IN THE SUPREME COURT OF FLORIDA

MARK HENRY WARDEN, et al.

Petitioner,

v.

CASE NO: SC09-1027
Lower Tribunal: 1D08-3852

RUNNER SANTANA,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT
RUNNER SANTANA

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

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PRELIMINARY STATEMENT

Petitioner, MARK HENRY, WARDEN, FLORIDA DEPARTMENT OF CORRECTIONS, is referred to as "the Department." Respondent, RUNNER SANTANA, is referred to as "Respondent" or "Santana."

The record is contained in one volume consisting of the original petition and attachments, and the briefs filed with the First District Court of Appeal. References to the record are denoted as "R y-z," where "y-z" is the page number(s).

All emphasis in quotations in this brief has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, Runner Santana, believes that the relevant facts of this case are thoroughly addressed in the First District Court of Appeal's decision in Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009), and the Statement of Case and Facts provided by Petition adequately sets forth the underlying facts. Accordingly, Santana will not restate the facts in this brief.

SUMMARY OF ARGUMENT

This review proceeding comes before the Court on a certified conflict between Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009), and Pope v. State, 898 So. 2d 253 (Fla. 3d DCA 2005). In Pope v. State, 898 So. 2d 253 (Fla. 3d DCA 2005), the Third District Court of Appeal concluded that a "prerequisite to the issuance of an extraordinary writ is exhaustion of all administrative remedies," and where a prisoner fails to allege that he has exhausted all administrative remedies, the trial court should sua sponte dismiss or deny the petition. Id. at 253.

In contrast, in Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009), the First District Court of Appeal held that, when an incarcerated prisoner filed a petition for writ of habeas corpus alleging that he or she is entitled to immediate release and the petition sets forth plausible reasons and a specific factual basis supporting the claim, a trial court cannot *sua sponte* dismiss the petition due to the prisoner's failure to allege an exhaustion of administrative remedies. Rather, the

First District concluded that, in such circumstances, the custodian should be required to respond to the petition, and if it so chooses, it can raise the issue of exhaustion of remedies as an affirmative defense.

The First District's holding is consistent with the high value the democratic process has placed on ensuring the writ of habeas corpus continues its effectiveness as a mechanism to test the reasons and grounds for the restraint and detention of the citizens of Florida. Of importance, the First District's limited its decision solely to situations in which it appears the prisoner has asserted plausible reasons and presented a factual basis to support a conclusion that the prisoner may be entitled to immediate release, recognizing that the unlawful deprivation of one's liberty is the most egregious act a democracy can commit against its citizenry.

This Court should adopt the reasoning followed by the First District and reject the Third District's position.

STANDARD OF REVIEW

The issue in this case is whether the circuit court erred in *sua sponte* dismissing a facially plausible habeas petition on the technical procedural ground that the prisoner failed to allege that he exhausted all administrative remedies with the Department. This is a question of law subject to *de novo* review. See generally Mora v. McDonough, 934 So. 2d 587, 588 (Fla. 1st DCA 2006) (holding that

whether circuit court erred in dismissing mandamus petition for lack of jurisdiction was “purely legal one” to be reviewed under the de novo standard of review).

ARGUMENT

I. The First District Properly Determined that the Circuit Court Erred in Summarily Dismissing Respondent's Petition for Writ of Habeas Corpus, Where the Petition Alleged that Santana Was Entitled To Immediate Release and It Set Forth Plausible Reasons and a Specific Factual Basis for Relief.

The Department asserts that the First District does not believe the doctrine of exhaustion of remedies should apply to habeas petitions, and if it does, it nonetheless is an affirmative defense and not a pleading requirement. I.B. at 23. The First District, however, never stated that the doctrine of exhaustion of remedies does not apply to any habeas petition. Rather, the district court determined that the exhaustion of remedies doctrine is not absolute. Under the unique circumstances of this case, the district court held that the trial court erred in summarily dismissing Santana's petition, based on the affirmative defense of exhaustion of remedies, when that defense was neither plead nor proven by the Department and no party was provided notice or an opportunity to be heard prior to the Court's action. This conclusion is entirely consistent with Florida law.

