IN THE SUPREME COURT OF FLORIDA

Case No. SC06-301

Certified Question of Great Public Importance

JAMES R. McDONOUGH,

Appellant,

v.

LEO J. COX, a/k/a LEONARD COOK,

Appellee.

ANSWER BRIEF OF APPELLEE, LEO J. COX

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STATEMENT OF THE CASE AND FACTS

Since 1937, indigent Floridians have been allowed to file any judicial or administrative action without payment of court costs. Ch. 17883, Law of Fla. (1937), codified as amended at § 57.081, Fla. Stat. (2005). Under this statute, a wide range of fees and services, including filing fees, service of process, copies of any court pleadings or records, mediation services, examining fees, subpoena fees, service charges, and "any other cost or service arising out of pending litigation" are provided without charge. § 57.081, Fla. Stat. (2005). In such actions, if the indigent person prevails, all deferred costs are deducted from the award.

In 1996, the Legislature created a separate, more onerous path to the courthouse door for indigent inmates through the passage of the Prisoner Indigency Statute. Ch. 96-106, Laws of Fla. The heightened requirements of this statute do not apply to "criminal proceedings" or to "collateral criminal proceedings." § 57.085(10), Fla. Stat. (2005).

This statute imposes several disincentives that make it harder for an inmate to file an action in court. For example, prior to accepting an action under Prisoner Indigency Statute, the court is required to test the legal sufficiency of the action. § 57.085(6), Fla. Stat. (2005). Also, if the indigent prisoner has filed two previous actions within the past three years, the prisoner must obtain special leave of the court in order to bring a third action. *Id.* at 57.085(7). In addition, if the indigent inmate is able to pay any part of the costs, service of process may not be made

until a court order requiring partial payment is entered. *Id*. at 57.085(4). Moreover, once partial payment is made, the Department is required to "place a lien on the inmate's trust account for the full amount of the court costs and fees." *Id.* at 57.085(5).

Even after the indigent inmate clears these initial "filing" hurdles, the Prisoner Indigency Statute makes it easier for a court to dismiss the action. An action may be dismissed at any time upon a finding that the prisoner's claim of indigence was misleading, that the prisoner provided false or misleading information in another proceeding, that the prisoner did not make required payments despite having the ability to do so, or that the action (or even a portion of the action) is frivolous or malicious. § 57.085(8), Fla. Stat. (2005). Finally, unlike its non-prisoner counterpart, the Prisoner Indigency Statute does not delineate the scope of services available to the indigent filer.

Leo Cox, a/k/a Leonard Cook ("Cox" or "Appellee"), was convicted of second-degree murder with a firearm and sentenced to twenty years for a crime committed on or about April 16, 1995. His conviction was affirmed on appeal in December of 1999. (Vol. I, page 3.)

On August 27, 2003, Cox, an inmate and pro se litigant, filed an action styled as a "Petition for a Writ of Habeas Corpus" ("Cox action") with the Florida Supreme Court. (Vol. I, pages 1-10.)

The Cox action challenged the constitutionality of the Safe Streets Initiative of 1994 on the grounds that it violated the single-subject requirement of article III, section 6 of the Florida Constitution. The Safe Streets Initiative eliminated a basic gain time deduction for crimes committed after January 1, 1994. Ch. 93-406, § 26, at 2959-60, Laws of Fla. The Safe Streets Initiative was officially incorporated into the Florida Statutes as part of the biennial adoption that cures any single subject violations on July 10, 1995.

Cox was convicted of a crime that was committed after the effective date of the bill but before the bill's biennial incorporation into the statute—the window of time when a single-subject challenge may be brought. *See Heggs v. State*, 759 So. 2d 620, 623-25 (Fla. 2000) (finding that an inmate had standing to raise a single-subject challenge to the constitutionality of a legislative act where the offense was committed after the effective date of the legislation and before the biennial adoption of the Act into the statutes); *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993) (noting that a legislative act was subject to attack as being violative of the Constitution's single-subject requirement where the offense was committed during the window after the effective date of the act but before the reenactment of the act into the official statutes).

Based on Cox's twenty-year sentence with a three-year minimum mandatory, this change extended his tentative release date by five years and seven months.[1]

On December 16, 2003, this Court transferred the Cox action to the Second Judicial Circuit, pursuant to *Harvard v. Singletary*, 733 So. 2d 1020 (Fla. 1999).

On April 12, 2004, the Circuit Court entered a Case Management Order requiring Cox to either pay the $97.50 filing fee or file a certification of indigence. (Vol. I, pages 12-13.) The Order mischaracterized Cox's Petition as an action seeking "review of inmate disciplinary action by the Department."

