IN THE SUPREME COURT OF FLORIDA

MARK HENRY, WARDEN, ETC.

Petitioner,

v.

CASE NO. SC 09-1027
Lower Tribunal No.: 1D08-3852

RUNNER SANTANA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

On Review from the District Court of Appeal,
First District, State of Florida

CAROLYN J. MOSLEY
Florida Bar Number 593280
Attorney Supervisor
and
BEVERLY BREWSTER
Florida Bar Number 0974986
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
FLORIDA DEPARTMENT OF CORRECTIONS
2601 Blair Stone Road
Tallahassee, Florida 32399
(850) 488-2326

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitutional Provisions and Statutes

Court and Administrative Rules

PRELIMINARY STATEMENT

This case involves litigation between the Department of Corrections and Mr. Runner Santana, a state prisoner, regarding the manner in which his sentences are being executed. Mr. Santana was the petitioner in the circuit court where he filed a habeas petition; the appellant in the First District where he sought review of the order dismissing his habeas petition; and he is the respondent before this Court defending the decision of the First District. He will be referred to in this brief as "Inmate Santana" or by his last name. Mark Henry, Warden, Florida Department of Corrections, was the respondent in the habeas circuit court, the appellee in the First District, and he is the petitioner before this Court seeking a reversal of the First District's decision. In this brief, the petitioner will be referred to as the "Department" or "DOC."[1]

The record on appeal from the circuit court to the First District will be referred to by the symbol "R" followed by the appropriate page numbers. Since the First District has not yet filed its indexed and paginated record with this Court, the Department will identify the documents filed in the First District by the filing date.

[1] Mr. Henry is the warden of Graceville Correctional Facility operated by the GEO Group, Inc. The Department has defended the lawsuit because sentence structure is an exclusive agency function, regardless of whether an inmate is housed in a private or state facility.

STATEMENT OF THE CASE AND FACTS

Inmate Santana filed a petition for writ of habeas corpus on June 24, 2008, in Jackson County Case No. 08-429 CA, alleging that he was entitled to immediate release when properly credited with time served. (R. 2) He asked the court to exercise its original jurisdiction over Orange County Case Nos. 95-04926, 96-09601, and 96-10668. (R. 2) He alleged that he was serving concurrent sentences ranging in length from five years to six years that were imposed on October 4, 2007 upon revocation of his probation. He alleged that he was entitled to 142 days of violation-of-probation jail credit and credit for time served in the state hospital. In addition, he alleged he was entitled to 2,023 days of jail credit in the 1995 case; to 831 days of jail credit in Case No. 96-09601, and to 1,682 days of jail credit in Case No. 96-10668. (R. 2) He argued that the law entitled him to this credit--that upon revocation of probation, an inmate has a right to credit on the new sentence for all time previously incarcerated on the count. (R. 3-4)

Inmate Santana attached to his petition sentencing orders, revocation-of-probation orders, and a transcript of the violation-of-probation hearing in these three Orange County cases. (R. 7-27)

The four sentencing orders were all dated October 4, 2007, except for one that was dated October 11, 2007, nunc pro tunc October 4, 2007. According to these orders, Santana received a prison term of six years followed by two years of

probation in Case No. 95-04926 (Count 2); a prison term of 60.75 months in Case No. 96-9601 (Count 7); and a prison term of six years in Case No. 96-10668 (Counts 27 and 51). All sentences ran concurrently, and on each sentence, the court awarded 142 days of jail credit and prison credit for all time previously served on the count in the Department of Corrections. (R. 9-10, 13-15, 18-19) The sentences in the two 1996 cases (but not the 1995 case) also provided that the defendant was to "receive credit for any time served in the State Hospital." (R. 15, 19)

The revocation-of-probation orders related to three of the four sentences. The one missing was on Count 51 of Case No. 96-10668. The sentencing information was the same, except that the order in the 1995 case included the award of credit for time served in the state hospital. (R. 7-8, 11, 16)

The transcript of the violation-of-probation hearing disclosed the following information: Santana was found incompetent to stand trial on March 28, 1996 in the 1995 case. (R. 25-26) Approximately four months later on August 11, 1996, he committed fifty-nine burglaries and grand thefts in Case No. 96-10668 and additional burglaries, mostly of conveyances, in Case No. 96-09601. (R. 26) Santana was found competent to stand trial in 2001, either on March 21st or 28th. (R. 20, 22, 25-26) He was sentenced in the three Orange County cases on April 18, 2001. (R. 20, 22, 23) On December 11, 2002, the Department filed an affidavit

alleging that Santana had never reported to serve his probationary term and thus had violated its terms. (R. 22) The arrest warrant was signed on January 22, 2003. (R. 22) On May 16, 2007, Santana was brought back from Puerto Rico for his revocation hearing. (R. 24) He was found competent to stand trial on September 5, 2007. (R. 22) The revocation hearing was held on October 4, 2007. (R. 20) The court reporter transcribed the hearing on May 22, 2008. (R. 27)

According to Santana, he spent "about six months or what not" in a state hospital (R. 25), resided at the Orlando Living Center for some unspecified time period (R. 25), and never served any time in the Department's custody after being sentenced on April 18, 2001 (R. 24). According to defense counsel, Santana had "a total of 5.61 years in custody -- or in the State Hospital." (R. 22) This included the time he resided in the Orlando Living Center (a mental health facility). (R. 26) The prosecutor was unclear at to how much credit was due Santana for time served but believed it was a substantial amount. (R. 22)

The length of the prison terms imposed on April 18, 2001 was not clear. The judge knew Santana had been sentenced to 3 years and 73 days in the Department's custody, in addition to 142 days. (R. 22) Defense counsel believed one sentence was for three years and another for two years and seven months. (R. 26) Santana believed he had a three-year time served prison term with probation to follow. (R. 24)

The court found that Santana had violated his probation and revoked it. (R. 26) The court sentenced him in the 1995 case to prison for six years to be followed by two years of probation with credit "for all the previous Department of Corrections time or any other time that you've currently served on this case, in addition to 142 days that you've served since May of 2007." (R. 27) In Case No. 96-10668, the court sentenced Santana to prison for six years "with credit for previous Department of Corrections time, previous time served in the State's system, and since May of 2007, 142 days." (R. 27) In Case No. 96-09601, the court sentenced Santana to prison for 60.75 months "with credit for previous Department of Corrections time and 142 days and any other time served in custody." The court added, "If this needs to be cleared up through DOC we might need to have actual records under 3.800 motion. But it sounds to me like the Department of Corrections had the records before." (R. 27)

Defense counsel then stated that she had the Orange County jail records showing his actual time "in and out on." (R. 27) The court asked her to provide the information. (R. 27) She stated that Santana had 2,023 days of credit in the 1995 case; 1,682 days of credit in Case No. 96-19668; and 831 days of credit in Case No. 96-09601. (R. 27) When she finished, she stated, "I hope I'm right." (R. 27)

