IN THE SUPREME COURT OF FLORIDA

FLORIDA PAROLE COMMISSION,

Petitioner, **Case No.: SC06-1252**

vs.

JOSEPH ROBERT SPAZIANO,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

On Petition for Discretionary Review from a Decision
of the District Court of Appeal, First District of Florida

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PRELIMINARY STATEMENT

In this brief, the Petitioner, FLORIDA PAROLE COMMISSION, will be referred to as "the Commission." The Respondent, JOSEPH ROBERT SPAZIANO, will be referred to as "Mr. Spaziano." The initial brief filed by the Commission will be referred to by "IB."

The record before this Court does not come from a paginated record. Therefore the documents cited herein will be referred to by the name of the document, and the appropriate reference therein.

STATEMENT OF THE CASE AND THE FACTS

Because the Commission's statement of the case and facts (IB 1-4) is not complete, Mr. Spaziano adds the following. It must also be noted that the Appendix attached to the Commission's initial brief is not complete. In its Appendix C, the Commission attached Mr. Spaziano's Petition for Writ of Mandamus, with the index to its appendix, but it omitted the 17 documents that made up that appendix. The full appendix can be found in the record to be forwarded by the First District in Mr. Spaziano's Petition for Writ of Certiorari, Appendix, Tab 2, Documents A-Q. In its Appendix I, the Commission attached Mr. Spaziano's Petition for Writ of Certiorari, but again it omitted the documents that made up the appendix to that petition. The full appendix can be found in the

record to be forwarded by the First District in the Petition for Writ of Certiorari, Appendix, Tabs 1-5.

One important fact that the Commission omits when discussing the relief sought in Mr. Spaziano's petition for writ of mandamus (IB 1) is that his claim was that if his presumptive parole release date was calculated properly, he would be entitled to immediate release. Petition for Writ of Certiorari, Appendix, Tab 2 at pp. 13-14.

The statement that Mr. Spaziano was sentenced in 1998 to a concurrent 23-year sentence for second degree murder (IB 1) fails to advise the Court that this sentence was a time served sentence arising from a 1975 case. See State v. Spaziano, 692 So.2d 174 (Fla. 1997); Petition for Writ of Certiorari at p. 4, Appendix 2, Tabs I, J, K, and L. Thus, Mr. Spaziano is not currently serving any sentence for murder.

The Commission referenced (IB 2-3), but did not include in its appendix, the circuit court's order that denied his motion to vacate the inmate lien order. That order is found in the record at Petition for Writ of Certiorari, Appendix 5.

The First District's opinion has not yet been published in the official reporter. It is found at Spaziano v. Florida Parole Commission, 31 Fla. L. Weekly

D1597 (Fla. 1st DCA 6/9/06). At the request of the Commission, the First District stayed its mandate pending review in this Court.

In addition to the instant appeal which involves the lien issue, Mr. Spaziano sought review of the First District's decision, in an effort to obtain review of the merits of the PPRD decision. Spaziano v. Florida Parole Commission, Case No.: SC06-1328. By order dated July 21, 2009, the Court has again stayed that case pending a decision in this one.

SUMMARY OF THE ARGUMENT

CHALLENGE TO PRESUMPTIVE PAROLE RELEASE DATE IS A COLLATERAL CRIMINAL PROCEEDING FOR PURPOSE OF PRISONER INDIGENCY STATUTE

Mr. Spaziano's challenge to the calculation of his presumptive parole release date, if successful, would directly affect the length of time he will actually spend in prison. Therefore that challenge, via a petition for writ of mandamus, must be considered a collateral criminal proceeding for the purpose of the prisoner indigency statute that permits liens to be placed on inmate accounts for certain civil lawsuits filed by inmates. The First District reached the right result, for the right reasons, and its decision must be affirmed.

ARGUMENT

CHALLENGE TO PRESUMPTIVE PAROLE RELEASE DATE IS A COLLATERAL CRIMINAL PROCEEDING FOR PURPOSE OF PRISONER INDIGENCY STATUTE

This Court must affirm the decision of the First District, which held that Mr. Spaziano's lawsuit challenging his presumptive parole release date was a collateral criminal proceeding for the purpose of the prison indigency statute, because it could directly affect the length of time he was to spend in prison, and therefore that the circuit court clerk could not impose a lien, pursuant to § 57.085, Florida Statutes (2004), on his inmate account. The First District's decision properly conforms to the intent of the statute, and conforms with this Court's decisions and the decisions of the only other district court to consider the issue.

