IN THE
SUPREME COURT OF FLORIDA

JAMES R. MCDONOUGH, Interim Secretary, Florida Department of Corrections,	)	
Appellant,	)	
v.	)	**Case No. SC06-301**
	)	**DCA Case No. 1D05-3857**
LEO J. COX, a/k/a LEONARD COOK,	)	**L.T. No.: 2003 CA 002973**
Appellee.	)	

INITIAL BRIEF OF APPELLANT, STATE OF FLORIDA

On Appeal From The District Court of Appeal,
First District of Florida

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PRELIMINARY STATEMENT

Appellant, Interim Secretary of the Department of Corrections, James R. McDonough, shall be referred to as "Appellant," "McDonough." The Department of Corrections shall be referred to as the "Department."

Appellee, Leo Cox, AKA Leonard Cook, shall be referred to as "Appellee, or "Cox."

Appellant McDonough's Appendix shall be referred to as "McDonough's App." followed by citation to the proper appendix item.

STATEMENT OF THE CASE AND FACTS

In 1993, the Legislature amended Florida Statutes section 944.275(6)(2) to provide that "[b]asic gain-time under this section shall be computed on and applied to all sentences imposed for offenses committed on or after July 1, 1978, and before January 1, 1994." Ch. 93-406, § 26, at p. 2280, Laws of Fla. Appellee Leo Cox committed Second-Degree Murder after January 1, 1994, and was therefore excluded from a basic gain-time award under the statute.[1] See McDonough's App. A, at p. 3.

More than 10 years later, Cox filed an action against the legislation, but not challenging 944.275(6)(2) directly. Rather, he argued that *another* provision of the legislative act

[1] Cox's offense date is April 16, 1995. See McDonough's App. A, at p. 3.

violated the single subject clause of the Florida Constitution. See McDonough's App. A.

It is Cox's theory that he is entitled to five years and eight months of basic gain time by virtue of the alleged single subject violation. See McDonough's App. A, at p. 2. Cox contends that he is allowed to receive the basic gain time allowed before the amendment due to his offense occurring in the "window period" prior to the Legislature's re-enactment. See McDonough's App. A, at p. 4.

Initially, the circuit court found that Cox's case was "not affected by Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003), because it does not involve the plaintiff's loss of gain time due to prison disciplinary action." See McDonough's App. B, at p. 1. Having reviewed Cox's application for indigency, the court determined that Cox was able to make a $7.00 initial partial prepayment toward court costs and fees. See McDonough's App. B, at p. 2. Cox's Inmate Trust Account reflected that between November 10, 2003, and May 3, 2004, Cox received deposits totaling $150.00. See McDonough's App. C. Cox's Inmate Trust Account reflected that, despite having initiated legal

action without paying a filing fee, he spent approximately $150.00 in canteen purchases.[2]

The circuit court proceeded to decide the case on the merits. After Appellant responded to an order to show cause and Cox submitted a reply, the circuit court denied Cox relief for his claim. See McDonough's App. D. The court stated that a challenge to the validity or application of a statute was not the proper subject for mandamus. The court found that, considering the petition as one for declaratory relief, Cox did have an interest in the validity of the statute. See McDonough's App. D. Ultimately, however, the court denied the declaration sought by the Cox. The Court found that

> Chapter 93-406 is defined in the short title as "an Act relating to criminal justice;..."[footnote omitted] Section 40 of Chapter 93-406, which deals with the establishment of new correctional facilities, is logically connected to the subject of criminal justice and is therefore within the act's single subject matter.

See McDonough's App. D.

Cox appealed but did not pay the appellate filing fee. See McDonough's App. E. As directed by the First District, Cox

[2] Cox initially styled his case as a "petition for writ of habeas corpus" and filed it with this Court [the Supreme Court of Florida][SC03-2086] on August 27, 2003. This Court transferred the case to the Second Judicial Circuit pursuant to Harvard v. Singletary, 733 So. 2d 1020 (Fla. 1999), on December 16, 2003.

sought a determination of indigency in the lower tribunal pursuant to rule 9.430, Florida Rules of Appellate Procedure.[3]

The Clerk of Court for the circuit court certified pursuant to section 57.085 that Cox was unable to pre-pay the court costs and fees because of indigence, yet found that Cox was able prepay part of the court costs and fees in the amount of 20% of the average monthly balance of the prisoner's trust account for the preceding six months and that this amount was **$7.00.** See McDonough's App. E. The circuit court reviewed the Clerk's certificate and conclusion. The circuit court stated:

> THIS CAUSE came before the court upon the Clerk's Certificate of Indigence and conclusion that the appellant is able to prepay part of the court costs ad fees, pursuant to 57.085, Florida Statutes.