A. Habeas Corpus Relief and the Exhaustion of Administrative Remedies Doctrine Under Florida Law

1. The Great Writ

The writ of habeas corpus, or the "Great Writ" as it sometimes referred, is as old as the common law itself and an integral part of the democratic process of the State of Florida. See Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1956). "The writ

[is] . . . designed to obtain immediate relief from unlawful imprisonment without sufficient legal reasons. Essentially, it is a writ of inquiry and is issued to test the reasons or grounds of restraint and detention." Allison v. Baker, 11 So. 2d 578, 579 (Fla. 1943).

This Court has stated that "[t]he writ [of habeas corpus] is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty." Allison, 11 So. 2d at 579. For this reason, the framers and adopters of Article I, section 13 of the Florida Constitution expressly mandated: "The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable **without delay** . . . ." (emphasis added). Thus, the people of this state viewed the Great Writ to be of such vital importance to our democracy that the government is prohibited from placing any financial burdens upon a citizen's right to seek habeas relief. In doing so, the framers signaled their intent that few, if any, procedural impediments should be imposed upon persons seeking a writ of habeas corpus.

Simply put, the right to habeas corpus is a "basic guarantee of Florida law," Haag v. State, 591 So. 2d 614, 616 (Fla. 1992), and the writ may be issued by the Supreme Court of Florida, any district court, or any circuit court in this state. See Art. V, §§ 3(b)(9), 4(b)(3), 5(b), Fla. Const. As this Court recognized in Anglin v. Mayo, 88 So. 2d 918 (Fla. 1956):

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Id. at 919-20 (emphasis added).

2. The Doctrine of Exhaustion of Administrative Remedies

In contrast, as the First District noted, the doctrine of exhaustion of administrative remedies is a fairly new judicial invention.[1] "The doctrine of

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[1] In Flo-Sun, Inc. v. Kirk, 783 So.2d 1029, 1038 (Fla. 2001), this Court examined the difference between the doctrines of primary jurisdiction and exhaustion of remedies. This Court stated:

> It is necessary to mention that although usually considered companion doctrines, the doctrines of primary jurisdiction and exhaustion of remedies are not synonymous. . . .
>
> > The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process runs its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the

exhaustion of administrative remedies is based on the need to avoid prematurely interrupting the administrative process, and to enable the agency or association to apply its discretion and expertise in the first instance to [a] technical subject matter." See Florida High School Athletic Ass'n v. Melbourne Central Catholic High School, 867 So. 2d 1281, 1286 (Fla. 5th DCA 2004); see also Baillie v. Dep't of Nat. Res., Div. of Beaches & Shores, 632 So. 2d 1114 (Fla. 1st DCA 1994).

The doctrine's purpose is to assure that an agency responsible for implementing a statutory scheme has a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue. See Key Haven Assoc. Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153, 158 (Fla. 1982). In this manner, the

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> judicial process is suspended pending referral of such issues to the administrative body for its review.
>
> Accordingly, the doctrine of exhaustion arises as a defense to judicial review of an administrative action and is based on the need to avoid premature interruption of the administrative process; whereas primary jurisdiction operates where a party seeks to invoke the original jurisdiction of a court to decide issues which may require resort to administrative expertise.

Id. at 1038. Given this definition of the two doctrines, this case may more appropriately involve the doctrine of primary jurisdiction rather exhaustion of remedies. However, since the First District, the Department, and most Florida courts addressing this issue couch the issues in terms of exhaustion of administrative remedies and similar exceptions seem to apply to both doctrines, Santana addresses the issues in this brief in terms of exhaustion of administrative remedies.

exhaustion requirement permits full development of the facts, allows the agency to employ its discretion and expertise, and helps preserve executive and administrative autonomy. See State, Dept. of Revenue v. Brock, 576 So. 2d 848, 850 (Fla. 1st DCA 1991); see also DeCarlo v. Town of West Miami, 49 So.2d 596 (Fla. 1950) (holding that local administrative boards should be given opportunity to afford relief from zoning regulations or state their reasons for not doing so before aggrieved party may sue for injunction against enforcement of ordinance as invalid).

