IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

FSC CASE NO. SC09-1409,
2D08-3536, 2008-CA-000401

WARREN STANG,
Respondent.
_____/

BRIEF OF AMICUS CURIAE
FLORIDA DEPARTMENT OF CORRECTIONS
IN SUPPORT OF PETITIONER, STATE OF FLORIDA

_____

On Petition for Review from the Second District Court of Appeal
State of Florida

_____

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INTEREST OF AMICUS CURIAE

This case concerns the validity of sentencing orders, the manner of their execution, and the authority of a court in another jurisdiction to declare the order void and set the inmate free. Amicus curiae is the agency delegated the duty to execute sentences. It has a special interest in these issues because it routinely seeks clarification of sentencing orders. Its in-house counsel also defends the Department in lawsuits involving challenges to the manner of execution of sentences. In-house counsel does not, however, defend the State of Florida against challenges to the validity of sentences. The expansion of the meaning of a "void sentence" could wreak havoc because inmates will include both claims in the same petition filed in various courts throughout the state.

SUMMARY OF ARGUMENT OF AMICUS CURIAE[1]

This case demonstrates the pitfalls of allowing judges to decide the validity of a judgment or sentence over which they have no jurisdiction. The Second District converted a certiorari proceeding into an original habeas proceeding and ordered Inmate Stang's immediate release from the Department's custody. It held

[1] Respondent, Warren Stang, is currently incarcerated in state prison and will be referred to herein as "Inmate Stang" or by his last name. Amicus Curiae, Florida Department of Corrections, is Inmate Stang's custodian and will be referred to herein as the Department. An appendix to the brief has been prepared and bound separately. It will be referred to herein by the letter "A," followed by the appropriate page numbers.

that Inmate Stang's amended violation-of-probation (VOP) sentencing order in Palm Beach County Case No. 95-3736 was void; that the original VOP sentencing order awarded 1915 days of credit on each sentence; and that this sentence had been served in full. See Stang v. State, ___ So.3d ___, 34 Fla. L. Weekly D1541 (Fla. 2nd DCA July 31, 2009). The Second District reached these conclusions without ever having read the sentencing transcript and by apparently overlooking the first page of the original VOP sentencing order. In doing so, the Second District usurped the power of the sentencing court (Palm Beach County Circuit Court); the appellate court (Fourth District Court of Appeal); and the Department of Corrections. The Second District has ordered the release of an inmate who is lawfully serving sentences for crimes committed against citizens who reside in another jurisdiction.

At the sentencing hearing, the judge stated, not once but twice, that Inmate Stang was to serve a total prison term of 27 years less 1915 days of credit. The original VOP sentencing order was two pages in length. The first page mirrored the oral pronouncement of 1915 days of credit on the overall term, which the Second District appears to have overlooked. The second page, however, awarded credit on each of the nine sentences in the amount of 1915 days *plus* credit for time served from the prior incarceration. The sentencing order, therefore, was clearly contradictory, which the Second District appears to have overlooked. Had the

Department ignored the first page and applied the credit awarded on the second page, Stang would have been an immediate release from prison without ever having served a single day in prison on his 27-year prison term. The credit (1915 days by itself) far exceeded the length of each of the nine prison terms. The Second District was mistaken when it said that Stang would have served two months; he would have served no time. The Department sought clarification of the contradictory order in the sentencing court. The Second District criticized the Department for doing so. The *sentencing court* obviously recognized that a clerical mistake had been made and corrected it by removing the credit from the second page and leaving it on the first page. The order then mirrored the oral pronouncement. The Second District was unaware of the clerical mistake, or that the amended order was identical to the oral pronouncement. The Second District assumed that page two of the original sentencing order was correct, and all subsequent conclusions flowed from that erroneous assumption.

As amicus curiae, the Department has a special interest in this case. Sentencing and the execution of sentences are more complex than they seem. While everyone agrees that inmates should serve the sentences imposed, this understanding does not ensure that all parties have the same understanding of the sentences. The Department, therefore, must be free to request clarification of

sentencing orders. It seeks this Court's approval so that other appellate courts will stop criticizing the Department for doing so, as did the Second District in this case.

