary. If the prison was state owned, both of these provisions are superfluous. If the state owned it from inception, it could house the contract monitor without the consent of the contractor. Likewise, if the state is the owner from inception, why did the

legislature provide that the contractor had to obtain the financing to construct the facility?

Even more glaring, if the legislature intended that these facilities be state-owned prisons, why was there any mention made at all of payments a private entity would have to make to the state and political subdivisions? The state pays no sales taxes, corporate income taxes, or ad valorem taxes. All of the following language would be superfluous and meaningless if DMS is correct as to what the legislature intended. Section 957.07, Florida Statutes (1995), provided in part that:

> Reasonable projections of payments of any kind to the state or any political subdivision thereof for which the private entity would be liable because of its status as private rather than a public entity, including, but not limited to, corporate income and sales tax payments, shall be included as cost savings in all such determinations.

This Court resorted to and used basic rules of construction in Koile, 934 So.2d at 1230-31, in which it stated:

> Before resorting to the rules of statutory interpretation, courts must first look to the actual language of the statute itself. *Joshua v. City of Gainesville,* 768 So.2d 432, 435 (Fla.2000); *accord Bell-South Telecomms., Inc. v. Meeks,* 863 So.2d 287, 289 (Fla. 2003). As this Court has often repeated:
>
> > When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v.*

> *Jacobs*, 820 So.2d 297, 303 (Fla. 2002). In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent. *See State v. Burris*, 875 So.23 408, 410 (Fla. 2004). When the statutory language is clear, 'courts have no occasion to resort to rules of construction — they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power.' *Nicoll v. Baker*, 668 So.2d 989, 990-991 (Fla. 1996).

At bar, the clear language is to provide for private contractors to construct and operate private prisons. The private contractor has to obtain the financing and construct the facility. In Koile, this Court stated:

> The main purpose of section 775.089 has been to uphold the rights of crime victims by guaranteeing that they are compensated for their losses. Anything less than full compensation for those items discussed in section 775.089 would defeat the legislative intent of the statute. Moreover, this result is likewise supported by the statutory tenet that 'courts should avoid readings that would render part of a statute meaningless.' *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 456 (Fla. 1992)). A statute 'must be construed in its entirety and as a whole.' *St. Mary's Hosp., Inc. v. Phillipe*, 769 So.2d 961, 967 (Fla. 2000). As addressed above, Koile's interpretation of the statute would render the section expanding the definition of 'victim' meaningless.

934 So.2d at 1233 (emphasis added). The language in section 957.07 would be rendered meaningless. Moreover, it would defeat the legislative intent of

privatizing prisons if they were always intended to be state prisons. The plain language is unambiguous.

In Koile, this Court stated:

> According to the plain language of the statute, the term 'victim' includes not only the person injured by the defendant but also the person's estate if he or she is deceased as well as the person's next of kin if he or she is deceased as a result of the offense. *See* § 775.089(1)(c), Fla. Stat. (2003) (defining the term 'victim'). By expanding the definition of 'victim' to include the victim's estate and next of kin, the Legislature clearly contemplated an award to the estate or next of kin beyond just covering the victim's funeral expenses. Otherwise, there would be no need to expand the definition of victim. As this Court has held, provisions in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words and provisions. *See, e.g., State v. Goode,* 830 So.2d 817, 824 (Fla. 2002) ('[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.").

934 So.2d at 1231 (emphasis added). If the legislature did not intend that the payments of tax owed by a private entity be taken into account when the Auditor General is certifying the bid as meeting the 7 percent threshold because the facility would be private as opposed to public, that part of the statute would be totally superfluous and meaningless. Moreover, DMS is asking this Court to read this language out of the statute. Comparing public versus private entities in terms of

the tax consequences of each is only necessary if the legislature expected the facilities to be taxable.

Most significantly, at bar DMS never contended or offered any evidence that sales tax was not included in the payment to CCA. If sales tax was included then ad valorem taxes should be also because a private contractor would be subject to both while the state would be subject to neither.

Finally, DMS' comments that the state is immune and requires no statute to establish same is not applicable if the state is a lessee of private property. No statute exempts it as was the case in Hartsfield, and the language explaining the different tax consequences of a private entity certainly indicate private and not a public entity as being the owner and subject to tax.

CONCLUSION

Based on the arguments and authorities cited herein, this Court respectfully is requested to answer the certified question in the affirmative and reverse the district court's decision.

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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 **ROBERT C. REID, ESQUIRE** and **THERESA BIXLER PROCTOR, ESQUIRE**, Bryant, Miller & Olive, P.A., 101 N. Monroe Street, Suite 900, Tallahassee, Florida 32301; **MICHAEL S. DAVIS, ESQUIRE**, Bryant, Miller & Olive, P.A., One Tampa City Center, Suite 2700, 201 N. Franklin Street, Tampa, Florida 33602; **DOUGLAS L. SMITH, ESQUIRE**, Burke, Blue, Hutchinson & Walters, P.A., Post Office Box 70, Panama City, Florida 33402-0070 on this the **10th** day of October 2006.

_____

Larry E. Levy

CERTIFICATE OF COMPLIANCE

The undersigned counsel for petitioner certifies that the font size and style used in the foregoing reply brief is 14 Times New Roman and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a).

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Larry E. Levy