The doctrine of exhaustion of administrative remedies places special emphasis on Florida courts not interfering with the discretionary decisions of administrative agencies. As the First District noted in Santana, "[w]hen an agency has discretion to exercise, it should of course be allowed to make discretionary decisions. If a party succeeds in vindicating its rights in the administrative process, thus obviating the need for judicial intervention, judicial resources are conserved; and immediate judicial access can weaken the effectiveness of an agency by encouraging people to ignore its procedures." Santana, 12 So. 3d at 846. However, this same deference should not apply when the agency has no discretion or brings little or no additional expertise as to the subject matter. See generally Carthane v. Crosby, 776 So. 2d 964, 965 (Fla. 1st DCA 2000) (deciding not to apply doctrine of exhaustion of remedies because "[t]he Florida State Prison has no

greater expertise than this court in deciphering [prisoner's] argument, which is based solely upon his interpretation of statutes and rules.").

Of importance, "[w]hether to require exhaustion of administrative remedies is a question of judicial "policy rather than power." Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc., 361 So. 2d 695, 699 (Fla. 1978); see also State, Dep't of Revenue v. Brock, 576 So. 2d 848, 850 (Fla. 1st DCA 1991) ("[T]he doctrine requiring the exhaustion of administrative remedies is not jurisdictional. The exhaustion requirement is a court-created prudential doctrine; it is a matter of policy, not of power.")(citations omitted). In short, Florida courts have never considered the doctrine of exhaustion of administrative remedies to be a jurisdictional impediment to a courts subject-matter jurisdiction. See Brock, 576 So. 2d at 850. Rather, it is an affirmative defense to be raised in the appropriate context where the agency is uniquely suited to address an administrative matter. See Sylvia H. Walbolt, Matthew J. Conigliaro & J. Andrew Meyer, Florida Civil Practice Before Trial, § 25.34 at 25-30 (7th ed. 2004) ("Affirmative defenses to extraordinary writs include impossibility or lack of power to perform, laches, unclean hands, absence of parties whose substantial rights would be affected, illegality of purpose, detriment to the public interest, mootness, and failure to exhaust administrative remedies.").

It should also be mentioned that Florida courts have never viewed the exhaustion doctrine as absolute. Indeed, there are three well-recognized exceptions to the doctrine: the first is where the party seeking to bypass the usual administrative channels can demonstrate that no adequate administrative remedy remains available; the second is where an agency acts without colorable statutory authority clearly in excess of its delegated powers; and the third applies to constitutional issues. See District Bd. Of Trustees Of Broward Community College v. Caldwell, 959 So. 2d 767 (Fla. 4th DCA 2007).

B. The First District Balanced the Competing Interests Encompassed By the Writ of Habeas Corpus and the Doctrine of Exhaustion of Administrative Remedies and Fashioned a Limited Exception to the Doctrine Consistent With Florida Law

1. First District's Decision Is Limited To the Facts of this Case

While the Department makes grandiose claims that the First District's holding will "end the exhaustion requirement for all sentence structures issues, regardless of whether they were raised in a mandamus or habeas petition," I.B. at 39, nothing could be further from the truth.

The First District took great care to limit the scope of its decision. The district court clarified that its decision had no application to writs for mandamus. Indeed, the court stated:

> At issue is whether the habeas court properly dismissed the petition on its own motion without hearing from the authorities alleged to hold the petitioner unlawfully. We are not concerned here

> with mere conditions of confinement, or gain-time calculations not affecting DOC's current right to hold the petitioner, or anything less than a state prisoner's alleged right to immediate release from custody.

Santana v. Henry, 12 So. 3d 843, 845-846 (Fla. 1st DCA 2009) (emphasis added and citations omitted). As this Court established in Bush v. State, 945 So. 2d 1207 (Fla. 2006), the proper remedy for a prisoner pursuing a challenge to sentence-reducing credit determination, where the prisoner is not alleging entitlement to immediate release, is through a writ of mandamus. Id. at 1210. Thus, since the Santana decision is limited to cases involving allegations that the prisoner is entitled to immediate release, it has no application to writs of mandamus.