On or about May 20, 2004, Cox filed an Affidavit of Indigency pursuant to section 57.081, Florida Statutes, citing *Schmidt v. Crusoe*, 878 So. 2d 361, 366 (Fla. 2004) (concluding that "a gain time challenge should be considered a 'collateral criminal proceeding,'" and the Prisoner Indigency Statute [57.085] should not apply"). (Vol. I, pages 16-19.)

[1] Prior to the passage of the Safe Streets Initiative of 1994, the tentative release date was calculated by deducting the total projected basic gain time from the sentence expiration date. §944.275(3)(a), Fla. Stat. (1991). Under this system, Cox would have been entitled to an award of five years and seven months of basic gain time based on the following calculation. First, 20 years total sentence – 3 years minimum mandatory portion of sentence = 17 years to accrue basic gain time. Second, 17 years * 12 months/year = 204 months to accrue basic gain time. Third, 204 months * 10 days of basic gain-time/month = 2040 days of gain time, which is just over 5 years and 7 months.

On September 16, 2004, the Circuit Court entered an Order on Prisoner Indigence and Eligibility for Waiver of Prepayment of Court Costs and Fees in Civil Proceedings. (Vol. I, pages 20-23.) The Circuit Court concluded that the Cox action was not affected by *Schmidt*, "because it does not involve the plaintiff's loss of gain time due to prison disciplinary action." *Id.* at 20.

The Circuit Court then analyzed the Cox action under section 57.085, Florida Statutes, concluding that although Cox was indigent, he was able to pay part of the court costs and fees. On that basis, the court required an initial payment of $7 and placed a lien on Cox's prisoner trust account for the "**full amount of the court costs and fees.**" *Id.* at 21 (emphasis in original).

On July 7, 2005, the Circuit Court construed the Cox Petition as an action for declaratory judgment and issued an Order Denying Mandamus Relief:

> Considering the complaint as one for declaratory relief, the plaintiff [Cox] does have an interest in the validity of the statute. . . . The plaintiff therefore seeks to have basic gain-time awarded, reducing his tentative release date by five years and eight months."

(Vol. I, page 40.)

On September 20, 2005, Cox filed a Motion for Review, requesting that the First District Court of Appeal "review the circuit court's order of indigency, and to administer any and all justice consistent with the law." (State's Initial Brief, App. H.)

On January 26, 2006, the First District Court of Appeal concluded that Cox's action is a "collateral criminal" proceeding and granted his motion to reverse the trial court's order imposing a lien on Cox's inmate trust account. (Vol. II, page 46.) The First District Court of Appeal certified to the Florida Supreme Court a question of great public importance:

> DOES THE HOLDING IN *SCHMIDT V. CRUSOE*, 878 So.2d 361 (FLA.2003), EXTEND TO ALL ACTIONS, REGARDLESS OF THEIR NATURE, IN WHICH, IF SUCCESSFUL, THE COMPLAINING PARTY'S CLAIM WOULD DIRECTLY AFFECT HIS OR HER TIME IN PRISON, SO TO PRECLUDE IMPOSITION OF A LIEN ON THE INMATE'S TRUST ACCOUNT TO RECOVER APPLICABLE FILING FEES?

(Vol. II, page 48.)

On March 14, 2006, the Florida Supreme Court accepted jurisdiction and appointed the undersigned as counsel for the Appellee. The Petitioner filed its Initial Brief on April 7, 2006.

SUMMARY OF THE ARGUMENT

This Court has consistently held that actions which, if successful, would directly impact the amount of time an inmate will spend in prison are collateral criminal proceedings. It is uncontroverted that the Cox action, if successful, would directly impact the amount of time he would be required to spend in prison. Therefore, the court below properly concluded that the Cox action is a collateral criminal proceeding.

This Court has analyzed the Florida Indigency Statute in two recent cases. In *Geffken v. Strickler*, 778 So. 2d 975, 977 (Fla. 2001), this Court concluded that an action which "contests a criminal conviction or sentence is a 'collateral criminal proceeding' for purposes of the Prisoner Indigency Statute." More recently, in *Schmidt v. Crusoe*, 878 So. 2d 361, 366 (Fla. 2004), this Court concluded that the decision of whether or not to classify an action as a collateral criminal proceeding should be based on the substance of the action and not on its nominal designation. *Schmidt* also concluded that the Prisoner Indigency Statute was enacted for the same reasons as an analogous federal provision—"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.