Mr. Spaziano agrees with the Commission that the applicability of § 57.085 is a question of law and that the standard of review is de novo (IB 5).

A. Section 57.085 and Statutory Intent

The inmate account lien was imposed pursuant to the prisoner indigency statute, § 57.085, Florida Statutes (Petition for Writ of Certiorari, Appendix, Tab 3). Section 57.085, Florida Statutes (2004),[1/] is entitled "Deferral

1/ This is the version of the statute in effect at the time Mr. Spaziano filed his Petition for Writ of Mandamus in October 2004. The current statute is the same.

of prepayment of court costs and fees for indigent prisoners." In the first nine sections of the statute, the legislature sets forth a procedure and requirements for a Florida inmate to follow when seeking to be declared indigent when initiating or intervening in a civil lawsuit. The last paragraph of the statute, and the one at issue in this case, states:

> (10) This section does not apply to a criminal proceeding or a collateral criminal proceeding.

The intent of the legislature in passing this statute is critical to the issue before the Court, but was not directly addressed by the Commission in its initial brief. That intent has been discussed in several cases by this Court. In Schmidt v. Crusoe, 878 So.2d 361 (Fla. 2003), the Court quoted the preamble to the statute which showed the legislature's frustration with, and desire to curb, frivolous civil lawsuits by pro se inmates. Id. at 365-366. The Court looked at the intent behind the federal indigency statute, after which the Florida statute was patterned. The Court then stated:

> Based upon this express language and a close reading of the legislative scheme, we conclude that the Florida act was enacted . . . to discourage the filing of frivolous civil lawsuits, but not to prevent the filing of claims contesting the computation of criminal sentences.

Id. at 366. The Court has since reiterated that conclusion in two other cases that dealt with gain time issues. McNeil v. Cox, 997 So.2d 343, 346 (Fla. 2008); Schmidt v. McDonough, 951 So.2d 797, 801 (Fla. 2006).

Thus the legislature's intent was not to limit court access in cases where the inmate was challenging a ruling that related to his criminal conviction or sentence. Mr. Spaziano's mandamus petition was not seeking to sue a state official for some prison wrong, or expand his prison rights. Filed by an attorney, it was seeking to correct the Commission's calculation as to when he would be released from prison on his criminal sentences. It was not the type of frivolous lawsuit the legislature was attempting to curtail, but instead was one seeking to challenge a computation that greatly affected his criminal sentence.

B. Rationale of this Court's Gain Time Decisions Supports Affirmance

As the Court noted in its July 21, 2009, order accepting jurisdiction in this case, the Court has addresses the application of § 57.085 in the context of an inmate's attack on his gain time calculation, but it has not addressed the statute in a case where the inmate challenged the calculation of his presumptive parole release date (PPRD). The rationale of the Court's decisions in the gain time context applies equally in the PPRD context.

The Court first addressed the issue in a case in which an inmate challenged a gain time calculation in Schmidt v. Crusoe, 878 So.2d 361 (Fla. 2003). It examined the statutory intent discussed above, and examined the federal indigency statute after which Florida's was patterned. The Court noted that historically (and currently in federal cases) a habeas corpus petition would have been used to challenge a ruling dealing with the computation of a criminal sentence and thus was not the type of lawsuit that Congress meant to restrict. Id. at 365. Because a gain time action can directly affect the length of time an inmate will spend in prison, the Court ruled it was a collateral criminal proceeding and § 57.085 did not apply. Id. at 366-367. The Court stated that to hold otherwise would result in an unlawful chilling of a defendant's right to challenge his sentence, and would raise a serious issue as to the denial of access to courts to make such a challenge. Id. at 367. See also Schmidt v. McDonough, 951 So.2d 797 (Fla. 2006).