On June 30, 2008, the Jackson County Circuit Court dismissed the habeas petition because Inmate Santana in part was seeking relief in the wrong court in the

wrong proceeding. He was relying in part on information in the sentencing transcript that was not reflected in the sentencing orders. The court ruled that it could not grant Inmate Santana relief from his sentences which were imposed by another court in another county. The court added that to the extent Santana was arguing that the Department had failed to award him proper credit for time served, he had to grieve this issue with the Department and demonstrate exhaustion of his administrative remedies. The court reasoned as follows:

> A circuit court in the county in which the petitioner was incarcerated was without jurisdiction to hear petition for writ of habeas corpus seeking relief from sentence imposed following petitioner's conviction in another county. See Leichtman v. Singletary, 674 So. 2d 889 (Fla. 4th DCA 1996). To the extent Petitioner seeks an order directing the Department to award proper credit for time served, he should have sought relief through the inmate grievance procedure. See Department of Corrections, State of Florida v. Mattress, 686 So. 2d 740 (Fla.5th DCA 1997); See also Williams v. State, 673 So. 2d 873 (Fla. 1st DCA 1996). In the instant case, Petitioner failed to demonstrate the exhaustion of his administrative remedies with the Department.

(R. 28)

Inmate Santana filed a rehearing motion which the court received on July 21, 2008. He argued that the court had jurisdiction because he was alleging entitlement to immediate release from custody upon being credited with time actually served. (R. 30-33) He further alleged:

> Reconsideration is warranted in order to correct a 'manifest injustice,' such as the one presented in the present case, in which this primary

> 'miscarriage of justice' occurred, either by defense counsel, the State, or the Court, but the record clearly shows on its face that this Petitioner should of never have set a foot in prison according with his credit.

(R. 33)

On July 23, 2008, the Jackson County Circuit Court denied the motion for rehearing on the ground that Inmate Santana "fails to raise any new arguments or allegations of merit which the Court overlooked in his previous motion." (R. 34-35)

On August 6, 2008, Inmate Santana filed his notice of appeal to the First District Court of Appeal to review the dismissal order. The First District assigned the appeal Case No. 1D08-3852. On December 9, 2008, Inmate Santana sought permission to supplement to appellant recorded with documents not presented to the habeas court – Violation-of-Probation Affidavits, Arrest Warrants, and a grievance response from the warden dated June 20, 2008 regarding Santana's sentence structure. These documents reflected that Santana's original 2001 prison term in the 1995 case was 3 years and 73 days (1168); in Case no. 96-9601 the prison term was 3 years and 9 days (1104); and in Case No. 96-10668, the prison term was 2 years, 11 months, and 17 days (1081 days). On each sentence, the court awarded Santana credit equal to the prison term. The documents also reflected that Santana was arrested on May 16, 2007 on the violation-of-probation

charges. (The time frame between May 16, 2007 and October 4, 2007 is 141 days.). The warden's grievance response reflected violation-of-probation jail credit in the amount of 142 days applied to each sentence and original credit in the following amounts: 1082 days (two sentences); 1106 days (one sentence) and 1170 days (one sentence). On December 17, 2008, the First District denied the motion. On December 9, 2008, Inmate Santana filed an amended initial brief in which he argued that the habeas court erred in concluding it lacked jurisdiction to hear his petition. On February 17, 2009, the Department filed an answer brief in which it argued that the habeas court correctly dismissed the petition on both procedural grounds.

On December 9, 2008, Inmate Santana filed an amended initial brief in which he argued that the habeas court erred in concluding it lacked jurisdiction to hear his petition. On February 17, 2009, the Department filed an answer brief in which it argued that the habeas court correctly dismissed the petition on both procedural grounds.

On May 29, 2009, the First District reversed the habeas court in an opinion that is published in Westlaw as Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009). The Court addressed only one of the two grounds relied on by the habeas court to dismiss the petition--the inmate's failure to demonstrate exhaustion of administrative remedies in his habeas petition.

The First District's opinion identified the following facts: date of sentence, length of prison terms, and credit sought by Inmate Santana in three cases: Case No. 95-4926 (2,023 days); Case No. 96-9601 (831 days); Case No. 96-10668 (1682 days); 142 days of VOP jail credit on each sentence; and credit on each sentence for time spent in a state hospital. The First District identified the amount of time Santana was hospitalized as six months based on the "uncontroverted" testimony at the sentencing hearing. Santana, 12 So. 3d at 845.

The First District's opinion was silent as to the following information provided in the attachments to the habeas petition: The sentences were imposed by the Orange County Circuit Court; the sentencing orders did not identify any amounts of credit, except for the 142 days of violation-of-probation jail credit; the sentencing orders awarded prior prison credit even though the inmate had never been to state prison; the 1995 sentencing order was missing the award of credit for time spent in a state hospital; the inmate committed the crimes in the 1996 cases (including 59 burglaries and grand thefts) after being declared incompetent to stand trial in the 1995 case; the dates the inmate was in a state hospital for "about six month or what not" (R. 25) were never identified at the sentencing hearing; the exact amount of credit due was never clearly established at the sentencing hearing; and the inmate obtained most of his figures from the sentencing transcript instead of the sentencing orders.

The First District held that the habeas court erred in dismissing the habeas petition on the ground that the inmate had failed to demonstrate exhaustion of his administrative remedies. The Court reasoned as follows: Inmate Santana invoked the "Great Writ" to obtain his freedom. Procedural requirements generally do not apply to the Great Writ. Santana, 12 So. 3d at 844-846, 848. The requirement that administrative remedies be exhausted is a judicial doctrine which should not apply to the Great Writ. Assuming that the exhaustion doctrine does apply to the Great Writ, this doctrine has exceptions, and one of the exceptions should apply to the Great Writ. When the complaint is that an agency has acted beyond its statutory authority, exhaustion is not required. This exception should apply to the Great Writ because the inmate's complaint is that the Department has no lawful authority to hold him. Santana, 12 So. 3d at 844-848. The Department has "no discretion" to confine an inmate upon expiration of his sentences, and it has "little or no expertise to bring to bear" on the subject. Santana, 12 So. 3d at 846-847. Assuming that the exhaustion doctrine applies and is not excused, it is an affirmative defense that has to be raised by the Department. It is not a pleading requirement. The cases holding the doctrine to be a pleading requirement of habeas petitions are distinguishable. The inmates in those cases challenged conditions of confinement or sought an earlier release from custody through restoration of gain time, but they did not seek

immediate release from custody. Santana, 12 So. 3d at 847-848. The First District held:

> In any event, we hold the trial court erred by dismissing Mr. Santana's petition for writ of habeas corpus on the basis of a technicality--an assumed pleading defect--that was not raised by the parties.