Schmidt determined that an action should be classified as a collateral criminal proceeding, where the action, if successful, would directly impact "the amount of time an inmate has to actually spend in prison." *Id.* at 367. Guided by this test, the Court held that an action challenging the revocation of an inmate's gain time "should be considered a 'collateral criminal proceeding,' and the Prisoner Indigency Statute should not apply." *Id.*

Applying this analysis here, it is clear that the Cox action must be classified as a collateral criminal proceeding. The Cox action argues that the Safe Streets Initiative of 1994, which eliminated "basic gain time" for crimes committed after January 1, 1994, violated the single-subject requirement of article III, section 6, of

the Florida Constitution. Were Cox to prevail, the Department would be required to modify his tentative release date, crediting him with the basic gain time deduction that the Safe Streets Initiative took away. This additional gain time would advance his tentative release date by more than five years.

In sum, but for the passage of the Safe Streets Initiative, Cox would have been entitled to this basic gain time deduction. Therefore, his action challenging the constitutionality of the statute must be classified as a collateral criminal proceeding because it would directly impact "the amount of time [Cox] has to actually spend in prison." *Schmidt*, 878 So. 2d at 367.

The state argues that *Schmidt* should be read as a narrow exception that only applies to gain-time challenges brought through an "adversarial administrative proceeding." (State's Initial Brief, page 12-13.) However, nothing in *Schmidt* even hints that the Court intended such a narrow reading. Moreover, the Court indicated that any action that would affect an inmates gain time should be classified as a collateral criminal proceeding. Further, the State argues that the Cox action is a routine civil action. However, unlike "routine" civil proceedings, the Cox action challenges the length of his prison term, and therefore, implicates Cox's liberty interests.

In the alternative, if this Court concludes that the Cox action is not a collateral criminal proceeding, then Cox respectfully requests that this Court invalidate the lien provisions of the Prisoner Indigency Statute because they

impermissibly restrict Cox's fundamental right to access our courts and his right to defend his fundamental liberty interests. The Legislature is only permitted to burden the right to court access where it has shown there is an overpowering public necessity that justifies the infringement and where the remedy is strictly tailored to accomplish its purpose without burdening the fundamental right more than is absolutely necessary. *Mitchell v. Moore*, 786 So. 2d 521, 527-28 (Fla. 2001).

Under this scrutiny, the lien provision of the Prisoner Indigency Statute must fall because it was not narrowly tailored to accomplish the Legislature's intended purpose through the least-restrictive means. For example, the way section 57.085 is structured, once a determination is made that the prisoner is able to pay part of the court costs and fees, the Department of Corrections is required to "place a lien on the inmate's trust account for the full amount of the court costs and fees." § 57.085(4)-(5), Fla. Stat. (2005).

Further, by placing a lien on the inmate's trust account, the Prisoner Indigency Statute imposes an additional financial burden on the benevolence of an inmate's family and friends. Placing the burden associated with the exercise of an inmate's fundamental right on charitable donations is an abuse of charity, and a travesty of justice. Such a system lowers the right to court access from its lofty pedestal as a fundamental right to the common currency of a marketplace commodity. Those with resources are able to defend their liberty interests and are given full and unfettered access to our courts. In contrast, indigent prisoners must

sign away current and future gifts from charity just to reach the courthouse door. Cox respectfully requests that the Court reject this system because it impermissibly impairs his fundamental rights.

ARGUMENT AND AUTHORITIES

Standard of Review. The issues are purely legal and therefore the standard of review is de novo. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001).

I. A COLLATERAL CRIMINAL PROCEEDING IS AN ACTION THAT, IF SUCCESSFUL, WOULD IMPACT THE AMOUNT OF TIME THAT AN INMATE IS INCARCERATED

The Legislature did not define "collateral criminal proceeding" when it adopted the Prisoner Indigency Statute. Ch. 96-106, Laws of Fla., codified at § 57.085, Fla. Stat. (2005). In *Schmidt v. Crusoe*, 878 So. 2d 361, 366 (Fla. 2004), this Court undertook a detailed analysis of this statute to determine both its purpose and scope. In its analysis, this Court reviewed federal case law construing the Prison Litigation Reform Act of 1995 (PLRA). *Id.* at 364-67. PLRA is an analogous federal provision upon which Florida's prisoner indigency legislation was fashioned. Looking to the legislative intent of PLRA, *Schmidt* concluded that Congress's principal interest was "in discouraging civil damage suits involving frivolous challenges to prison conditions." *Id.* at 364.

Schmidt further concluded that the Florida act was adopted for substantially the same reasons as its federal counterpart:

> [W]e conclude that the Florida act was enacted for substantially the same reasons Congress acted at the federal level: to discourage the filing of frivolous civil lawsuits, but not to prevent the filing of claims contesting the computation of criminal sentences. Hence, the federal decisions provide a valid framework for our own analysis and decision.