The First District further noted that Santana's jail credit was not "simply to be calculated by the Department of Corrections." Id. at 845 n.2. Instead, the trial court orally announced the amount of jail credit Santana was to receive during his sentencing hearing. (R 27). As the First District stated:

> The petition below alleges that, after his probation (in three separate cases) was revoked, Mr. Santana was sentenced anew on October 4, 2007, receiving three concurrent prison sentences. In case No. 95-CF-4926, the petition alleges, he was sentenced to six years in prison with credit for 2,023 days, to be followed by two years' probation; in case No. 96-CF-9601 to 60.75 months with credit for 831 days; and in case No. 96-CF-10668 to six years with credit for 1682 days. In addition, against each sentence, the petition alleges, he was awarded "credit for time served at the State Hospital," and a separate credit for 142 days for time spent in jail before the revocation hearing.

Santana, 12 So.3d at 845 (footnotes omitted). This is a critical fact.

Indeed, the Department spends much of its brief discussing its administrative procedures and suggesting that it has unique expertise in addressing sentencing issues. However, a review of the administrative rules cited by the Department reflects that its grievance system is designed primarily to address discretionary non-sentencing issues.

For instance, Florida Administrative Rule 33-103.013 sets forth the classification of grievances and provides:

> (1) Transfers — Complaints or objections concerning movement to and from institutions and facilities.
>
> (2) Program Assignments — Complaints or objections concerning work, education, housing and other assignments; custody and security classification, classification decisions and actions; progress reviews, protective custody.
>
> (3) Communications — Complaints or objections concerning mail, visiting, telephones, packages, letters and requests to staff.
>
> (4) Confinement — Complaints or objections concerning administrative and disciplinary confinement, privileges, program participation, living conditions.
>
> (5) Discipline — Complaints concerning the entire disciplinary process, excluding specific complaints concerning the conditions of confinement.
>
> (6) Institutional Operations — Complaints concerning clothing, sanitation, time schedules, general policies, heat and ventilation, safety, security matters, privileges, services and activities.
>
> (7) Medical and Dental — All complaints concerning medical, dental, psychiatric and psychological services, and HIPAA.

(8) Legal — Complaints concerning sentence computation, release dates, gain time, jail time credits, religious, due process.

(9) Grievance Process — Forms unavailable, response not received.

(10) Complaints Against Staff — Discrimination, harassment, negligence, improper conduct or language.

(11) Personal Property — Loss, damage, confiscation, transfer of personal property.

(12) Food Service — Complaints concerning any aspect of food service.

(13) Miscellaneous — All other types of complaints not covered above.

(14) Admissible Reading Material: Complaints filed pursuant to Rules 33-103.009 and 33-501.401, F.A.C.

(15) ADA — Americans with Disabilities Act.

Fla. Admin. Code 33-103.013.

The above chart reflects that the Department's grievance process primarily addresses non-sentencing discretionary issues. As to the issue of confinement, subparagraph 4 of the grievance classifications above specifically mentions issues such as living conditions and privileges, which are uniquely within the purview of the Department, but there is no discussion regarding sentencing structures relating to court-imposed jail credit. Rather, the only mention of sentencing structure in the rules cited by the Department address "gain time governed by Rule 33-601.101,

F.A.C.," see Fla. Admin. C. 33-103.006, which is a discretionary sentence-reducing provision that is typically determined post-sentence by the Department.

Simply stated, nothing in the administrative rules cited by the Department suggest that issues regarding **court-imposed** jail credit are uniquely within the purview of the Department, or that the Department has any more expertise in applying jail credit than the court that awarded the credit in the first instance. See generally Carthane, 776 So. 2d at 965 (deciding not to apply doctrine of exhaustion of remedies because "[t]he Florida State Prison has no greater expertise than this court in deciphering [prisoner's] argument, which is based solely upon his interpretation of statutes and rules.").