Santana, 12 So. 3d at 847. The Court elaborated:

> When a petition for writ of habeas corpus alleging that the petitioner is entitled to immediate release sets out plausible reasons and a specific factual basis in some detail, the custodian should be required to respond to the petition. To the extent Pope v. State, 898 So.2d 253 (Fla. 3d DCA 2005), holds to the contrary, we certify conflict.

Santana, 12 So. 3d at 84.

The First District speculated that had the habeas court issued a show-cause order, the Department might have decided the petition was meritorious and released the inmate from custody instead of moving to dismiss the petition for failure to exhaust administrative remedies. Santana, 12 So. 3d 847-848.

On June 12, 2009, the Department filed a motion to stay issuance of the mandate, which was denied on June 17, 2009. The mandate issued on June 24, 2009. The Department then filed a motion for stay of the First District's opinion pending review in this Court, which was denied on July 2, 2009.

On June 12, 2009, the Department filed its notice to invoke this Court's discretionary jurisdiction. It filed its jurisdictional brief on June 22, 2009. Inmate Santana did not file a jurisdictional brief. On September 9, 2009, this Court

accepted jurisdiction of the case and assigned it Case No. SC09-1027. The Department's merits brief is due to be filed on or before November 4, 2009.

SUMMARY OF ARGUMENT

Inmate Santana filed a habeas petition in Jackson County alleging entitlement to immediate release when properly credited with time served on his Orange County sentences. The habeas court dismissed the petition in part because Santana had failed to demonstrate exhaustion of his administrative remedies.

The First District reversed the habeas court. It held that Inmate Santana did not have to allege and show exhaustion of his administrative remedies. The Court reasoned that procedural requirements do not, or should not, apply to the "Great Writ"; that the Department has "no discretion" to confine an inmate upon expiration of his sentences, and it has "little or no expertise to bring to bear" on the subject; that if the exhaustion doctrine does apply to habeas petitions, it is an affirmative defense instead of a pleading requirement; and that cases holding to the contrary involved different issues--requests for earlier release from custody or changes in conditions of confinement. Thus, according to the First District, exhaustion is a pleading requirement if the inmate seeks an earlier release, but it is an affirmative defense if the inmate seeks immediate release.

Respectfully, the First District's decision should be reversed. Exhaustion of administrative remedies necessarily is a pleading requirement for all sentence structure issues, regardless of the effect on the release date. In the mandamus/habeas petition, the inmate must allege that the Department is

incorrectly executing his sentences. Since the inmate lacks first-hand knowledge of how the Department has structured his sentences, he must ask the Department for a calculation of his release date. The way the inmate obtains this information is through the Department's inmate grievance procedure. If the inmate is dissatisfied with what he learns, he has the opportunity to challenge the calculation on three levels of administrative review.

This Court has applied the exhaustion doctrine to an inmate's request for sentence-reducing credits that would shorten his release date. See Bush v. State, 945 So. 2d 1207, 1210, 1215 (Fla. 2006) (mandamus action). This Court also has required an inmate seeking a less restrictive confinement status to allege exhaustion of his administrative remedies in his petition. See Harvard v. Singletary, 733 So. 2d 1020, 1021 n. 1 (Fla. 1999) (habeas action). The District Courts of Appeal, except for the First District, also consistently apply the exhaustion doctrine to sentence structure issues and treat it as a pleading requirement.

As this Court knows, sentence structure is complex due in part to the numerous gain time laws that must satisfy the *ex post facto* doctrine and the lack of uniformity in sentencing orders leading to unintended results. The Department calculates an ending date on each sentence, based on sentencing factors unique to each sentence, and the sentence ending last controls the release date. Sentencing

factors include the following: date sentence imposed; date sentence commences to run depending on whether it is to be served concurrently or consecutively; length of prison term; mandatory terms, including 85% minimum mandatory term; jail, prison, and gain time credit awarded by the sentencing court; eligibility for and award of gain time during service of sentence—type, rate, and amount; and forfeiture of gain time upon revocation of supervision or during service of sentence due to disciplinary actions.

The Department is currently executing the sentences of over 100,000 inmates housed in sixty-two major prisons located in forty-eight counties throughout the State. While inmates receive monthly gain time reports showing their tentative release date based on the controlling sentence, the only way they can know how the Department has structured their sentences is to ask for a calculation of their release date. The Department has the commitment documents showing what was ordered by the courts; and it knows what it has done to comply with those orders. After an inmate receives the release-date calculation, he may grieve any objections to it through the Department's three-tier review process, beginning at the institutional level and ending in central office where the sentence structure experts are located.

Absent evidence of the Department's calculation of the release date, inmates are simply speculating about how their sentences have been structured. A

sentencing order by itself generally will not suffice. It may not reflect the actual starting date or the actual time to be served; it may have been amended; and it may not even be the sentence controlling the release date. The most common mistakes made by inmates relate to jail credit and gain time forfeiture, both of which may significantly affect the actual release date.

The Department's grievance procedure serves the interests of the penal system, the inmates, and the courts. In the context of sentence structure, the grievance procedure gives the Department the opportunity to correct its mistakes, to clarify the facts and the law for the inmates, to resolve issues without judicial intervention, and to provide the inmates with a factual record of the calculation of their release dates for use in pursuing judicial remedies (post-conviction motions or extraordinary writ petitions).

The exhaustion requirement does not diminish the rights of inmates to pursue their judicial remedies. Since inmates are generally serving lengthy prison terms, they have months and years in which to grieve their sentence structure issues. Further, once the grievance process commences, the Department's part of it is completed within sixty days. Thus, any delay in the filing of mandamus or habeas petitions is usually by choice.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review the decision of the First District Court of Appeal in Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009) because it expressly and directly conflicts with the decisions of Third, Fourth, and Fifth District Courts of Appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

The First District held that a circuit court cannot summarily dismiss a habeas petition on the ground the inmate failed to allege exhaustion of his administrative remedies. Inmate Santana filed a habeas petition in the circuit court alleging entitlement to immediate release from custody upon being properly credited with time served. The habeas court dismissed the petition in part because Santana had "failed to demonstrate the exhaustion of his administrative remedies with the Department." Santana, 12 So. 3d 845 & n. 1. The First District held that the exhaustion of administrative remedies was not a pleading requirement and reversed the habeas court:

> In any event, we hold the trial court erred by dismissing Mr. Santana's petition for writ of habeas corpus on the basis of a technicality--an assumed pleading defect--that was not raised by the parties.

Santana, 12 So. 3d at 847. The Court elaborated:

> When a petition for writ of habeas corpus alleging that the petitioner is entitled to immediate release sets out plausible reasons and a specific factual basis in some detail, the custodian should be required

> to respond to the petition. To the extent Pope v. State, 898 So.2d 253 (Fla. 3d DCA 2005), holds to the contrary, we certify conflict.

