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 REPLY 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 THE GENERAL COUNSEL
FLORIDA DEPARTMENT OF CORRECTIONS
2601 Blair Stone Road
Tallahassee, Florida 32399
(850) 488-2326
Counsels for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

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 Department's duty is to execute sentences, and it does so by establishing release dates for all inmates and confining them until they reach their *tentative release dates*, which in some cases will be the same as their *maximum sentence expiration dates*. See Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997) ("The Department of Corrections is Gay's custodian and has been given the duty of calculating his release date, taking into consideration gain time and other factors.") The release dates are calculated based on a variety of factors taking into account the uniqueness of each sentence. Absent an explanation from the Department, an inmate is simply speculating on how his release dates have been computed, regardless of how he phrases his complaint (as a refusal to comply with the various terms of the sentencing order or as a refusal to comply with the gain time law). Such speculation is insufficient to establish the facial sufficiency of the petition. This is why the requirements of a facially sufficient petition and exhaustion of the administrative remedies are inextricably intertwined.

To illustrate--through the grievance process, an inmate may request and receive a computation of his release dates which will show all the relevant facts. If that computation should exclude what the inmate thinks is his entitlement (such as court-ordered jail credit), he can then grieve that issue. The Department will investigate the issue. If the Department has made a mistake, it will correct it. If the court did not actually award the credit, perhaps through omission or incomplete information, the Department will inform the inmate. Sometimes, depending on the circumstances, the Department will seek clarification from the court, and at other times, the Department will tell the inmate to return to the sentencing court. The documents generated in the three-tier grievance process will assist the inmate in obtaining from the sentencing court credit to which he is entitled but was inadvertently omitted from the sentencing order.

A state inmate files a habeas petition to obtain his freedom because he believes his sentences have expired. In evaluating the facial sufficiency of the petition, the habeas court needs to know the release dates and how the Department has computed those dates. If the inmate has exhausted his administrative remedies, he can provide this information by attaching the grievance documents to his petition. On the other hand, if the inmate has not exhausted his administrative remedies, it will be difficult, if not impossible, for the habeas court to evaluate the facial sufficiency of the petition. It will be based on what the inmate imagines the

Department has done. The sentencing order, even if attached to the petition, will not provide a complete picture. It provides no information as to what other sentences the inmate might be serving or what the Department has done. Even the information in the sentencing order can be misleading, for some inmates serve more time than the length of the prison term identified in the order. See, for example, Eldridge v. Moore, 760 So.2d 888 (Fla. 2000) (upon revocation of probation, accrued gain time from prior term was properly forfeited).

Inmate Santana contends that his case is unique because of the nature of the proceeding (habeas action) and the type of issue presented (court-ordered credit). He contends that these factors excuse him from alleging and showing that he has exhausted his administrative remedies and in fact excuse him from ever having to exhaust his administrative remedies. The Department respectfully disagrees.

More specifically, Inmate Santana argues that the "Great Writ" has a special status. (A.B. 4-6, 27) This is true, but its special status does not exempt inmates from exhausting their administrative remedies and filing facially sufficient petitions challenging the manner in which the Department is executing their sentences. As previously explained, unless the inmate obtains an explanation from the Department on how his release dates are computed, his petition will be based on what he believes the Department has done. If the exhaustion requirement has in fact been satisfied, it will be a simple matter for the inmate to allege and show it in

his petition. It is an understatement to say that such information would greatly assist the habeas court in evaluating the petition.

As to the precise issue raised (failure to apply court-ordered credit), Inmate Santana argues that this issue is not one that needs to be exhausted because it involves a ministerial function, as opposed to a discretionary function, of the Department. The Department disagrees. Santana's focus is far too narrow. There are many factors affecting the Department's computation of an inmate's release date. Parsing those factors into ministerial or discretionary factors would be both unwise and unworkable. Inmates need a bright line rule. They always claim entitlement to whatever they think has been denied them, and they in fact must make this claim in order to satisfy the pleading requirements. However, a simple assertion of a right is not sufficient; there must be something more.