Indeed, as the First District noted in Santana, "[s]entencing is the power, obligation, and prerogative of the courts, not the [Department]." Id. at 847. As part of the executive branch, the Department lacks the power to adjudicate the legality of a sentence or to add or delete sentencing conditions. See Slay v. Singletary, 676 So. 2d 456, 457 (Fla. 1st DCA 1996) ("[DOC] lacks the authority to correct an illegal sentence or render the illegality harmless."). Thus, where, as here, the trial court imposed a specific amount of credit for time served, the Department lacked any discretion regarding the calculation of Santana's sentence as to that jail credit. See Williams v. State, 957 So. 2d 600, 603 (Fla. 2007) (citing Ashley v. State, 850 So. 2d 1265, 1268 (Fla. 2003)) (holding that the sentencing

court's oral pronouncement controls in the event of a discrepancy between oral pronouncement and written sentence).

The First District recognized this fact and limited its holding to the specific facts of this case, i.e. where the jail credit has been determined by the trial court and awarded as part of the sentence. In sum, the First District's opinion reflects that its decision is limited to situations in which: (1) an incarcerated person files a writ of habeas corpus alleging entitlement to immediate relief; (2) the petition and the attachments to the petition set forth plausible reasons and a specific factual basis supporting the petitioner's claim; and (3) the basis for the relief involves a sentencing matter that was imposed by the trial court rather than issues such as forfeiture of gain time. Given these limitations, there is no great danger that the First District's exception will be abused.

2. First District Properly Balanced The Competing Interests

In reaching its conclusion, the First District weighed the importance of habeas relief under Florida's Constitution against the role of the exhaustion of administrative remedies doctrine under Florida law. The Court determined that, under the unique circumstances of this case, the exhaustion doctrine should not control. This Court should approve that determination.

The First District's opinion reflects that it examined the important role of habeas relief and the Florida Constitution's mandate that "[t]he writ of habeas

corpus shall be grantable of right, freely and without cost. It shall be returnable **without delay** . . . ." (emphasis added).

The First District further examined this Court's prior decisions in which this Court stated:

> If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956).

Against these strong policy considerations, the First District then considered the doctrine of exhaustion of remedies. The First District recognized that, when an issue concerns a matter of agency decision-making regarding a discretionary matter, agencies should be allowed to make such discretionary decisions without prior court intervention. Santana, 12 So. 3d at 846. However, where the issue concerns a matter upon which the agency has little or no discretion, the rationale for the exhaustion of administrative remedies doctrine diminishes. Id.

With these guiding principles, the First District held that, in a case in which the petitioner has filed a habeas petition setting forth plausible reasons and a factual basis to support the conclusion that the prisoner may be entitled to immediate relief, and where the basis for relief is a court-imposed jail credit of which the Department has little or no discretion in imposing, a trial court should

not *sua sponte* dismiss the petition based on the technical failure of the petitioner to allege an exhaustion of administrative remedies.

When viewed in this light, there can be no question that the First District's decision was proper. Such an exception does not "do violence to the contours of the exhaustion doctrine as understood in other settings." Santana, 12 So. 3d at 846. Indeed, Florida courts have recognized an exception to the exhaustion doctrine:

> When an agency acts without colorable statutory authority that is clearly in excess of its delegated powers, a party is not required to exhaust administrative remedies before seeking judicial relief.

State, Dep't of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787, 796 (Fla. 1st DCA 1982). As the First District stated:

> Mr. Santana's claim that the DOC has no lawful authority to hold him is analogous to a "challenge to agency jurisdiction," which, when made "on persuasive grounds," constitutes "a widely recognized exception to the exhaustion doctrine." Falls Chase, 424 So.2d at 794 (footnote omitted). An exception available when the Department of Environmental Regulation's jurisdiction to regulate dredge and fill activities is challenged, see id. at 793, ought arguably apply to a challenge to the jurisdiction of the DOC to hold a citizen prisoner.

Santana , 12 So. 3d at 847.