[3] Rule 9.430, Florida Rules of Appellate Procedure, provides:

> A party who has the right to seek review by appeal without payment of costs shall, unless the court directs otherwise, file a motion in the lower tribunal, with an affidavit showing the party's inability either to pay fees and costs or to give security therefor. For review by original proceedings under rule 9.100, unless the court directs otherwise, the party shall file the motion and affidavit with the court. If the motion is granted, the party may proceed without further application to the court and without either the prepayment of fees or costs in the lower tribunal or court or the giving of security therefor. If the motion is denied, the lower tribunal shall state in writing the reasons therefor. Reasons for denying the motion shall be stated in writing. Review of decisions by the lower tribunal shall be by motion filed in the court.

> The appellant is hereby ordered to prepay $7.00 prior to receiving further services of the Clerk of Court.
>
> The Department of Corrections or local detention facility is hereby ORDERED to place a lien on the prisoner's trust account for the full amount of $142.50 ($50.00 filing fee plus $25.00 partial payment setup fee plus $67.50 and shall withdraw and forward money maintained in that trust account as provided in section 57.085, Florida Statutes.

See McDonough's App. F.

The First District waived its filing fee altogether based upon its determination that Cox was indigent for appellate purposes though pursuant to section 35.22(3), Florida Statutes, an appellate filing fee is applicable. See McDonough's App. G.

Through rule 9.430, Cox sought review of the circuit court's certification and lower tribunal's order on the ground that his appeal falls under the "collateral criminal" exception to the prisoner indigency statute created by section 57.085(10). See McDonough's App. H.

Appellant responded that Cox's case was distinct from Schmidt because Cox did not suffer a forfeiture of earned gain-time through prison disciplinary proceedings as had the petitioner in Schmidt. See McDonough's App. I, at p. 5. Appellant additionally argued that Cox's action – a single subject challenge to a Legislative enactment - is an available remedy not exclusive to criminal cases or offenders. See McDonough's

App. I, at p. 6. Appellant argued that considering Cox's appeal a "collateral criminal" action expanded Schmidt to encompass an action shared by the general public. See McDonough's App. I, at pp. 6-7.

Considering itself constrained by Schmidt, the First District granted Cox's motion for review. See McDonough's App. J; Cox v. Crosby, 2006 Fla. App. LEXIS 832, *3 (Fla. 1st DCA 2006). The Court seized upon language from the Schmidt opinion regarding gain- time and computation of a criminal defendant's sentence. See Cox, 2006 Fla. App. LEXIS 832 at * 3. According to the First District,

> if [Cox's] claim is successful the result would be that his time in prison would be "directly affected," i.e, significantly reduced. . . However, because we share many of the dissent's concerns regarding what we perceive to be the logical implications of Schmidt in cases such as this, we certify to the supreme court the following question, which we believe to be 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?

Cox, 2006 Fla. App. LEXIS 832 at *3-4.

Appellant asks this Court to answer the question in the negative and reverse the opinion of the First District.

STANDARD OF REVIEW

As this is a pure question of law, the standard of review is *de novo*. See Moore v. State, 882 So. 2d 977, 980 (Fla. 2004); Martinez v. Fla. Power & Light, Co., 863 So. 2d 1204, 1205 n.1 (Fla. 2003).

SUMMARY OF THE ARGUMENT

This case illustrates how Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003), has created confusion regarding what constitutes a "collateral criminal" action. Schmidt has encouraged inmates to expansively label challenges as "collateral criminal," and to pursue less than marginally sufficient actions for relief.

Schmidt was clearly not intended to extend to civil suits, such as the instant constitutional challenge to a statute below. This Court should answer the certified question in the negative and find that Schmidt only applies when the length of time in prison is extended as the result for the forfeiture of gain time in an adversarial administrative proceeding.

ARGUMENT

I. THE INSTANT CASE IS CIVIL.

This Court should answer the certified question in the negative because Schmidt cannot possibly extend to all actions in which the complaining party's claim, if successful, would directly affect the inmate's time in prison. Instead, this Court should adopt the well-reasoned dissent by Judge Hawkes because "[t]he instant case is civil." Cox, 2006 Fla. App. LEXIS 832 at *10.

Even the majority questioned its own decision finding that "Appellee's argument is not without appeal" and that they were "constrained to conclude that this proceeding is a 'collateral criminal' one as defined by our supreme court in Schmidt." Id. at *2, *3. In deciding to certify the question of great public importance to this Court, the majority reasoned "because we share many of the dissent's concerns regarding what we perceive to be the logical implications of Schmidt in cases such as this, we certify to the supreme court the following question." Id. at *3-4. The majority joined in many of Judge Hawkes' concerns. Appellant submits that Schmidt should not be extended to cases such as the case below.