ISSUE
(PHRASED BY PETITIONER)

WHETHER THE SECOND DISTRICT ERRED IN PROVIDING RELIEF FOR A CLAIM COLLATERALLY ATTACKING A JUDGMENT AND SENTENCE WHEN THE SENTENCING COURT WAS NOT LOCATED WITHIN THEIR JURISDICTION.

The Department has the duty of executing sentences consistent with the law and the terms of the sentencing order. Specific statutory instructions are provided with respect to commitment packages, the award and forfeiture of gain time, and the calculation of release dates. See §§ 944.17, 944.275 and 944.28, Fla.; Gay v. Singletary, 700 So.2d 1220 (Fla. 1997); Eldridge v. Moore, 760 So.2d 888, 892 (Fla. 2000). The Department in general must interpret sentencing orders as if they were rendered according to the law, Forbes v. Singletary, 684 So.2d 173, 174 (Fla. 1996), but it also must execute the sentences exactly as written, Hall v. Moore, 777 So.2d 1105, 1106 (Fla. 1st DCA 2001). The importance of the fundamental task of executing sentences cannot be overstated. Inmates must be both confined and released at the right time.

When one considers what it takes to produce a sentence, and how many sentences are imposed daily throughout the state (with a current prison population of over 100,000), it is truly amazing that most sentencing orders are sufficiently

clear to be executed exactly as written.[2] Some of the sentencing orders, however, do require clarification to make sure the Department is executing the sentences as was intended. The most common mistakes occur upon *resentencing* and involve the *award of credit for prior time served and gain time*. Several factors contribute to the mistakes.

First, there is no uniform way in which credit must be awarded. A standard sentencing form is set forth in Florida Rule of Criminal Procedure 3.986(d), but judges are not required to use it and may create their own forms instead. Some of the sentencing forms provide a place for the award of the three most common types of credit (jail, prison, and gain time), whereas other forms include a place for jail credit only, or for jail credit and prison credit but omit gain time credit. When the form does not provide a space for a specific type of credit, it may end up in a different credit box and thereby misidentified. If the credit award is for gain time, either independently or as part of the prison credit, its misidentification can have a huge unintended consequence.

[2] The sentencing process involves a judge, lawyers, defendant, and court personnel; factual findings based on documentary and testimonial evidence; the application of a variety of sentencing laws; and the use of terms that have no uniform meaning throughout the state. The sentence (including prison term and credit for time served) is orally pronounced, usually after much discussion, and then a clerk incorporates it into a written order for the judge's signature.

Second, there are different types of credit, each of which is unique and not interchangeable. Jail credit is time actually incarcerated in the county jail; prison credit is time actually incarcerated in state prison, which may or may not include gain time; and gain time is time not served incarcerated. Most sentences when satisfied are comprised of the following: jail time + prison time + gain time = prison term. The gain time is subject to forfeiture upon revocation of judicial supervision, Eldridge v. Moore, 760 So.2d 888 (Fla. 2000), [3] but if the award of gain time credit is misidentified as jail credit on the sentencing order, the forfeiture will be defeated.

Third, courts overlook the importance of accurately identifying the credit awarded. The uniqueness of the terms--jail, prison, and gain-time credit--is not recognized by all judges and lawyers. They instead may use the terms "jail credit" and "prison credit" as generic terms for all incarceration time, regardless of the place of confinement, and entirely fail to take into account the role of gain time in the execution of sentences. The misidentification or repetition of credit on the sentencing order may nullify the sentence actually imposed and result in the

[3] There is one exception to the forfeiture of gain time. If the offender returns on a VOP sentence for an offense committed prior to October 1, 1989, the gain time is treated as the functional equivalent of time served and cannot be forfeited. See Forbes v. Singletary, 684 So.2d 173 (Fla. 1996).

offender receiving a windfall of immediate release or an earlier release. Two short hypothetical cases illustrate this point.