Santana, 12 So. 3d at 84.

The decisions of the Third, Fourth, and Fifth District Courts of Appeal conflict with the First District's decision: Pope v. State, 898 So. 2d 253, 253 -254 (Fla. 3rd DCA 2005); Grace v. State, 3 So. 3d 1290 (Fla. 4th DCA 2009); and Pope v. State, 711 So. 2d 638 (Fla. 5th DCA 1998).

The Third District in Pope held just the opposite of what the Santana Court held—that is, the Third District held that a circuit court may summarily dismiss a habeas petition which fails to allege exhaustion of administrative remedies. In Pope, the inmate filed a habeas petition in circuit court alleging that the Department was confining him beyond his maximum release date. He did not allege or prove that he had exhausted his administrative remedies. The habeas court summarily dismissed the petition because it was facially insufficient, and the Third District affirmed the habeas court's decision. The Third District reasoned and held:

> Anthony Evans Pope appeals the denial of his Emergency Petition for Writ of Habeas Corpus Ad Testificandum. The petition alleges that the appellant is being illegally detained by the Department of Corrections beyond his maximum release date. When Appellant filed his petition with the trial court, he failed to allege, or prove, that he had exhausted any of the administrative procedures available to him prior to filing the petition. The prerequisite to the issuance of an extraordinary writ is exhaustion of all administrative remedies. The

> trial court, without addressing the merits, summarily and correctly denied the appellant's petition, without prejudice, finding the petition facially insufficient for failing to allege the appellant had exhausted all of the administrative remedies. [citation omitted]

Pope, 898 So. 2d at 253.

The Third District affirmed the habeas court "without prejudice to Pope's right to file a new petition, upon the exhaustion of all administrative remedies available to him. Pope, 898 So. 2d at 254.[2]

The Fourth District in Grace, as did the Third District in Pope, held just the opposite of what the Santana Court held—that is, the Fourth District held that a circuit court may summarily dismiss a habeas petition which fails to allege exhaustion of administrative remedies. The inmate in Grace filed a Rule 3.850 post-conviction motion to seek enforcement of his plea agreement for a 17-year prison term. He alleged that he had completed his 17-year sentence, and that he was still incarcerated because the Department had miscalculated his time served. The circuit court summarily denied the motion, and the Fourth District upheld that decision. The Fourth District implicitly treated the motion as a habeas petition and found it to be facially insufficient for failure to demonstrate exhaustion of administrative remedies. The Fourth District reasoned and held:

[2] For the first time on appeal, the inmate in Pope tried to show exhaustion of his administrative remedies. The Third District would not allow the inmate to do so because he had bypassed the lower court, and it was the lower court's decision that was under review. Pope, 898 So.2d at 254.

> Nothing in his motion demonstrates that he has exhausted his administrative remedies with the department. Accordingly, we affirm the summary denial, without prejudice to Appellant's pursuing his available remedies against the department and then, if necessary, filing a petition for extraordinary relief in circuit court. If he still claims entitlement to immediate release, then he should file a petition for writ of habeas corpus with the circuit court in the county where he is incarcerated. [citations omitted]

Grace, 3 So. 3d at 1290-1291.

As did the Third and Fourth Districts, The Fifth District in its Pope case held just the opposite of what the Santana Court held—that is, the Fifth District held that a circuit court may summarily dismiss a habeas petition which fails to allege exhaustion of administrative remedies. The inmate in Pope filed a "petition for writ of habeas corpus/mandamus" seeking release from custody because he had not received overcrowding provisional release credits. The habeas/mandamus court correctly denied the petition as being facially insufficient. There was no allegation that administrative remedies had been exhausted or that the number of credits requested would cause the sentence to expire. The Fifth District in Pope reasoned and held:

> The trial court correctly denied the defendant's petition because the petition failed to allege that (1) the defendant had exhausted his administrative remedies with the Department of Corrections, and (2) the defendant would be entitled to receive the amount of credit equal to the amount of time remaining on his sentence. Accordingly, we affirm the trial court's order. [citations omitted]

Pope, 711 So.2d at 639.

Resolution of the conflict in these cases is important. There are over 100,000 inmates serving sentences who potentially could file extraordinary writ petitions challenging the manner in which the Department is executing their sentences. The circuit courts, the Department, and the inmates need to know whether exhaustion of administrative remedies is a pleading requirement. Intertwined with this issue is the more basic issue whether the exhaustion requirement should even apply to inmates' extraordinary writ petitions. The First District devoted a considerable portion of its opinion developing arguments as to why the exhaustion requirement does not, or should not, apply to habeas petitions. The First District's approach is difficult to reconcile with this Court's Bush decision requiring exhaustion of administrative remedies when the relief sought would only shorten the release date. If the First District's approach is correct, this would mean inmates could bypass the Department's grievance procedure simply by filing a free habeas petition and alleging entitlement to immediate release from custody.

STANDARD OF REVIEW

The issue in this case is whether the circuit court erred in dismissing a habeas petition on a procedural ground--inmate's failure to demonstrate exhaustion of administrative remedies with the Department of Corrections. This is a legal issue subject to *de novo* review. See generally Mora v. McDonough, 934 So.2d 587 (Fla. 1 DCA 2006) (issue as to whether circuit court erred in dismissing mandamus petition for lack of jurisdiction was "a purely legal one" to be reviewed under the *de novo* standard of review).

DEPARTMENT'S ARGUMENT

ISSUE

DID THE JACKSON COUNTY CIRCUIT COURT ERR IN SUMMARILY DISMISSING THE INMATE'S HABEAS PETITION SEEKING CREDIT ON HIS SENTENCES FOR TIME SERVED ON THE GROUND THAT THE INMATE HAD FAILED TO DEMONSTRATE EXHAUSTION OF HIS ADMINISTRATIVE REMEDIES?

The First District held that the habeas court erred in dismissing the habeas petition on the ground that the inmate had failed to demonstrate exhaustion of his administrative remedies. The First District does not believe the exhaustion requirement should apply to the "Great Writ," but if it does, it is an affirmative defense and not a pleading requirement of a habeas petition. The Department respectfully disagrees. The exhaustion requirement applies to habeas petitions, and it constitutes a pleading requirement. The inmate grievance procedure is the vehicle by which inmates learn how the Department has structured their sentences. They need this information for their mandamus and habeas petitions to avoid speculating about the structure of their sentences and to assist the courts in understanding the true nature of their complaints.