C. This Court Should Not Follow Pope and Grace To The Extent Those Decisions Conflict With The First District's Decision in Santana

In Santana, the First District certified conflict with the Third District's decision in Pope v. State, 898 So. 2d 253 (Fla. 3d DCA 2005). The Department urges that this Court follow the Pope decision. In addition, the Department asserts

that the First District's decision also conflicts with the Fourth District's decision in Grace v. State, 3 So. 3d 1290 (Fla. 4th DCA 2009). As will be discussed, the Pope and Grace decisions are not persuasive and should not be followed to the extent they conflict with the First District's holding in Santana.

1. The Third District's Decision in Pope Should Not Be Followed

In Pope, the prisoner filed a petition for writ of habeas corpus alleging that he was being illegally detained by the Department beyond his maximum release date. 898 So. 2d at 253. The trial court summarily denied the petition, finding that the petition was facially insufficient for failing to allege the prisoner had exhausted all administrative remedies. Id. While the prisoner failed to address the issue of exhaustion of remedies in his initial brief, he did raise the issue in his reply brief and attached copies of documents showing that he did attempt to exhaust his administrative remedies. Id. at 254. Nonetheless, the Third District Court affirmed, noting:

> The trial court was never informed by Appellant that he did attempt to exhaust his administrative remedies. Therefore the trial court was never in a position to determine whether or not the administrative remedies had been exhausted and, if so, to then address the petition on its merits.

Id. at 254. The court stated that the "prerequisite to the issuance of an extraordinary writ is exhaustion of all administrative remedies." Id. at 253.

It should first be noted that the Pope decision does not reflect that the petitioner alleged he was entitled to immediate release. While the petition alleges that the prisoner is being illegally detained beyond his maximum release date, the opinion is not clear on whether that date had actually expired at the time the petition was filed. Thus, as an initial matter, Santana questions whether the Pope decision conflicts with Santana, since the First District limited its decision to petitions alleging entitlement to immediate release.

In any event, even assuming the decisions do conflict, the Pope decision provides no analysis to support its holding. The only case cited in the decision is Reed v. Moore, 768 So. 2d 479 (Fla. 2d DCA 2000). However, the Reed decision addressed a "petition for writ of mandamus/alternative writ of habeas corpus" in which the petitioner alleged that he was entitled to additional gain time. See Reed, 768 So. 2d 479 (emphasis added). Obviously, as discussed above, issues regarding the imposition of gain time are generally determined post-sentence by the Department. Thus, as to such issues, it is understandable that Florida courts have leaned toward requiring the prisoner to exhaust all administrative remedies. However, neither Pope nor Reed provide any judicial analysis as to why this same rational should apply to a habeas petition dealing solely with court-imposed jail credit for time served.

It should also be mentioned that, if the trial court in Pope had followed the First District's holding and required the Department to respond, the Department might have conceded that Pope exhausted his administrative remedies and Pope could have obtained his release much sooner, or at the very least, the Department may have addressed the merits of the petition in its response and allowed the trial court to resolve the issue sooner.

As this Court recognized in Anglin v. Mayo, 88 So. 2d 918 (Fla. 1956):

> If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Id. at 919-20 (emphasis added). The First District's holding in Santana promotes this goal under the limited circumstances present in this case. Nothing in the Pope or Reed decisions should persuade this Court to adopt a contrary view.

2. The Fourth District's Decision in Grace Should Not Be Followed

In Grace v. State, 3 So. 3d 1290 (Fla. 4th DCA 2009), the Fourth District Court of Appeal affirmed the circuit court's summary denial of a rule 3.850 motion for postconviction relief, seeking to enforce his plea agreement to receive a sentence of seventeen years. 3 So. 3d 1290. The motion alleged that the Department erroneously calculated his time served causing him to serve more than

the full seventeen years, which the motion alleges expired on May 19, 2008. Id. at 1290. The Fourth District stated: "Nothing in his motion demonstrates that he has exhausted his administrative remedies with the department." Id. Thus, the Fourth District upheld the trial court's summary dismissal of the 3.850 motion. Id.