Id. at 366 (emphasis added). *Schmidt* also found that actions affecting gain time directly relate to the computation of a criminal defendant's sentence "because the length of time the inmate will actually spend in prison is directly affected." *Id.* Ultimately, *Schmidt* held that a gain time challenge should be considered a collateral criminal proceeding:

> Therefore, we agree, in accord with the authorities discussed above, that his gain time challenge should be considered a "collateral criminal proceeding," and the Prisoner Indigency Statute should not apply. 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," *Geffken v. Strickler*, 778 So.2d 975, 977 n. 5 (Fla. 2001), and raise a serious issue as to criminal defendants' constitutional rights of access to the courts to challenge their sentences.

Id. (emphasis added.)

The Florida courts have held that a broad range of actions are properly categorized as collateral criminal proceedings:

- Action for declaratory judgment. *Muhammad v. Crosby*, 922 So. 2d 236 (Fla. 1st DCA 2006) (construing an inmate's petition for writ of mandamus

to be a suit for declaratory relief and finding that the inmate's challenge to the Department of Correction's revocation of his gain time to be a collateral criminal proceeding).

- Writ of Mandamus—seeking restoration of gain time. *Fla. Dep't of Corrections v. Hanson*, 903 So. 2d 282 (Fla. 1st DCA 2005) (concluding that an inmate's gain time challenge was a mandamus petition, but that venue was proper in the county where the Department of Corrections is located).
- Writ of Mandamus—alleging miscalculation of release date. *Small v. Crosby*, 877 So. 2d 911 (Fla. 4th DCA 2004) (concluding that a mandamus petition alleging that the Department of Corrections had miscalculated his tentative release date was a collateral criminal proceeding).
- Rule 3.800(a) Motion challenging a statute. *Thomas v. State*, 904 So. 2d 502 (Fla. 4th DCA 2005) (construing a challenge to the parole statutes to be a petition for writ of mandamus, and finding that the action was a collateral criminal proceeding exempt from the requirements of section 57.085, Florida Statutes).
- Rule 3.850 Motions. *Hall v. State*, 752 So. 2d 575 (Fla. 2000) (agreeing with the Fifth District Court of Appeal that rule 3.850 motions are collateral criminal proceedings).

The common thread of these diverse decisions is that an action directed toward the length of an inmate's stay in prison constitutes a collateral criminal proceeding. In *Geffken*, this Court reasoned that the Legislature excluded collateral criminal proceedings from the heightened requirements of section 57.085, Florida Statutes, to reduce the potential that the measure might be invalidated as "an improper 'chilling' of a criminal defendant's right to appeal or otherwise challenge the propriety or constitutionality of the conviction or sentence." 778 So. 2d at 978 n.5. Therefore, in order to avoid a finding that the Prisoner Indigency Statute is unconstitutional, the exclusionary term, collateral criminal proceedings, must be construed broadly enough to include Cox's action. *State v. Keaton*, 371 So. 2d 86, 89 (Fla. 1979) ("Fundamental principles of statutory construction dictate that an enactment should be interpreted to render it constitutional if possible.")

II. COX'S ACTION IS PROPERLY CATEGORIZED AS A COLLATERAL CRIMINAL PROCEEDING

Cox's action should be characterized as a collateral criminal proceeding for three reasons. First, if successful, the Cox action would directly affect the time he is required to spend in prison—the very essence of a collateral criminal proceeding. Second, a challenge to the gain time statute asserts that a prisoner is being unlawfully detained, and thus is functionally similar to a statutory habeas proceeding, which is considered collateral. Third, the failure to treat a gain-time challenge as a collateral criminal matter will impede access to the courts by

persons asserting the violation of fundamental liberty interests, a result not intended by the Florida Legislature.

A. An Action Challenging the Constitutionality of a Statute that Diminished Cox's Opportunity to Accrue Gain Time Attacks the Sentence Imposed and Is, Therefore, a Collateral Criminal Proceeding

As a starting point, "writ petitions which contest a criminal conviction or sentence are 'collateral criminal proceedings,' and are exempt from the partial payment provisions of the Prisoner Indigency Statute." *Geffken*, 778 So.2d at 976. A challenge to restore gain time pertains to the sentence, and is therefore, a collateral criminal proceeding.