1. The Department's duty is to take custody of convicted criminals, execute their sentences as imposed by the judiciary, and manage and regulate the state prison system. The Department is currently executing sentences ranging from a

term of years to a life or death sentence of over 100,000 inmates. There are sixty-two major prisons located in forty-eight counties throughout the State. See http://www.dc.state.fl.us. The Department has "supervisory and protective care, custody, and control of the inmates, buildings, grounds, property, and all other matters pertaining to … [state] facilities and programs for the imprisonment, correction, and rehabilitation of adult offenders." See § 945.025(1), Fla. Stat. Three chapters of the Florida Statutes are devoted to the Department's duties and functions. See Chapters 944, 945, and 946, Fla. Stat.

2. The Department has established an internal procedure for review of inmate grievances that serves the interests of the penal system, the inmates, and the courts. The Department's grievance procedure is set forth in Florida Administrative Code Rules 33-103.001 through 33-103.019. The grievance procedure was fully certified by the United States Department of Justice in March, 1992, pursuant to the requirements of sections 944.09(1)(d) and 944.331, Florida Statutes. See Fla. Admin. Code R. 33-103.001. The Department's Office of General Counsel oversees the grievance procedure. See § 944.331, Fla. Stat.[3]

[3] Congress in 1982 enacted 42 U.S.C. § 1997(e) to allow federal district courts to order state prisoners filing a civil rights lawsuit under 42 U.S.C. § 1983 to exhaust the state prison grievance procedure. Such procedure had to be approved either by the United States Department of Justice or the federal district court. Congress in 1995 amended this provision in the Prison Litigation Reform Act (PLRA) to compel prisoners to exhaust their administrative remedies before suing

Informal resolution of inmate complaints through use of an "Inmate Request" form is encouraged, but the grievance procedure also provides a three-tier review process—Informal Grievance; Formal Grievance; and Appeal to the Secretary's Office. An inmate begins the process with an informal grievance to prison staff, for example an institutional sentencing specialist; if dissatisfied with the response received, the inmate may appeal to the warden of the prison; and if the warden's response is not satisfactory; the inmate may then appeal to the Secretary's Office. At this level, the experts in sentence structure located in central office will review the issue. See Fla. Admin. Code R. 33-103.005 through 33-103.007.

The grievance procedure sets specific time limits for the Department to respond in writing, and it requires that a reason for the decision be stated. The maximum time frame is 60 days [10 days for a response to the informal grievance; 20 days for a response to the formal grievance; and 30 days for a response to the appeal to the Secretary's Office]. Unless an inmate agrees to a written extension,

---

over prison conditions. See Booth v. Churner, 532 U.S. 731,734-41 (2001) (exhaustion required even though relief sought, such as money damages, cannot be awarded); Porter v. Nussle, 534 U.S. 516 (2002) (exhaustion applies to all inmate suits about prison life); Woodford v. Ngo, 548 U.S. 81, 90-91 (2006) (exhaustion means compliance with all administrative deadlines and requirements); Jones v. Bock, 549 U.S. 199, 216 (2007) (exhaustion is not a pleading requirement but rather an affirmative defense).

expiration of a time limit allows an inmate to proceed to the next level of the process. See Fla. Admin. Code R. 33-103.011.

In addition to the procedure for responding to routine grievances, provision is made for the priority processing of grievances which are of an emergency nature. See Fla. Admin. Code R. 33-103.006(3) and 33-103.007(6).

The grievance procedure provides a role for inmates and employees in its development and improvement. See Fla. Admin. Code R. 33-103.004. It provides safeguards to avoid reprisals against inmates for participating in the grievance process. See Fla. Admin. Code R. 33-103.015(6) and 33-103.017. Finally, it provides for independent review of the grievance process by the Office of Internal Audit. See Fla. Admin. Code R. 33-103.018.

While the grievance procedure encourages the prompt investigation and resolution of all inmate grievances, the focus in this brief will be on issues involving sentence structure. In this context, the grievance procedure gives the Department the opportunity to correct its mistakes, to clarify the facts and the law for the inmates, to resolve issues without judicial intervention, and to provide the inmates with a factual record of the calculation of their release dates for use in pursuing judicial remedies.

3. Inmates must use the Department's grievance procedure to air complaints about sentence structure and exhaust this process before pursuing judicial remedies. As the following cases illustrate, inmates present a variety of sentence structure issues that must be exhausted before pursuing judicial remedies:[4] Willis v. State, 9 So. 3d 630 (Fla. 5th DCA October 2, 2009) (DOC's alleged refusal to award post-sentencing jail credit on sentence); Phillips v. State, 998 So. 2d 675 (Fla. 4th DCA 2009); (DOC's alleged refusal to apply court-ordered jail credit to sentence); Wilson v. State, 9 So. 3d 630 (Fla. 3rd DCA 2009) (DOC's alleged refusal to apply court-ordered jail and prison credit to sentence); Grace v. State, 3 So. 3d 1290 (Fla. 4th DCA 2009) (Department's alleged miscalculation of time served resulting in unlawful confinement of inmate); Ferenc v. McNeil, 8 So. 3d 397 (Fla. 1st DCA 2009) (DOC's alleged award of basic gain time in lump sum on length of prison term instead of monthly based on time served); Reeves v. State, 987 So. 2d 779 (Fla. 3rd DCA 2008) (DOC's alleged refusal to award or apply to sentence credit for time served, gain time, and overcrowding provisional release credits); Jackson v. State, 971 So. 2d 208 (Fla. 4th DCA 2007) (DOC's alleged refusal to apply to sentence credit for jail time and gain time for period spent in jail awaiting post-conviction hearing); Wells v. State, 966 So. 2d 459 (Fla. 4th DCA

[4] The Department has limited the list to a single case for each issue presented, even though there are numerous cases with the same holding.

2007) (DOC's alleged execution of wrong sentence); Grieco v. State, 962 So. 2d 1067 (Fla. 5th DCA 2007) (DOC's alleged refusal to award gain time); Pugh v. State, 954 So. 2d 1254 (Fla. 4th DCA 2007) (DOC's alleged refusal to run sentences concurrently); Galarza v. State, 955 So. 2d 69 (Fla. 3rd DCA 2007) (DOC's alleged refusal to restore gain time); Grace v. State, 920 So. 2d 719 (Fla. 4th DCA 2006) (DOC's alleged miscalculation of maximum sentence expiration date); West v. State, 789 So. 2d 1123 (Fla. 3rd DCA 2001) (DOC's alleged miscalculation of tentative release date and refusal to apply court-ordered jail credit to sentence); Swain v. State, 795 So. 2d 1031 (Fla. 2d DCA 2001) (DOC's alleged refusal to increase monthly rate of gain time pursuant to Heggs decision); Duggan v. Department of Corrections, 665 So. 2d 1152 (Fla. 5th DCA 1996) (DOC's alleged refusal to apply court-ordered credit from prior sentence on VOP sentence); Milne v. State, 807 So. 2d 725 (Fla. 4th DCA 2002) (DOC's alleged refusal to restart escape sentence on date inmate captured); Fisher v. State, 789 So. 2d 431 (Fla. 4th DCA 2001) (DOC's alleged improper structuring of consecutive sentences upon revocation of conditional release supervision).