In McNeil v. Cox, 997 So.2d 343, 348 (Fla. 2008), the Court again considered the application of § 57.085 in a gain time case. There the Court stated:

> We hold that Schmidt v. Crusoe, 878 So.2d 361 (Fla. 2003), is applicable to all claims that, if successful, will directly affect "the length of time the inmate will actually spend in prison." Id. at 366. Such claims constitute "collateral criminal proceedings" for purposes of section 57.085, Florida Statutes (2005), as explained in Bush v. State, 945 So.2d 1207, 1213 (Fla. 2006).

Bush v. State, supra, was issued the same day as Schmidt v. McDonough, supra, and also involved a challenge to the loss of gain time. It primarily involved a venue issue. The Court cited Schmidt v. Crusoe in discussing a collateral criminal proceeding, but the application of the prisoner indigency statute was not at issue in Bush.

The rule that has been created by Schmidt v. Crusoe and McNeil v. Cox is that a collateral criminal proceeding, in the context of § 57.085, is one in which the claim, if successful, will directly affect the length of time an inmate will serve in prison. Mr. Spaziano's claim - that the proper calculation of his PPRD would result in his immediate release from prison - is the epitome of a claim that if successful would directly affect the length of time he serves in prison. The Court's decisions in Schmidt v. Crusoe and McNeil v. Cox therefore should be held to apply in the PPRD context. The Court should answer "yes" to the certified question, as restated by the Court, resulting in affirmance of the First District's decision on the lien issue in Mr. Spaziano's case.

C. Decisions of District Courts of Appeal Support Affirmance

Since the First District issued its Spaziano opinion, it has repeatedly followed that decision and held that inmate challenges to parole decisions are collateral criminal proceedings. See e.g., Michael v. Florida Corrections

Commission, 966 So.2d 982 (Fla. 1st DCA 2007)(claim that inmate was eligible for parole consideration because her sentence was an upward departure from the recommended guidelines range); Thomas v. Florida Parole Commission, 963 So.2d 777 (Fla. 1st DCA 2007)(challenge to calculation of PPRD); Rowlie v. Florida Parole Commission, 958 So.2d 1131 (Fla. 1st DCA 2007)(challenge to suspension of inmate's PPRD); Miller v. Florida Parole Commission, 951 So.2d 22 (Fla. 1st DCA 2007)(challenge to calculation of PPRD; opinion noted that Commission had conceded that point); Brooks v. Florida Parole Commission, 948 So.2d 801 (Fla. 1st DCA 2006)(challenge to suspension of PPRD).

The Fourth District has also addressed § 57.085 in the context of a parole decision. Thomas v. State, 904 So.2d 502 (Fla. 4th DCA 2005), is the one case cited by the First District in its Spaziano decision. IB, Appendix J at p. 11. In Thomas, the court characterized Thomas' claims as "challenges to the parole statutes," without any additional specificity. Whatever those challenges were, the court held the petition for a writ of mandamus was a collateral criminal proceeding and thus exempt from § 57.085. The Fourth District cited one gain time case from the First District, Cason v. Crosby, 892 So.2d 536 (Fla. 1st DCA 2005), in support of its decision. The Commission now asserts that in Thomas "The indigency issue was not raised on appeal and the Fourth District Court of Appeal made its

determination without the benefit of briefing by the parties" (IB 7). The opinion itself offers no support for that statement.

Prior to Thomas, in Small v. Crosby, 877 So.2d 911 (Fla. 4th DCA 2004), the Fourth District addressed a petition for writ of mandamus in which the inmate alleged the Commission has miscalculated his tentative parole release date. Citing to Schmidt v. Crusoe, the court ruled that such a case was a collateral criminal proceeding, and thus exempt from § 57.085.

It is important to note that the Small and Thomas decisions of the Fourth District on this issue have been in existence for several years, and the Spaziano decision was issued over three years ago. The legislature has not seen fit to amend the prisoner indigency statute to overrule those decisions. That should be seen as an indication that the First and Fourth Districts' decisions were correct.

Each of these district court decisions has held that attacks on parole decisions are collateral criminal proceedings, thus recognizing that parole release decisions do affect the length of time an inmate may serve in prison. These are not frivolous, harassing civil suits. They are rightly determined to be collateral criminal proceedings. No district court has held to the contrary.