Florida, like many other states, rewards convicted prisoners for good conduct and compliance with prison rules by using a statutory formula that reduces the length of time that an inmate must serve in prison. The United State Supreme Court, in considering Florida's application of gain-time rules, has concluded that gain time is part of a prisoner's sentence. *See Lynce v. Mathis*, 519 U.S. 433, 445 (1997). Revoking a prisoner's gain time lengthens his actual sentence. *Weaver v. Graham*, 450 U.S. 24, 33-34 (1981).

In *Lynce*, the Florida Attorney General had issued an opinion interpreting a 1992 statute as having retroactively canceled all provisional gain time awarded to inmates convicted of murder and attempted murder. 519 U.S. at 436. The Petitioner filed a habeas corpus petition challenging the retroactive cancellation of his provisional gain time on the ground that his sentence has been lengthened. The

respondents argued that the retroactive cancellation of provisional gain time bore no relationship to the original penalty assigned to the crime or the actual penalty calculated under the sentencing guidelines. The United States Supreme Court, in holding that gain time was part of the petitioner's sentence, stated that "[t]o the extent that the respondents' argument rest on the notion . . . gain-time is not 'in some technical sense part of the sentence,' . . . this argument is foreclosed by our precedents . . . [gain-time is] one determinant of [the] petitioner's prison term, and [his] effective sentence is altered once this determinant is changed." *Id.* at 445. In the instant case, were Cox to succeed in invalidating Chapter 93-406, it cannot be reasonably disputed that it would shorten his prison term. Thus, by challenging a gain-time statute, the Cox action directly impacts the amount of time he will be in prison.

B. An Action to Challenge the Constitutionality of a Statute that Deprived an Inmate of More than Five Years of Gain Time is a Collateral Criminal Proceeding

Even if this Court concludes that Cox's challenge to the Safe Streets Initiative of 1994 is not a direct attack on his sentence, it should still conclude that his challenge is a collateral criminal proceeding for which filing fees should be waived.

In the proceeding below, the Circuit Court found that this case is not affected by *Schmidt* "because it does not involve the Plaintiff's loss of gain time due to prison disciplinary action." (Vol. I, page 20.) In tandem, the State argued in

its Initial Brief that *Schmidt* only applies when gain time is forfeited as a result of an "adversarial administrative proceeding." (State's Initial Brief, page 9-10.) This is a distinction without a difference. Admittedly, *Schmidt* involved an action brought to challenge discipline imposed by the Florida Department of Corrections that resulted in the loss of gain time, 878 So. 2d at 362, as was *Cason v. Crosby*, 892 So. 2d 536 (Fla. 1st DCA 2005), which the Petitioner also cites. Those actions, if successful, would have impacted the litigant's time in prison. Likewise, Cox's action, if successful, would impact his time in prison.

The State's position flies in the face of *Schmidt* where this Court indicated that it would not be bound by variations in terminology but instead intended to focus on whether the action would affect the inmate's time in prison:

> [W]e conclude that a gain time challenge is analogous to a collateral challenge to a sentence in a criminal proceeding because the end result is the same--the inmate's time in prison is directly affected.

878 So. 2d. at 367 (emphasis added).

The Petitioner argues that Cox's attack on the Safe Streets Initiative of 1994, was a routine civil suit, no different from a similar suit filed by a person not subject to a prison sentence. Such an assertion overlooks a fundamental difference. Cox is challenging the constitutionality of a statute that directly impacts his prison term and, therefore, his liberty interests. *Schmidt*, 878 So. 2d at 367; *Johnson*, 616 So. 2d at 3; *see also O'Neal v. McAninch*, 513 U.S. 432, 440 (1995) (noting that habeas is a civil proceeding involving someone's custody rather than mere civil

liability). Were he to succeed, Cox would accrue an additional five years and seven months of gain time. In contrast, a "routine" civil action filed by a person who is not incarcerated does not implicate the filer's liberty interests.

C. The Legislature Did Not Intend to Bar Access to Courts for the Unlawfully Incarcerated

Nothing in the legislative history of section 57.085 supports the conclusion that the Florida Legislature intended the civil filing fee to be a bar to presenting a claim of unlawful incarceration. Instead, it is much more reasonable to conclude that all challenges to unlawful detention, whether presented by way of rule 3.850, rule 3.800, common law habeas, or mandamus, or petition for declaratory judgment should be treated as collateral criminal proceedings and exempt from certain costs and filing fees—regardless of the label that is applied.[2] To conclude otherwise would "raise a serious issue as to criminal defendants' constitutional rights of access to courts to challenge their sentences." *Schmidt*, 878 So. 2d at 367.