4. After exhausting administrative remedies regarding sentence structure issues, inmates who are still dissatisfied may pursue their judicial remedies by filing either a mandamus petition or a habeas petition. This Court's decision in Bush v. State, 945 So. 2d 1207 (Fla. 2006) is instructive. Inmate Bush sought

additional overcrowding credits in the form of provisional release credits, which, if granted, would have shortened his prison time. After exhausting his administrative remedies, Bush filed a mandamus petition in Leon County and then in Seminole County. Each court dismissed the petition, the first court because it was a "criminal action," and the second because it was a "civil action." The Seminole County case by way of the Fifth District eventually ended up in this Court, resulting in the clarification of both the remedy and venue for challenging a sentence structure issue.

Citing Griffith v. Florida Parole and Probation Com'n, 485 So. 2d 818, 820 (Fla. 1986) and Stovall v. Cooper, 860 So. 2d 5 (Fla. 2DCA 2003), the Bush Court recognized that the Administrative Procedure Act does not apply to the claims of inmates, and that their judicial remedies are the common law writs of mandamus and habeas corpus.[5] The Court held that since Inmate Bush had exhausted his administrative remedies and had not alleged entitlement to immediate release from custody, his remedy was a mandamus petition filed in Leon County where the

[5] The only rights of inmates under the Administrative Procedure Act are to petition the Department to initiate rulemaking, to request a public hearing, and to appeal a final order denying the petition on two procedural grounds (timeliness of the order and inclusion of written statement for denying petition). The Department is authorized to limit inmate participation in public rulemaking hearings to written correspondence, and inmates cannot appeal the merits of a final order denying a petition to initiate rulemaking. See §§ 120.54(3)(c), 120.54(7), 120.68, and 120.81(3), Fla. Stat.; Quigley v. Florida Department of Corrections, 745 So. 2d 1029 (Fla. 1DCA 1999).

Department is headquartered. Citing section 79.09, Florida Statutes, the Court also noted that a habeas petition must be filed in the circuit court of the county in which the inmate is being housed. More specifically, the Court reasoned and held:

> When challenging a sentence-reducing credit determination by the Department, such as a gain time or provisional release credit determination, once a prisoner has exhausted administrative remedies, he or she generally may seek relief in an original proceeding filed in circuit court as an extraordinary writ petition. In such a case, if the prisoner alleges entitlement to immediate release, a petition for writ of habeas corpus is the proper remedy; whereas if the prisoner does not allege entitlement to immediate release, a petition for writ of mandamus is the proper remedy. [footnotes omitted]

Bush, 945 So.2d at 1210. The Court further held:

> [W]e hold as follows: (1) the proper remedy for a prisoner to pursue in challenging a sentence-reducing credit determination by the Department, where the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release, continues to be a mandamus petition filed in circuit court; (2) the proper venue for a prisoner's challenge to a sentence-reducing credit determination by the Department, where the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release, continues to be in circuit court in Leon County, where the Department is located; and (3) transfer rather than dismissal is the preferred remedy where improper venue is sought in a case involving a challenge to a sentence-reducing credit determination by the Department.

Bush, 945 So.2d at 1215.

The Department recognizes that the administrative and judicial review process for sentence structure issues may not be a perfect fit with traditional notions of the role of extraordinary writs, but it works. Inmates need to use the

Department's grievance procedure for all the reasons previously mentioned (correction of mistakes, clarification of facts and law for inmates; resolution of issues without judicial intervention; and preparation of factual record of sentence calculations for inmates to use in court). Inmates also need a procedural vehicle for judicial review of their sentence structure issues to the extent they are not fully satisfied with the Department's response to their complaints. Bush holds that this vehicle is either a mandamus or habeas petition, depending on whether the inmate is seeking a shorter release date or an immediate release date. The mandamus petition must be filed in Leon County, and the habeas petition must be filed in the county where the inmate is housed. This approach works well for case management. The First District's Santana decision has injected confusion into this process.

5. Inmates must allege and show exhaustion of administrative remedies in their mandamus and habeas petitions. Since the inmate in Bush had exhausted his administrative remedies, this Court had no occasion to address the pleading requirements for an extraordinary writ petition challenging the Department's structure of an inmate's sentence. In other cases, however, this Court and the District Courts of Appeal have held, either expressly or impliedly, that inmates must include exhaustion information in their petitions. See, for example, Harvard v. Singletary, 733 So. 2d 1020, 1021 n.1 (Fla. 1999) (Inmate filed an emergency

habeas petition seeking a less restrictive confinement status. Jurisdiction was declined and the case transferred to a circuit court, but prior to doing so, this Court commented, "Harvard alleges that he has exhausted available administrative remedies. If he had not, we would have dismissed his petition."); Pope v. State, 898 So. 2d 253, 253 -254 (Fla. 3rd DCA 2005) (Inmate filed habeas petition alleging that DOC was confining him beyond his maximum release date. The petition was properly denied because the inmate "failed to allege, or prove, that he had exhausted any of the administrative procedures available to him prior to filing the petition."); Grace v. State, 3 So. 3d 1290 (Fla. 4th DCA 2009) (Inmate filed a Rule 3.850 motion complaining that DOC had miscalculated his time served and was confining him beyond his maximum release date, which was summarily denied by the circuit court and affirmed on appeal. The Fourth DCA, after noting that "[n]othing in his motion demonstrates that he has exhausted his administrative remedies with the department," held that the inmate had to exhaust his administrative remedies and then file a habeas petition if he still believed he was entitled to immediate release from custody.); Dandashi v. State, 956 So. 2d 528 (Fla. 4th DCA 2007) (Inmate's motion to compel DOC to give him jail credit properly denied because the inmate "did not indicate that he had pursued his administrative remedy with the Department of Corrections"); Pope v. State, 711 So. 2d 638 (Fla. 5th DCA 1998) (inmate's "petition for writ of habeas

corpus/mandamus" seeking overcrowding credits was denied because "the petition failed to allege that (1) the defendant had exhausted his administrative remedies with the Department of Corrections, and (2) the defendant would be entitled to receive the amount of credit equal to the amount of time remaining on his sentence"); Duggan v. Department of Corrections, 665 So. 2d 1152 (Fla. 5th DCA 1996) ("Brenda Duggan filed this petition for writ of mandamus seeking to compel the Department of Corrections . . . to award her gain time in compliance with an order of the circuit court. The circuit court's order directed the DOC to compute and apply credit for time served and unforfeited gain time from Duggan's 'prior service in this case.' . . . Since Duggan has not alleged that any administrative remedy has been initiated, much less resolved, the petition for writ of mandamus is denied without prejudice."); Gillespie v. State, 910 So. 2d 322, 324 (Fla. 5th DCA 2005) ("While the defendant asserts that he has 'tried several times' to rectify the problem [length of prison term] with his classification officer and DOC's main headquarters, he fails to allege that he has sought a proper administrative remedy or that the matter has been resolved and his remedies have been exhausted. As such, the proper remedy is for the defendant to seek mandamus relief in the circuit court after the administrative process through the DOC has been exhausted."); Cooper v. State, 715 So. 2d 330 (Fla. 1st DCA 1998) ("Although titled a motion to correct an illegal sentence, it appears that the motion is actually in the nature of a

petition for a writ of mandamus, seeking to compel the Department of Corrections to credit him with prison time previously awarded by the trial court. Because the motion does not name the proper respondent or allege that appellant has exhausted his available administrative remedies, we affirm.").