Inmate Santana's case in fact is a perfect example of why the exhaustion requirement and pleading requirement exist. Santana filed a habeas petition in Jackson County approximately a year after having been sentenced in Orange County in multiple cases. To properly evaluate the facial sufficiency of the petition, the habeas court needed to know Santana's release dates and how the Department had computed them. Santana completely ignored this critical information. The sentencing documents that were attached to the habeas petition did not match up with Santana's factual allegations, and the sentencing transcript,

to put it mildly, was not a model of clarity. Nevertheless, Santana and the First District were willing to accept this information as a "plausible" showing of an illegal detention and excuse Santana from the exhaustion requirement. The habeas court followed the law and dismissed the petition. It was eminently correct in doing so.[1]

Inmate Santana asks this Court to draw a distinction between mandamus petitions and habeas petitions and between "court-ordered jail credit" and other issues. (A.B. 10-11, 21-22)[2] The Department respectfully disagrees. Mandamus and habeas proceedings are procedural vehicles by which an inmate can challenge the Department's calculation of his release dates. If the correction of the alleged

---

[1] A detailed summary of the facts is included in the Department's initial brief. Inmate Santana did not summarize any of the facts in his answer brief and asks the Court to rely on what the First District said in its opinion and the habeas petition. (A.B. 1) The Department in its initial brief pointed out what the First District relied on in its opinion and disclosed what was omitted from the First District's opinion. (I.B. 9) Most significantly, the inmate was relying on the somewhat ambiguous information in a sentencing transcript that was not reflected in the sentencing orders that were attached to his petition, and this is the same information relied on by the First District.

[2] Throughout his brief Inmate Santana refers to the credit ordered by the sentencing court as court-ordered "jail credit." That term is misleading and should not be used as a generic term for incarceration credit. If prison credit that includes gain time is classified as court-ordered "jail credit," that can have the unintended consequence of converting gain time into incarceration time. On sentences for offenses committed prior to October 1, 1989, gain time cannot be forfeited, but it is forfeited on sentences for offenses committed on or after this date. Forbes v. Singletary, 684 So.2d 173 (Fla. 1996); Eldridge v. Moore, 760 So.2d 888 (Fla. 2000).

error will entitle the inmate to immediate release, the remedy is habeas, but if it will entitle him to only an earlier release, the remedy is mandamus. The issues are identical in both proceedings, and their resolution is the same. The inmate alleges in his petition that the Department has miscalculated his release dates because the Department has committed one or more of the following errors: The Department has failed to apply to the sentences court-ordered credit--original jail credit, violation-of-probation jail credit, credit for time incarcerated in a hospital or Jimmy Ryce facility; prison credit, and credit for accrued gain time from prior incarceration; the Department has failed to apply to the sentences post-sentencing jail credit, which is a function of the Department; the Department has failed to apply double or triple credit that was awarded on resentencing (same credit included in jail credit box, prison credit box, and by use of nunc pro tunc language); the Department is running the inmate's sentences consecutively when they should be running concurrently; the Department has failed to apply to the sentences various types of gain time to which the inmate is entitled (basic, incentive, work, educational, extra, overcrowding, meritorious); the Department has erroneously forfeited gain time upon revocation of judicial or executive supervision or as a result of disciplinary actions while incarcerated; and the Department has miscalculated the 85% date. The list goes on, for there is no limit to the inmates' creativity in fashioning their claims, some of which are pretty good.

All these issues will be resolved in the same manner, regardless of the procedural vehicle used to raise them.

Inmate Santana denies the existence of mandamus cases holding that prior to filing a mandamus petition, the inmate must exhaust his claim that the Department has refused to apply to his sentence court-ordered jail credit. (A.B. 21) Santana ignores the cases cited by the Department in its initial brief, pages 27-28. Moreover, all court-ordered credit of whatever nature serves to reduce incarceration time, which is exactly what gain time does.

According to Inmate Santana, the exhaustion requirement is an affirmative defense because no court has held the exhaustion requirement to be a *pleading requirement*. (A.B. 25) He admits, however, that cases do exist which require inmates to *allege exhaustion of administrative remedies*, and he cites to one of the eight cases the Department cited in its initial brief, pages 32-34. (A.B. 26) Respectfully, this sounds like a pleading requirement to the Department. Santana then argues that notwithstanding these cases, the exhaustion requirement is still an affirmative defense in his case because his case is different. It involves a habeas petition in which he seeks the application of court-ordered jail credit to his sentences. (A.B. 27) The Department disagrees. Four of the pleading requirement cases cited in the Department's initial brief, pages 31-34, involved inmate complaints that the Department was not complying with the sentencing order, just

like in Santana's case: See Cooper v. State, 715 So.2ed 330 (Fla. 1st DCA 1998) (court-ordered prison credit); Gillespie v. State, 910 So.2d 322, 324 (Fla. 5th DCA 2005) (length of prison term, 20 years versus 25 years); Dandashi v. State, 956 So.2d 528 (Fla. 4th DCA 2007) (court-ordered jail credit); Duggan v. Department of Corrections, 665 So.2d 1152, 1153 (Fla. 5th DCA 1996) (court-ordered credit for time served and unforfeited gain time). Neither the nature of the proceeding (habeas or mandamus) nor the type of sentence structure issue (whether it involves ministerial or discretionary action) makes a difference. Inmates must file a facially sufficient petition based on real facts, which necessarily must come from the Department, and not from what the inmate believes are the facts. All the inmate has to do is ask for a computation of his release dates and then grieve any objections he has to it.