The Petitioner argues that challenges that do not depend on the individual petitioner's unique facts and which would benefit more than a single inmate somehow fall outside the scope of collateral criminal challenges. (State's Initial Brief, pages 12-14.) Such a distinction is both unworkable and misguided. If a statute depriving Cox of his liberty is unconstitutional, his action challenging that

[2] Circuit Judge Janet E. Ferris construed the Cox Petition as an action for declaratory judgment, concluding that "a challenge to the validity of a statute is not the proper subject for mandamus relief." (Vol. I, page 39.)

statute is a collateral criminal proceeding—without reference to whether its resolution turns on individual facts unique to the filer. For example, a facially unconstitutional statute could be challenged and invalidated without alleging any unique facts.

The State argues that Cox's action is not a collateral criminal proceeding because it is "speculative" and because it seeks to litigate a right to gain time that has not yet vested. Such a holding would require this Court to revisit the entire body of capital criminal proceeding case law, and would eliminate many meritorious actions brought under rule 3.850, rule 3.800, common law habeas, mandamus, or as petitions for declaratory judgment.

The State also argues that *Schmidt* was drafted too broadly because, under its holding, any challenge that could potentially lessen the inmate's sentence should be categorized as a collateral criminal proceeding. The Petitioner asserts that if this Court affirms *Schmidt* it will empower 80,000 inmates to "challenge the procedure the legislature uses to pass any statute," and permit multiple and repetitive filings without the smallest sacrifice on the part of the inmate. This danger is overstated. From 1937 to 1996, indigent persons, without reference to whether or not they were incarcerated, were given equal access to our court system—free of charge. *Schmidt* merely upholds the intent of the legislature (and the integrity of our justice system) by permitting indigent inmates to file petitions that have the potential to impact their prison term without charge.

Moreover, as part of the Legislature's ongoing efforts to discourage the filing of frivolous lawsuits, it has adopted numerous safeguards. For example, where an inmate is found by a court to have brought a frivolous or malicious collateral criminal proceeding, the inmate is subject to the disciplinary procedures of the Department of Corrections and to the forfeiture of gain time. §§ 944.279(1) and 944.28(2)(a), Fla. Stat. (2005). The State has provided no evidence that these provisions are inadequate. *See Simpkins v. State*, 909 So. 2d 427, 428 (Fla. 5th DCA 2005) (barring any further *pro se* pleadings and directing that the opinion be forwarded to the appropriate institution for disciplinary measures).

III. IN THE ALTERNATIVE, SHOULD THE COURT DETERMINE THAT COX'S ACTION IS NOT A COLLATERAL CRIMINAL PROCEEDING, THE COURT SHOULD INVALIDATE THE LIEN PROVISION IN FLORIDA'S PRISONER INDIGENCY STATUTE SINCE IT IMPERMISSIBLY RESTRICTS COX'S FUNDAMENTAL RIGHT TO COURT ACCESS

Should the Court conclude that the Cox action is not a collateral criminal proceeding and is, therefore, subject to the requirements of the Prisoner Indigency Statute, Cox argues that the lien provision set out in said statute is unconstitutional. The lien provision in the Prisoner Indigency Statute impermissibly impairs the constitutional right of access to the court system. In addition, the Cox action directly implicates his liberty interests by challenging the constitutionality of legislation that materially delayed his expected release date.

A. The lien provision is unconstitutional because it impermissibly infringes on the fundamental right of access to court

In Florida, the right to access our state court system is a fundamental right, protected by the Florida Constitution[3] and the United States Constitution. *Mitchell v. Moore*, 786 So. 2d 521, 525-27 (Fla. 2001). The Florida Constitution provides that "the courts shall be open to every person for redress of any injury." Art. I, § 21, Fla. Const. (emphasis added).

Historically, indigent persons in Florida have been given the right to use the court system without cost. This right was first codified in 1937 when the Florida Legislature adopted House Bill 1718, which expressly gave indigent persons in larger counties the statutory right to access to the court system without cost. Ch. 17883, Law of Fla. (1937). In 1957, this right was extended statewide. Ch. 57-251, § 1, at 497, Laws of Fla.

In *Kluger v. White*, 281 So. 2d 1, (Fla. 1973), the court set out a test to determine whether a legislative enactment violates the "access to courts" clause of the Florida Constitution:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an

[3] Art. I, § 21, Fla. Const. This right dates back to Florida's 1838 Constitution. *See* art. I, § 9, Fla. Const. (1838).

> overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4. In *Kluger*, the Florida Supreme Court struck a legislative act which purported to do away with a person's ability to sue for an automobile accident unless the property damages exceeded a certain amount. Central to this Court's analysis was the fact that the cause of action the Legislature sought to repeal was recognized by statute prior to the adoption of the 1968 Constitution of the State of Florida.