The holdings in these cases are eminently correct. This is so because without a formal sentence structure analysis from the Department, inmates are simply speculating about their entitlement to an immediate or earlier release. While inmates receive monthly gain time reports showing their tentative release date based on the controlling sentence, the only way they can know how the Department has structured their sentences is to ask the Department for a calculation of their release date. The calculation takes into account many factors, including the following: date sentence imposed; date sentence commences to run depending on whether it is to be served concurrently or consecutively; length of prison term; any mandatory terms, including 85% minimum mandatory term; jail, prison, and gain time credit awarded by the sentencing court; forfeiture of gain time upon revocation of supervision which is tied to the offense date; eligibility for gain time—type, rate, and amount—which is tied to the offense date; and forfeiture of gain time during service of sentence due to disciplinary actions.

As previously mentioned, the grievance procedure includes a form entitled "Inmate Request" which inmates can use to request institutional staff to provide

them with a calculation of their release date. Once they have this information, they can decide whether they think the calculation is wrong. If they have a problem with it, they then have the option of proceeding with the three-tier formal grievance procedure. By the time the inmate completes the process, both institutional and central office staff will have reviewed the calculation in the context of the complaints of the inmate. Due to the complexity of sentence structure, the importance of full exhaustion cannot be overemphasized.

Absent completion of this process, inmates are simply speculating about how their sentences have been structured. A sentencing order by itself generally will not suffice. It may not reflect the actual starting date; it may not reflect the actual time to be served, see, e.g., Eldridge v. Moore, 760 So. 2d 888 (Fla. 2000); it may have been amended; and it may not even be the sentence controlling the release date. The most common mistakes made by inmates relate to jail credit and gain time forfeiture, both of which may significantly affect the actual release date.

6. The First District's decision in Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009) should be overturned. The First District held that the habeas court erred in dismissing Inmate Santana's habeas petition without a response from the Department on the ground that Santana failed to demonstrate exhaustion of administrative remedies. The First District does not think that the exhaustion requirement should apply to habeas petitions, but that if it does, it is an affirmative

defense instead of a pleading requirement. The First District has subsequently reversed another habeas court on the same ground: Jones v. Department of Corrections, 14 So. 3d 272, 273 (Fla. 1st DCA 2009) (follows Santana but nature of claim not disclosed).

The Department's response is as follows:

A. *According to the First District, no procedural restrictions of any significance (and especially the administrative exhaustion requirement) should be placed on a habeas petition.* Throughout its opinion, the Court extols the virtues of the "Great Writ." Santana, 12 So. 3d at 844-848. The cases cited involved a state prisoner seeking bail based on an unrelated pending charge; an arrested rape suspect who was denied access to his lawyer; a state prisoner whose sentence exceeded the statutory maximum [case preceded adoption of Fla. R. Crm. P. 3.800 and 3.850], and a state prisoner challenging his conviction in federal court. See Allison v. Baker, 11 So. 2d 578 (Fla. 1943) (bail case); Anglin v. Mayo, 88 So. 2d 918 (Fla. 1956) (excessive punishment case); Jamason v. State, 447 So. 2d 892 (Fla. 4th DCA 1983) (arrested rape suspect case), *approved,* 455 So. 2d 380 (Fla. 1984); and Harris v. Nelson, 394 U.S. 286 (1969) (federal state conviction case).

The exhaustion requirement was not discussed in these cases, except for the federal case, which acknowledged that the prisoner had exhausted his state remedies. Harris v. Nelson, 394 U.S. at 288-289. The exhaustion requirement in

fact is well established in federal court. Before a state prisoner may file a federal habeas petition, he must exhaust his state remedies, including *state administrative remedies*. The seminal case is Preiser v. Rodriguez, 411 U.S. 475 (1973), in which state prisoners sought "restoration of their good-time credits" resulting from disciplinary actions. Preiser, 411 U.S. at 477-482, 493. The Court held that the prisoners' procedural remedy was a habeas action under 28 U.S.C. §§ 2241 and 2254 (instead of a civil rights action under 42 U.S.C. § 1983), because the prisoners were seeking immediate release from custody upon restoration of their forfeited credits. The specific holding was that a state prisoner's "sole federal remedy is a writ of habeas corpus" when "he is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment." Preiser, 411 U.S. at 500. The Court discussed at length the exhaustion requirement and made it clear that it applied; and that both state administrative and state judicial remedies had to be exhausted. Preiser, 411 U.S. at 491-500. The Court commented: "It is true that exhaustion of state remedies takes time, but there is no reason to assume that state prison administrators or state courts will not act expeditiously." Preiser, 411 U.S. at 494-495.[6] As will be

[6] At the time the state prisoners in Preiser filed their lawsuits, exhaustion of state remedies was required for habeas actions but not for section 1983 actions.

discussed below, federal prisoners also must exhaust administrative remedies involving sentence structure issues prior to filing a habeas petition against the federal Bureau of Prisons.

The First District stated that the reasons for the exhaustion requirement disappear in a habeas action because the Department has "little or no expertise to bring to bear" and "has no discretion about which prisoners to release upon expiration of their sentences." Santana, 12 So. 3d at 846-847. No one disputes the legal proposition that an inmate is entitled to be released upon the expiration of his sentences, but that is not the issue in a habeas proceeding. The issue is factual—whether all the inmate's sentences have been served, thereby entitling him to release from custody. Only the Department can answer that question, which the administrative process would bring to light. The Department has the commitment documents showing what was ordered by the courts, and it knows what it has done to comply with those orders. The Department calculates an ending date on each sentence, based on sentencing factors unique to it, and the sentence ending last controls the release date. The calculations in fact are conclusive proof of how the Department has structured an inmate's sentences.

The prisoners in Preiser , therefore, sought unsuccessfully to avoid the exhaustion requirement by labeling their lawsuits a section 1983 action. Under current law, as explained in footnote one, the exhaustion requirement applies to section 1983 actions.