According to Inmate Santana, Pope v. State, 898 So.2sd 253 (Fla. 3DCA 2005) does not conflict with the First District's decision in his case because "the Pope decision does not reflect that the petitioner alleged he was entitled to immediate release." (A.B. 19) Santana misreads Pope. The Court there stated, "The petition alleges that the appellant *is being illegally detained* by the Department of Corrections beyond his maximum release date." Pope, 898 So.2d at 253 (emphasis supplied). The meaning of this language is crystal clear. The inmate

is entitled to immediate release from custody because his sentence has expired and his detention is illegal.

According to Inmate Santana, Pope is distinguishable because it involved a gain-time issue and not jail credit. (A.B. 19) The opinion does not support his analysis. The Pope Court never identified the reason the inmate thought his sentence had expired; it was not relevant to the inmate's duty to exhaust his administrative remedies. The Court cited one case for the proposition that "[t]he prerequisite to the issuance of an extraordinary writ is exhaustion of all administrative remedies." Pope, 898 So.2d at 253. Just because that case involved a gain-time issue does not mean that the Pope case involved the same type of issue.

Santana argues that had the Pope Court followed the First District, the outcome might have been different. (A.B. 20) This argument is irrelevant. It relies on speculative facts, not the historical facts of the case.

According to Inmate Santana, Grace v. State, 3 So.3d 1290 (Fla. 4DCA 2009) is distinguishable because it involved a Rule 3.850 motion. (A.B. 20-21) The Department disagrees. The inmate in Grace, in relevant part, filed a 3.850 motion that included a habeas petition. The inmate alleged that his sentence had expired as having been fully served but for the Department's erroneous calculation of his time served. The inmate did not allege exhaustion of his administrative remedies. The

Fourth District held that the inmate had to exhaust his administrative remedies with the Department and then file a habeas petition if dissatisfied.

Inmate Santana cites several cases discussing the exhaustion doctrine in the context of lawsuits involving landowners, community residents, a student, a teacher, companies, and special taxing districts. There was no speculation in these cases as to what the government had done or intended to do to the citizens. No one was speculating that they had been denied a permit, or fired, or required to collect taxes, or denied full use of their land. The dispute was over the propriety of the government's action. It is understandable why the citizens would not be required to allege and plead exhaustion of their administrative remedies, even though many of the citizens were required to exhaust their administrative remedies after the government requested it.

The inmate cases are very different. The inmates are lawfully incarcerated because they have been sentenced to prison. The determination of their release dates is a function of the Department. The computation is based on several factors unique to each sentence. The only way the inmates can know how the Department has performed its function is to ask the Department through the grievance procedure. This information is needed to establish the facial sufficiency of their petitions.

The mandamus/habeas cases are the product of many years of experience with inmates seeking either an earlier release or an immediate release from custody. While inmates have a deep personal interest in obtaining their freedom, they do not necessarily understand all the facts or the legal implications of the facts. Even when not intentionally misleading the court, inmates often provide a woefully inaccurate and incorrect statement of the record. The exhaustion and pleading requirements diminish this problem.

According to Inmate Santana, there is no administrative remedy for him to exhaust because the Department's grievance procedure does not extend to his claim. (A.B. 12-14) The Department disagrees. Santana cites but then ignores relevant language in the grievance rules that separate grievances into categories, one of which is identified as "Legal" and includes "sentence computation, release dates, jail time credits...." Fla. Admin. Code R. 33-103.013(8).

Santana cites a single prisoner case, Carthane v. Crosby, 776 So.2d 964 (Fla. 1st DCA 2001) to support his argument that he is not required to exhaust administrative remedies. (A.B. 8-9) His reliance is misplaced. Carthane illustrates an independent ground for denying a habeas petition based solely on the allegations in the inmate's petition. If an inmate alleges facts that even if true would not entitle him to relief under the law, the petition can be denied on that ground without further litigation and without hearing from the Department.