Initially, since the Fourth District's decision in Grace addressed the issue of a 3.850 post-conviction motions, Santana does not believe that decision is applicable in this case. The First District's decision in Santana is limited to petitions for writs of habeas corpus, not rule 3.850 motions.

In any event, even assuming Grace applied, as with the Pope decision, the Fourth District provides no analysis why the exhaustion of remedies should be deemed a prerequisite where the petition addresses issues regarding court-awarded jail credit, which is an issue the sentencing court is as competent to address as the Department.

3. The Other Florida Cases That the Department Cites Are Not Applicable Here.

In addition to the Pope and Grace decisions, the Department cites a number of other state court decisions in which it alleges the trial court determined that the prisoner must first exhaust all administrative remedies before it can pursue an extraordinary writ. I.B. at 31-33. However, as the First District noted, the majority of the cases do not involve a habeas petitions in which the prisoner is alleging entitlement to immediate release and also do not involve situations in

which the petition involves court-imposed jail credit. Id. at 847. Accordingly, the cases the Department cites provide no more support for its position than Pope and Grace.

D. The Federal Decisions Cited By the Department Are Unpersuasive Because Under Federal Law, The Power To Grant A Writ of Habeas Corpus Flows From Congressional Statutes, Not the Constitution

The Department cites a number federal decisions holding that state prisoners must exhaust administrative and judicial remedies prior to filing a habeas petition with a federal court. The Department believes these decisions support its position. The Department, however, fails to acknowledge that federal habeas petitions are governed by a different standard than in Florida.

Indeed, as Justice Anstead noted in his concurrence in Chandler v. Crosby, 916 So. 2d 728, 736 (Fla. 2005) (Anstead, J., concurring specially):

> In contrast to [Florida's] constitutional guarantee that the writ shall be "grantable of right, freely and without cost," the United States Constitution mentions habeas corpus only in placing conditions upon its suspension: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Thus, the United States Supreme Court has "long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law,' and [has] likewise recognized that judgment about the proper scope of the writ are 'normally for Congress to make.'"

Id. at 736, n.3 (citing Felker v. Turpin, 518 U.S. 651, 664 (1996)). Thus, unlike in Florida, the power to issue writs in federal court does not flow from the U.S. Constitution.

Under federal law, habeas corpus petitions as to prisoners is controlled by two federal statutes, 28 U.S.C. §§ 2241 and 2254. Section 2241(c) provides that "(t)he writ of habeas corpus shall not extend to a prisoner unless . . . (3) (h)e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." Section 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> . . . .

(emphasis added). Thus, the requirement that a state prisoner exhaust all administrative remedies flows from a congressional directive.

As to federal prisoners, while § 2241 as to writs of habeas corpus does not expressly require that federal prisoners exhaust all administrative remedies, federal courts have leaned toward applying the doctrine in deference to the fact that the

issuance of the writ flows from congressional power. Indeed, the Supreme Court of the United States in McCarthy v. Madigan, 503 U.S. 140, 144 (1992), superseded by statute on other grounds as stated in Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997), stated:

> The doctrine of exhaustion of administrative remedies is one among related doctrines-including abstention, finality, and ripeness-that govern the timing of federal-court decision-making. Of "paramount importance" to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs. Nevertheless, even in this field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.

(citations omitted).

In contrast, the right to habeas corpus is a "basic guarantee of Florida law," Haag v. State, 591 So.2d 614, 616 (Fla. 1992), and the power to issue the writ flows from Florida's Constitution. See Art. V, §§ 3(b)(9), 4(b)(3), 5(b), Fla. Const. Thus, there is a constitutional dimension to habeas petitions under Florida law that does not exist to the same degree in federal courts. For this reason, this Court should not be swayed by federal decisions on this issue.

In any event, even under federal law, the courts have recognized the exhaustion requirements may be waived in certain circumstances in the court's "sound judicial discretion." See, e.g., McCarthy, 503 U.S. at 144 (noting that a

petitioner may seek judicial waiver of exhaustion by demonstrating that requiring administrative review "would be to demand a futile act" because of a predetermination by an administrative agency.).