The First District apparently is concerned that the exhaustion requirement will in some manner diminish the writ's effectiveness. That concern is unfounded. Inmates serving state prison sentences who are challenging the manner in which the Department is executing their sentences have months and years in which to use the Department's grievance procedure to find out how their sentences have been structured. Further, once the process commences, the Department's part of it is completed within sixty days. Inmates, therefore, are not denied the benefits of habeas [or mandamus] review, and any delay in the filing of their petitions is of their own choosing.

If the First District's approach were accepted, the result would be the end of the exhaustion requirement for all sentence structures issues, regardless of whether they were raised in a mandamus or habeas petition. Sentence structure issues by definition involve the liberty interest of inmates. In a mandamus action, inmates are seeking an earlier release, and in a habeas action, they are requesting immediate release. This is how the Bush Court distinguished between the two extraordinary writs. The distinction works. Mandamus petitions are filed in Leon County where the Department is headquartered, and habeas petitions are filed in the county where the inmate is housed. That is the only real difference.

B. *According to the First District, since the exhaustion requirement is a judicial doctrine, it is subject to exceptions, one of which is a claim that an agency*

has acted beyond its statutory authority, citing State, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 796 (Fla. 1st DCA 1982). *The Court views this exception as applying to habeas petitions.* Santana, 12 So. 3d at 846-847. The First District stated that "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.'" Santana, 12 So. 3d at 847. This argument assumes that the inmate is correct and the Department is wrong. In fact, the contrary is usually the case, for most habeas petitions are denied. Moreover, the issue is to be resolved and not assumed resolved. The "persuasiveness" of the asserted grounds for relief in the petition should not be the determining factor. Inmates often make extremely alarming assertions in their pleadings. The true "persuasiveness" of the grounds for relief can only be determined after full resolution. The grievance procedure is the most direct and effective way to develop the record for this purpose.

If the First District's approach were accepted, the result would be the end of the exhaustion requirement for all sentence structures issues, regardless of whether they were raised in a mandamus or habeas petition. All the inmate would have to allege is that the Department was acting without lawful authority when it allegedly failed to apply credit that was due on the sentence (jail, prison, gain time); or when

it allegedly declared a forfeiture of gain time; or when it allegedly ran the sentences consecutively instead of concurrently.

C. *The First District held that a habeas prisoner is not required to allege and show exhaustion of administrative remedies in his habeas petition*. Santana, 12 So. 3d at 847-848. That decision is unsound. It allows inmates, at no cost to themselves, to make bald factual allegations based solely on what they imagine the facts to be, and it puts the court in the untenable position of having to decide the facial sufficiency of their petitions without any real understanding of the facts. As previously explained, inmates cannot know for sure how the Department has structured their sentences until they request a calculation of their release date. The calculation itself is conclusive proof of what the Department has done. It shows the starting date, length of prison term, application of court-ordered credit, award and forfeiture of gain time, maximum sentence expiration date, and tentative release date which changes monthly as gain time is awarded or forfeited. The Department can also include the 85% date, if applicable, to show the earliest possible release date. When the tentative release date (which can never be reduced through gain time to a date earlier than the 85% date) matches the calendar date, the inmate is released.

The First District speculated that the outcome of Inmate Santana's case might have been different had the habeas court issued the Department a show-

cause order; that is, the Department might have decided the claim had merit and released the inmate. Santana, 12 So. 3d at 848. The same thing can be said about the grievance procedure—if only the inmate had grieved the issue, the Department might have seen the wisdom of his argument and set him free. The persuasiveness of an argument does not depend on the procedural vehicle used to present it. Moreover, allowing inmates to file habeas petitions without administrative exhaustion may actually increase the time improperly imprisoned since the most direct path to relief is by administrative grievance.

6. The federal courts also require prisoners to exhaust the prison grievance procedure before filing habeas petitions challenging the manner in which their sentences are being executed.[7] As previously discussed, in Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court held that state prisoners seeking restoration of good-time credits were required to exhaust state administrative and judicial remedies and then file a habeas petition pursuant to 28 U.S.C., §§ 2241 and 2254, instead of filing a civil rights action pursuant to 42 U.S. § 1983.

In the following cases, federal prisoners were required to exhaust BOP's grievance procedure before filing a 2241 habeas petition in federal court: Clemente v. Allen, 120 F.3d 703, 704-705 (7th Cir. 1997) (federal prisoner's

[7] The Federal Bureau of Prisons is commonly referred to as "BOP" in federal opinions and will be referred to herein in the same manner.

request for immediate release due to BOP's alleged miscalculation of his sentence was properly treated as a 2241 habeas petition and dismissed because prisoner "failed to allege the exhaustion of his administrative remedies"); Kane v. Zuercher, 2009 WL 2922941 (7th Cir. August 27, 2009) (unpublished opinion) (BOP's alleged refusal to award prisoner presentence credit subject to exhaustion requirement); Williams v. O'Brien, 792 So. 2d 986 (10th Cir. 1986) (BOP's alleged miscalculation of release date causing unlawful detention subject to exhaustion requirement); Gonzalez v. United States, 959 F.2d 211 (11th Cir. 1992) (exhaustion required even though prisoner had reached his presumptive parole release date); Redding v. Middlebrooks, 2009 WL 369961 (N.D. Fla. February 12, 2009) (BOP's alleged improper denial of eligibility for one-year sentence reduction subject to exhaustion requirement) (cases collected); and United States v. Smith, 2009 WL 1575185 (E.D. N.C. June 4, 2009) (federal prisoner seeking custody credits from BOP failed to exhaust administrative remedies and "failed to allege that he has otherwise met the exhaustion requirements for a habeas action pursuant to 28 U.S.C. § 2241").

CONCLUSION

The Department respectfully requests this Honorable Court to reverse the First District's decision in this case and hold that exhaustion of administrative remedies is a pleading requirement of habeas petitions when inmates seek immediate release from custody, as it is with mandamus petitions when they seek an earlier release from custody.

Respectfully submitted,

CAROLYN J. MOSLEY
Florida Bar Number 593280
Attorney Supervisor

BEVERLY BREWSTER
Florida Bar Number 974986
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
DEPARTMENT OF CORRECTIONS
2601 Blair Stone Road
Tallahassee, FL 32399-2500
(850) 488-2326 phone; (850) 922-4355 fax

COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in times new Roman fourteen point font in accordance with the Florida Rules of Appellate Procedure.

_____
Beverly Brewster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to **Henry G. Gyden,** Attorney for Respondent, c/o Swope Rodante, P.A., 1234 E 5th Ave., Tampa, Florida 33605-4904 and a courtesy copy to **The Honorable Brantley S. Clark, Jr., Circuit Judge,** Fourteenth Judicial Circuit, Jackson County, P. O. Box 400, Marianna, Florida 32447-0400 this 4th day of November 2009.

_____
Beverly Brewster