With respect to the case at bar, prior to the adoption of the 1968 Florida Constitution, individuals who were certified as indigent enjoyed the right to initiate an action—any action—in court without paying filing fees or costs.[4] Prior to 1996, this right applied to <u>all</u> indigent filers, without reference to whether they were incarcerated or not. Ch. 57-251, § 1, at 497, Laws of Fla. Then, in 1996 the Florida Legislature placed several hurdles in front of the courthouse door for

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[4] This statutory list of services that will be provided without charges is extensive:

> Such services are limited to filing fees; service of process; certified copies of orders or final judgments; a single photocopy of any court pleading, record, or instrument filed with the clerk; examining fees; mediation services and fees; private court-appointed counsel fees; subpoena fees and services; service charges for collecting and disbursing funds; and any other cost or service arising out of pending litigation.

§ 57.081(1), Fla. Stat. (2005).

indigent inmates,[5] thereby violating the principles set forth in *Kluger*. Ch. 96-106, § 2, at 93-95, Laws of Fla.

1. This Court has already invalidated a less burdensome copy requirement in Mitchell v. Moore.

In *Mitchell v. Moore*, 786 So. 2d 521 (Fla. 2001), this Court applied the *Kluger* analysis to invalidate a "copy requirement" contained in the Prisoner Indigency Statute because it significantly obstructed court access. The copy requirement was part of the Legislature's efforts to deter frivolous filings. Under this provision, an inmate who had filed two suits as an indigent within the past three years was required to obtain leave of the court before he or she could file an additional suit. Under the statute, the inmate was required to attach a copy of his or her prior lawsuits to his application for leave of the court. *Id.* at 524. Because the copy requirement infringed on the fundament right of access to courts, this Court concluded that it could only sustain the infringement if it met three requirements:

> In this case, the right to gain access to the courts itself has been infringed. Under *Kluger*, the Legislature may only abolish a right if it has provided a reasonable alternative, it has shown an overpowering public necessity for the abolishment of the right, and there is no alternative method of remedying the problem.

Id. at 527. Importantly, this Court found that the strict scrutiny review was appropriate. *Id.* at 528. Therefore, "the method for remedying the asserted malady

[5] These hurdles include preliminary screening, the duty to pay court costs and filing fees, and additional grounds for dismissal. *Id.*

must be strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary." *Id.* at 527.

In *Mitchell*, the Court observed that whereas *Kluger* only curtailed one type of legal action, the copy requirement in the Prisoner Indigency Statute infringed on "the right to seek redress for *any type* of injury or complaint of any kind in any civil case that requires a filing fee." *Id.* at 527 (emphasis in original). Like the copy requirement that this Court struck in *Mitchell*, the lien provision of the Prisoner Indigency Statute applies to a broad class of civil cases and not a single type of legal action. Further, the lien provision of the Prisoner Indigency Statute applies to a much broader class of inmates than the copy requirement. Whereas the copy requirement only applied where an inmate had initiated two prior proceedings within the past three years, the lien provision applies in every 57.085 case where the clerk concludes that the prisoner is able to pay any part of the court costs and fees. *See* § 57.085(7), Fla. Stat. (2005).

When the *Kluger* test is applied to the Prisoner Indigency Statute in the instant case, the statute must fall because it impermissibly burdens a fundamental right. In *Mitchell*, the court noted that in the Prisoner Indigency Statute "the Legislature specifically identified as the targeted evil only frivolous or malicious civil actions." *Id.* at 528. Yet, the copy requirement had the potential to infringe on <u>any type</u> of inmate petition requiring a filing fee. *Mitchell* concluded that the copy requirement was overbroad and thus failed the strict scrutiny analysis.

The instant case is even more compelling, because it implicates two fundamental rights. First, like the challenged copy requirement in *Mitchell*, the lien provision of the Prisoner Indigency Statute infringes an inmate's access to court for a broad range of civil actions. Second, as will be discussed below, the instant action involves Cox's fundamental liberty interests, invoking heightened scrutiny and protection.

2. The Lien Provision Must be Invalidated Because it was not Narrowly Tailored.

The way the lien provision of section 57.085, Florida Statutes, is structured, once a determination is made that the prisoner is able to pay **part** of the court costs and fees, the Department of Corrections is required to "place a lien on the inmate's trust account for the **full amount** of the court cost and fees." § 57.085(4)-(5), Fla. Stat. (2005) (emphasis added).