II. The First District Properly Determined That Circuit Courts Should Not *Sua Sponte* Dismiss Petitions Based On Affirmative Defenses Not Raised by Proper Pleadings

Even assuming this Court were to reject the First District's adopted exception to the exhaustion of administrative remedies doctrine, the First District nonetheless was correct in concluding that the trial court erred in *sua sponte* dismissing Santana's petition without notice to the parties based on a defense that was never asserted by the Department. Santana, 12 So. 3d 847-48. Such a practice should not be condoned where a petition states a plausible basis that a prisoner is entitled to immediate release.

Initially, it should be emphasized that the judicially-created doctrine of exhaustion of remedies has never been held to be a "pleading requirement" by Florida courts. See Brock, 576 So. 2d at 850 ("[T]he doctrine requiring the exhaustion of administrative remedies is not jurisdictional. The exhaustion requirement is a court-created prudential doctrine; it is a matter of policy, not of power.")(citations omitted). Rather, the general rule is that the exhaustion of administrative remedies is an affirmative defense. See Sylvia H. Walbolt, Matthew J. Conigliaro & J. Andrew Meyer, Florida Civil Practice Before Trial, §

25.34 at 25-30 (7th ed. 2004) ("Affirmative defenses to extraordinary writs include impossibility or lack of power to perform, laches, unclean hands, absence of parties whose substantial rights would be affected, illegality of purpose, detriment to the public interest, mootness, and failure to exhaust administrative remedies.").

Generally, under Florida law, a trial court may not *sua sponte* dismiss an action based on an affirmative defense not raised by the pleadings. See Liton Lighting v. Platinum Television Group, Inc., 2 So. 3d 366, 367 (Fla. 4th DCA 2008). See Lenoir v. Jones, 979 So.2d 1129, 1130 (Fla. 1st DCA 2008) (trial court's *sua sponte* dismissal reversed because plaintiff was not given notice or an opportunity to be heard); see also Lambrix v. Dugger, 547 So. 2d 1265, 1266 (Fla. 1st DCA 1989) (trial court erred in dismissing prisoner's complaint against prison officials who did not move to dismiss). This is so because "[w]hen a trial judge sua sponte dismisses a cause of action on grounds 'not pleaded,' the trial judge denies the parties due process because the claim is being dismissed without 'notice and an opportunity for the parties and counsel to be heard.'" Liton Lighting, 2 So. 3d at 367(citing Kerrigan, Estess, Rankin & McLeod v. State, 711 So. 2d 1246, 1249 (Fla. 4th DCA 1998)).

Santana acknowledges that Florida courts have approved the summary dismissal or denial of certain petitions when the petitioner fails to allege an exhaustion of administrative remedies. See, e.g., Duggan v. Department of

Corrections, 665 So. 2d 1152 (Fla. 5th DCA 1996) (denying petition since prisoner failed to allege that any administrative remedy has been initiated or resolved). None of those cases, however, have imposed such a pleading requirement on a petition for writ of habeas corpus alleging entitlement to immediate release and involving, as in this case, the non-discretionary imposition of court-imposed jail credit.

Of importance, there has been no showing that Santana, in fact, failed to exhaust his administrative remedies or that the Department would have asserted this defense if required to respond to the petition. Rather, the trial court summarily dismissed Santana's petition based solely on a failure to allege exhaustion. The First District determined that, where a petition raises plausible reasons and a factual basis supporting the inmate's immediate release, the Great Writ should not be *sua sponte* dismissed without at first requiring the Department to respond. This holding is consistent with this Court's prior decisions discussing the importance of writs of habeas corpus under Florida law. See Anglin, 88 So. 2d at 919; see also Allison, 11 So. 2d at 579.

CONCLUSION

For the foregoing reasons, this Court should approve the narrowly-tailored exception to the exhaustion of administrative remedies doctrine adopted by the First District. To the extent, the Third District's holding in Pope and the Fourth

District's holding in Grace conflict with the First District's decision, the holdings in those decisions should be rejected.

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 **Beverly Brewster, Esquire**, Office of General Counsel, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399, this 4th day of January, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

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