Carthane was a prison conditions case (custody status) in which the inmate sought both his return to the general prison population and his actual release from custody. The habeas court in Carthane had dismissed the inmate's petition in part because of the inmate's failure to exhaust his administrative remedies. The First District rejected that ruling on two grounds--it would be futile for the inmate to file yet another grievance after having already filed dozens of grievances and appeals with the Department *and* resolution of the issue depended solely upon the meaning of the law. The First District concluded that the inmate was simply wrong on the law (regardless of whether he was correct on the facts), *Id.*, at 965-966, and the Department won without ever having appeared in the case. [3]

[3]While the Department agrees with the *result* reached in Carthane, the law is more complicated than it appeared to the Court when it stated that the Department had no greater expertise than it did in interpreting the statutes and rules applicable to the Department. Carthane, 776 So.2d at 965. Three statutes were relevant to the calculation of Inmate Carthane's release date at various points in time during his incarceration: §§ 944.275, Fla. Stat. (1983-2009) (gain time); § 944.277, Fla. Stat. (1988-1993) (provisional credits); and § 947.146, Fla. Stat. (control release). Section 944.17(5) requires certain documents, including the sentencing scoresheet, to be included in the commitment package. This information can be used to determine an inmate's eligibility for various credits. See generally Dugger v. Grant, 610 So.2d 428 (Fla. 1992). What the First District said in Carthane about section 944.17(5), without hearing from the Department, has generated unintended litigation in the circuit courts. See Sykes v. State, 947 So.2d 1133, 1134 (Fla. 1DCA 2008) (citing section 944.17(5), inmate demanded to be returned to the county jail because of an alleged incomplete Uniform Commitment to Custody form).

According to Inmate Santana, sentencing is an exclusive function of the judiciary; the sentencing judge's oral pronouncement trumps the written sentencing order; and the Department is bound by the sentencing court's oral pronouncement in the sentencing transcript instead of the written order. (A.B. 14-15) The Department agrees with the first two propositions but disagrees with the third proposition. To the extent there are discrepancies between the oral pronouncement of a sentence and the written order, it is the duty of the sentencing court to make the correction, and the written order is binding until an amended order is issued. This explains the second ground on which the habeas court denied Santana's petition, citing Leichtman v. Singletary, 674 So.2d 889 (Fla. 4th DCA 1996).

According to the sentencing orders attached to Santana's habeas petition, the judge awarded jail credit (specified amount), prison credit (no amount specified), and credit for time spent in a state hospital (no amount specified). Unless Santana actually served a state prison term, or a time-served commitment package was delivered to the Department, the Department would have no information at all on his incarceration time, and it would have no record of any time spent in a state hospital. Sentencing transcripts are not part of the commitment package provided to the Department pursuant to section 944.17(5), Florida Statutes, for the obvious reason that the written order is what the Department is expected to execute. The

Department necessarily relies on the sentencing court to provide the requisite information needed to execute the sentence consistent with the court's intention.

According to Inmate Santana, procedural requirements must give way to habeas relief. (A.B. 5-6) This principle (whatever it may mean in practice) does not exempt inmates from filing petitions based on real facts obtained through the Department's administrative grievance process, instead of relying on what they believe the Department has done.

Inmate Santana dismisses all the federal cases as being based on a different standard than is Florida law. (A.B. 22-25) The First District relied on federal law, and the Department responded in kind. The federal exhaustion doctrine is a judicial doctrine that was first codified in 1948. Preiser v. Rodriguez, 411 U.S. 475, 488 n. 8 (U.S. 1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490 (U.S. 1973). The two federal cases cited by Santana are no longer good law. (A.B. 24) See Booth v. Churner, 532 U.S. 731 (U.S. 2001) (prisoners challenging prison conditions must exhaust administrative remedies irrespective of form of relief sought and offered through administrative avenues).

CONCLUSION

The Department respectfully requests this Honorable Court to reverse the First District's decision in this case and hold that an inmate who alleges that his sentences have expired but for the Department's erroneous calculation of his release date must *allege and show* exhaustion of his administrative remedies. The requirement applies to all claims, such as the one raised here (Department's refusal to apply to the sentences court-ordered credit for time spent in jail, prison, and a hospital). [4]

Respectfully submitted,

/CAROLYN J. MOSLEY
Florida Bar Number 593280
Attorney Supervisor
Office of General Counsel

/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

[4] The Department's public web site reflects that Inmate Santana completed his sentences and was released to a two-year probationary term on November 20, 2009, in Orange County Case No. 95-4926.

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 reply 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.,** Fourteenth Judicial Circuit, Jackson County, P. O. Box 400, Marianna, Florida 32447-0400 this 29th day of January 2010.

/Beverly Brewster