In the instant case, the clerk determined that Cox was able to make an initial payment of $7.00.[6] Without further analysis, a lien for the entire filing fee was levied against Cox's inmate trust account. Moreover, by placing a lien on an inmate's trust account, the Prisoner Indigency Statute places the burden for an

[6] During the six-month report that was attached to Cox's Affidavit of Indigency, he received three gifts totaling $175.00. (Vol. I, page 19.) Two of the gifts were from individuals whose surname was Cox, the third giver was unknown. Over the 182-day period considered when determining that Cox was able to pay part of the court costs and fees, Cox's account had a zero balance for 113 days, not including an additional 16 days when the balance was 2 cents.

indigent inmate's court fees and costs on the inmate's family and friends. Those fortunate enough to be connected to financial resources outside the prison system can defend their rights in court. In contrast, those from impoverished families and without outside resources could be stuck with a lien on their trust account for an amount that may exceed expected donations for several years.

B. Fundamental Liberty/Due Process Interests Do Not Permit the State to Infringe on an Inmate's Right to Facially Challenge the Constitutionality of a Statute that Affects a Quantifiable Determinant of the Length of an Inmate's Sentence

In *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993), an inmate sought to challenge the constitutionality of the habitual offender statute as violative of the single-subject requirement of the Florida Constitution. However, the statutory challenge was raised for the first time on appeal. *Id.* This Court observed that a facial challenge to a statute's constitutionality can only be raised for the first time on appeal where the error is fundamental. *Id.* In that case, the Court concluded that the challenged statute "allows a court to impose a substantially extended term of imprisonment on those defendants who qualify under the statute." *Id.* On that basis, this Court concluded that the statute amending the habitual felony offender statute involved "fundamental 'liberty' due process interests." *Id.*

In the instant case, the fundamental liberty due process interest presents itself in a different context than in *Johnson*. There, the challenge was raised for the first time on appeal. In the case at bar, Cox raised a facial challenge to the gain-

time statute in his initial petition. Even so, the fundamental right implicated is indistinguishable. In *Johnson*, the court found that the inmate had a fundamental right to challenge the constitutionality of a statute that substantially extended the inmate's term of imprisonment. In *Johnson*, this Court concluded that the challenged statute was violative of the single-subject requirement in the Florida Constitution. *Id.* at 4. It must follow that Cox has a fundamental right to challenge the constitutionality of a statute that substantially extended his term of imprisonment.[7]

Based on this Court's reasoning in *Johnson*, coupled with its analysis in *Mitchell*, any statute erecting a barrier to the defense of an inmate's liberty interests must be invalidated unless it can survive a strict scrutiny analysis. Under this analysis, the Legislature may only infringe on the Constitutional right of access to court if it has provided a reasonable alternative, has shown an overpowering public necessity for the abolishment of the right, and there is no alternative method of remedying the problem.

The lien provision must fall because it was not narrowly tailored to accomplish its intended purpose with the minimal restriction of the fundamental

[7] A discussion of the merits of Cox's underlying claim is inapposite to the issue before this Court. Even so, Cox notes that this Court's analysis in *Johnson* is on all fours since it involved a single-subject challenge to a statute that included both criminal and civil provisions and the relevant offense was committed during the window after the Act's effective date but before the biennial adoption of the statutes. 616 So. 2d 1; s*ee also Heggs v. State*, 759 So. 2d 620 (Fla. 2000).

right. Instead of being carefully targeted at frivolous or malicious civil actions, the lien provision applies to both frivolous and meritorious claims without distinction.

In addition, in any case where a prisoner is only able to pay part of a filing fee, the Prisoner Indigency Statute requires the Department of Corrections to impose a lien on an inmate's trust account for the full amount of the court costs and fees. Imposing a lien for the "full amount of the court costs and fees" when the determination is made that an inmate is able to pay part of this amount is overbroad and burdensome.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Cox respectfully requests that this Court find that the instant action is a collateral criminal proceeding and answer the certified question in the affirmative, thereby affirming the Judgment of the First District Court of Appeal. In the alternative, should the Court conclude that the Cox action is not a collateral criminal proceeding, Cox respectfully argues that the lien provision of section 57.085, Florida Statutes, is unconstitutional because it impermissibly infringes on Cox's fundamental liberty interests and right of access to court.

Respectfully submitted this 1st day of June, 2006.

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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 Joy A. Stubbs, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, Florida 32399-1050, and to Susan A. Maher, Deputy General Counsel, Department of Corrections, 2601 Blairstone Road, Tallahassee, Florida 32399-2500, this 1st day of June, 2006.

Attorney

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief was prepared using the Times New Roman font in 14 point, and therefore is in compliance with the Florida Rules of Appellate Procedure.

Attorney

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