Schmidt only applies when the length of time in prison is extended as the result for the forfeiture of gain time in an

adversarial administrative proceeding. That inmate, under Schmidt, can attack the Department's decision to increase his sentence, through the loss of gain-time. In such cases, this Court has held that an inmate may proceed under 57.085. Schmidt, 878 So. 2d at 367.

However, in cases such as this, the inmate is not challenging the Department's decision to increase the inmate's sentence by taking away a vested interest, but is challenging a statute in a civil proceeding where the inmate's interest is, at best, a speculative one. Only if the inmate is successful in the attack on the constitutionality of the statute might the possibility of a shorter sentence materialize. Thus, the challenge to the constitutionality of a statute is clearly civil in nature and not meant to be covered by the logic of Schmidt. Therefore, when an inmate challenges the constitutionality of a statute the inmate should proceed under 57.085, and a lien should be imposed on his/her inmate trust account to recover the applicable filing fees for the civil suit challenge.

The dissent makes the best possible argument for the Department. Judge Hawkes' first sentence sums up the Department's position: "Beyond dispute, Appellant's challenge to the 1993 amendment to section 944.275, Florida Statutes, as violative of the constitutional single subject requirement, was

a routine civil suit." Cox, 2006 Fla. App. LEXIS 832 at *4. Hawkes correctly contended that the only difference between this suit filed by Cox, a prisoner, and a similar suit filed by a citizen who remains at liberty is that the citizen would have financial consequences by the filing of such an action, while the decision by the majority exempts the entire prison population from financial consequences of any suit which can potentially lessen the inmate's sentence. Id.

The majority speculated that if the suit had merit, Cox may have earned more than five years of additional gain-time and thus his sentence would be substantially decreased. Id. at *1. However, Hawkes claimed that this fact, "does not, and cannot, magically transform this civil suit into a 'collateral criminal' action." Id. at *5. This suit is civil and unlike Schmidt because the inmate in Schmidt challenged the "loss of vested, earned gain-time for an alleged infraction." Id. at *6. In the Schmidt decision, this Court concluded that "Schmidt's loss of gain-time effectively lengthened his sentence, since by the Department of Corrections' action he now has to serve that additional time in prison." Schmidt, 878 So. 2d at 367. In this case Cox does not challenge the loss of vested earned gain time and his sentence was not lengthened by any action by the Department.

This case is not the first time the First District applied Schmidt. The First District applied Schmidt in Cason v. Crosby, 892 So. 2d 536 (Fla. 1st DCA 2005). In Cason, as in Schmidt, an inmate challenged a disciplinary action of the Department of Corrections, which resulted in a loss in gain time which effectively lengthened an inmate's sentence. The First District recognized that Schmidt held cases "where the prisoner challenges the loss of gain-time, are collateral criminal proceedings and are exempt from section 57.085." Id. at 537. Therefore, the First District held that the suit was a collateral criminal proceeding exempt from section 57.085 and no lien on the inmate's trust account was allowed to recover filing fees.

In both Schmidt and Cason the suit brought by the inmate challenged an administrative action by the Department that resulted in the prisoner losing vested and earned gain time, which required the inmate to serve a greater period of incarceration. Those decisions, unlike the case at bar, did not involve inmates who decided to file a civil lawsuit challenging the legislature's compliance with the constitutional requirements to enact a valid law. Cox's challenge to the legislature's 1993 amendment to section 944.275, Florida Statutes, as violative of the constitutional single subject

requirement is unlike an inmate challenging the Department's administrative action taking away an inmate's vested gain time. If the inmates in Schmidt and Cason were successful in their suits, they would have received the gain time that was administratively taken from them. However, if Cox is successful in his challenge to the amendment's single subject requirement, he does not get back vested time that was administratively taken from him. Rather, Cox would, at most, possibly **receive** a basic gain-time award for which he never had a vested interest.

Judge Hawkes' argument and reasoning regarding the differences between the civil action below and the collateral criminal actions in Schmidt and Cason extend to the unique factual circumstances presented in collateral criminal actions like Schmidt and Cason. Cox, 2006 Fla. App. LEXIS 832 at *8. Those decisions are fact-intensive and require courts to analyze record facts unique to each inmate. Moreover, the Department's administrative decision to take an inmate's vested gain-time is based upon a unique set of facts to that inmate. Those facts must be examined on a case-to-case basis and one inmate's suit and a court's determination does not necessarily determine another inmate's similar challenge because the determination is so fact-intensive. Judge Hawkes stated, "The resolution of one prisoner's case does not resolve the issue for every other

prisoner who may later file a similar case." Id. However, the instant challenge to the amendment of the statute, if successful, would affect every other prisoner who may later file a similar challenge. This would result in non fact-intensive holdings, which would apply universally over the large inmate population. This is dissimilar to Schmidt and Cason where a fact-intensive holding is required, the decision is unique to the inmate, and is not universally applied to the entire inmate population.