* * *

In addition to the presumptive parole release date and gain time cases, the First District has also held that an inmate's challenge to Commission's decision to revoke his conditional release supervision is a collateral criminal proceeding under § 57.085. Crosby v. Florida Parole Commission, 949 So.2d 1181 (Fla. 1st DCA 2007). The court did not engage in any new analysis, but cited a number of its opinions in other Commission cases, as well as this court's decision in Schmidt v. Crusoe. The Fourth District has also ruled that such a challenge is a collateral criminal proceeding. Cooper v. Florida Parole Commission, 924 So.2d 966 (Fla. 4th DCA 2006), review denied, ___ So.3d ___ (Fla. 7/7/09; Case No. SC06-1236). The First District has also ruled that a claim that the Department of Correction was running an inmate's sentences consecutively, when they should have been running concurrently, was a collateral criminal proceeding. Lopez v. McDonough, 935 So.2d 47 (Fla. 1st DCA 2006). These decisions comport with the rationale behind Schmidt v. Crusoe and McNeil v. Cox, as a decision that revokes a defendant's conditional release results in his return to prison, and a decision to run sentences consecutively results in a longer term in prison. Both are clearly claims that directly affect the length of time an inmate will spend in prison.

D. Commission's Arguments Must Be Rejected

The crux of the Commission's argument is its assertion that:

> Discretionary parole decisions of the Commission will not 'directly affect the length of time the inmate will actually spend in prison.' The Commission's decisions will not change the life sentence given to Mr. Spaziano by the courts. (IB 4-5).

That argument cannot pass muster. Mr. Spaziano is not asking the Commission to change his life sentence. Obviously, only a court can do that. What he is asking the Commission to do is change the calculation of his PPRD. In other words, he is asking the Commission to change its calculation as to how much time he has to serve in prison before he can be released on parole. His assertion is that with a proper calculation, he is entitled to immediate relief. To date, he has lost on that claim. But clearly it is a claim, that ". . . if successful, will directly affect 'the length of time [Mr. Spaziano] will actually spend in prison.'" That is the test pronounced by this Court, and Mr. Spaziano's claim meets that test.

The Commission's arguments to convince the Court not to apply the rationale it used in gain time cases to parole cases also must be rejected. The Commission asserts that parole is different from disciplinary proceedings that result in the loss of gain time, because parole is discretionary (IB 7). It also argues

that because a parole release date may not lead to an immediate release, it should not be considered a collateral criminal proceeding (IB 8-9). It spends pages discussing an inmate's rights in a parole proceeding (IB 12-14). These distinctions do not matter as to the lien issue. It makes no difference that the decision is a mandatory or discretionary one, or that the effect on the defendant's sentence be immediate. Of course, it must be remembered that Mr. Spaziano's petition for a writ of mandamus asserted that had the Commission correctly calculated his PPRD, he would be entitled to immediate release.

The Commission's reliance upon Williams v. Florida Parole Commission, 625 So.2d 926 (Fla. 1st DCA 1993); Myers v. Florida Parole and Probation Commission, 705 So.2d 1000 (Fla. 4th DCA 1998); and Sheley v. Florida Parole Commission, 720 So.2d 216 (Fla. 1998), affirming 703 So.2d 1202 (Fla. 1st DCA 1997) (IB 9-10) is misplaced. Those cases all dealt with the proper avenue of appellate review in a parole case. None of them discussed whether review of a parole proceeding was a collateral criminal proceeding under the indigency statutes. So too Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242 (2005)(IB 7-8, 14-15), has no application to Florida's prisoner indigency statute.

The critical point - and the basis for the Schmidt v. Crusoe and McNeil v. Cox decisions - is that both the gain time calculation and a parole release date

calculation directly affect the length of time a defendant will actually spend in prison. An attack on a parole decision is not a harassing civil suit, but one that is tied directly to the service of a defendant's criminal sentence. Mr. Spaziano's petition for writ of mandamus was properly held by the First District to be a collateral criminal proceeding.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must answer "yes" to the certified question, as restated by this Court, and affirm the decision of the First District on the lien issue.

Respectfully submitted this 18th day of September, 2009, at Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2009, a true and correct copy of the foregoing was served via United States mail to Sarah J. Rumph, General Counsel, Florida Parole Commission, 2601 Blair Stone Road, Building C, Room 220, Tallahassee, Florida 32399-2450; and the original and seven copies have been filed with Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant pleading was produced in Times New Roman, 14-point font.

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