The Department agrees with Judge Hawkes conclusion that the "majority's holding here dramatically expands Schmidt." Id. Further, "no logical analysis can limit the holding to cases involving gain-time." Id. There is no limiting the decision below to gain time challenges, when any such challenge by the inmate, which could potentially lessen an inmate's sentence, would fit under the decision below. Any procedural defect in the passage of a statute, whether violative of the single-subject rule or any other challenge to the statute's procedural passage, such as the three readings requirement, would be considered a "collateral criminal" filing under 57.085, and not allow the Department to place a lien on the inmate's trust account. Under the logic of the decision below any time an inmate challenges a statute, which if stricken would result in

the inmate's time in prison being reduced, that challenge would be exempt from the requirements of 57.081. The intention of Schmidt is not to allow these types of civil actions to be transformed into "collateral criminal" attacks, thus exempting the entire inmate population from having liens placed on their trust accounts to pay for their filing fees. Judge Hawkes concluded, "if technically possible that 'time in prison would be 'directly affected,' i.e., significantly reduced,' any of Florida's approximately 80,000 inmates can challenge the constitutionality of the procedures the legislature used to pass any statute." Id. at *9.

The majority's holding would not even prevent multiple and repetitive filings from these inmates' civil challenges. Id. Neither would it prevent a challenge by an inmate many years after the legislature acted to make the law. Id. Moreover, inmates are not limited from making the same argument, which could have been made years earlier. There is no bar to these arguments being raised at any time.

By not requiring an inmate to pay court filing fees or allow a lien on his/her trust account, the inmate would bear no financial consequences for filing multiple actions and would not be required to sacrifice "even the smallest purchase from his prison canteen fund." Id. at *10. Unlike citizens who would

have to pay to use the court resources in a civil challenge to the enactment of a statute, the decision below allows the prisoners to "utilize all of these judicial resources for free." Id.

II. PUBLIC POLICY DEMANDS THAT INMATES BE ACCOUNTABLE FOR THE FILING OF CIVIL SUITS.

Allowing prisoners what amounts to free access to the court system in civil actions, while requiring citizens to pay filing fees for similar civil actions, could present an equal protection problem. See e.g., Higgins v. Carpenter, 258 F.3d 797, 800 (8th Cir. 2001) ("a constitutional requirement to waive court fees in civil cases is the exception, not the general rule."). Filing fees are not a penalty for filing a court action - they are user fees. Even when a court cannot recoup all of its costs for processing an action, some payment helps defray its costs.

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

similarly have to weigh the potential benefits and costs of bringing an action, but they do not pay for these basic necessities.

The basic needs of inmates - food, clothing, shelter, and essential hygiene supplies (soap and toothbrush), are provided for by the State of Florida, as well as a good number of recreational, literary, and educational resources available through accessible prison libraries, chapels, recreation departments, and visiting parks. See Rule 33-602.101, Fla. Admin. Code. Inmates are provided three meals a day, two of which are required to be hot meals. See R. 33-204.003(1), Fla. Admin. Code. The prison canteen merely provides "extras" like cola drinks, candy, potato chips, board games, and radios. R. 33-203.101(1), Fla. Admin. Code ("Canteens are to be operated primarily to provide items of convenience to inmates."). Canteen privileges are not constitutionally required. Inmates in Florida are not deprived of basic needs when they contribute to the costs of their litigation. Requiring that an inmate choose how to spend extra money -- that is, between a snack or court fees -- hardly chills access to court.

Because the instant case is civil, Cox should be required to pay a filing fee. If he is found indigent, that filing fee should be taken from a lien placed on his inmate trust account.

An inmate should not be able to withdraw from his trust account, so as to qualify for indigency, and then file a civil action attacking the legislature's enactment of a statute without even a lien being placed upon the trust account for when the account is replenished at a later date. Prisoners should not be allowed unfettered and free access to the judicial resources of the State, without consequences, in actions that are do not directly attack the inmate's vested sentence.

This Court should answer the certified question in the negative and quash the decision below.

CONCLUSION

Based upon the argument and authorities above, Appellant asks this Court to answer the certified question in the negative, and not extend the holding of Schmidt to actions that are not "collateral criminal" proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Matthew Mears of Holland & Knight, Post Office Drawer 810 Tallahassee, Florida 32301 on this ____ day of April.

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Joy A. Stubbs

CERTIFICATE OF TYPESTYLE AND TYPESIZE

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

_____
Joy A. Stubbs