The first hypothetical case involves an offender who is resentenced while serving his sentence. The judge orally awards credit for all time served and gain time earned up to the date of resentencing. On the sentencing form, a lump sum award of credit (which includes jail and prison time) is put in the jail credit box; then the prison credit box is checked (which includes gain time); and finally the order is issued nunc pro tunc to the original sentencing date. This order has unwittingly doubled the gain time award and tripled the prison time award. In doing so, it has defeated the oral pronouncement of the sentence, violated the law prohibiting duplicate credit, and prevented the Department from implementing the gain time law as legislatively authorized.[4]

The second hypothetical case involves an offender who is being resentenced upon revocation of probation. He initially received a 366-day prison term, which when satisfied was comprised of the following: 75 days (jail time) + 236 days (prison time) + **55 days gain time** = 366 days. He is released to probation, and upon violating its terms, he is resentenced. The judge orally pronounces a second prison term of the same length--366-days--less 15 days of VOP jail credit and

[4] Some judges avoid this problem by instructing the Department not to apply duplicate credit.

credit for the prior prison term. The sentencing order shows this credit as a lump sum award of 381 days of "jail credit." The Department is unaware of what transpired at the sentencing hearing, and it is expected to apply the credit exactly as was awarded. The application of 381 days of credit to a 366-day prison term will result in a windfall of immediate release and defeat the sentence orally imposed. By contrast, had the 366 days been identified as the prior prison term (jail, prison, and gain time), the offender would serve an additional 40 days computed as follows: 366 days [new term] - 366 days [prior prison term] **+ 55 days [forfeited gain time]** - 15 days [VOP jail credit].[5]

Inmate Stang's case is also illustrative. He served multiple concurrent five-year prison terms that were comprised of the following when satisfied: 707 days [jail time] + 317 [prison time] + 801 days [gain time] = 1825 days [5 years] (A. 256) He was released to probation on nine other counts and returned to prison as a probation violator on these nine counts to serve a total prison term of 27 years (three concurrent and five consecutive 5-year terms plus one consecutive 2-year term). (A. 242-258)

[5] Other examples of mistakes in sentencing orders that readily come to mind include the inadvertent omission of credit for original jail credit when both VOP jail credit and prison credit are awarded; or the inclusion of directions on how to calculate the release date, Florida Department of Corrections v. Goodman, 995 So.2d 1097 (Fla. 4th DCA 2008).

The sentencing order dated March 30, 2005, was two pages in length. On the first page, the court imposed a total prison term of 27 years less 1915 days of credit. More specifically, the court listed all the counts, identified the prison term on each, totaled up the prison terms, and "further ordered that the Defendant shall be allowed a total of 1915 days as credit for time incarcerated prior to imposition of this sentence." (A. 245-246) On the second page, the court listed all the counts and awarded 1915 days of VOP jail credit and credit pursuant to Tripp v. State, 622 So.2d 941 (Fla. 1993) on each count. (A. 246) More specifically, the second page included language that is found in the standard sentencing form. See Fla.R.Crm.P. 3.986(d); Forbes v. Singletary, 684 So.2d 173, 175 (Fla. 1996). The paragraph that was checked off with an "X" read:

> It is further ordered that the defendant be allowed 1915 days time served between date of arrest as a violator following release from prison to the date of re-sentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on case/count _____. (Offenses committed on or after October 1, 1989 but before January 1, 1994).

(A. 246)

The award of credit on the two pages was in conflict. On the first page, 1915 days of credit were awarded on the total prison term of 27 years, and on the second page, 2939 days of credit (707 days original jail time; 317 days of prison time; and 1915 days of VOP jail time) were awarded on each sentence. Not only was there

conflict in the order, but the order conflicted with the law. The award of credit on all the consecutive sentences would have been inconsistent with the holding in Hodgdon v. State, 789 So.2d 958 (Fla. 2001). Finally, the conflict in the order was significant. The application of 2939 days of credit to each sentence (5-year terms [1825 days] and 2-year term [730 days]) would have totally wiped out each sentence.[6] Stang would have been released from prison immediately. Given such a drastic outcome, the conflict with the law, and the implausibility of an orally pronounced time-served 27-year prison term, the Department would have been derelict in its duty had it not contacted the court for clarification of the sentencing order. The Department, therefore, sought clarification of the order from the Palm Beach County Clerk's Office. (A. 250-252) In response, the sentencing court amended page two of the sentencing order by removing the credit that had been awarded. The amended order was dated June 7, 2005, nunc pro tunc March 30, 2005. (A. 254)

The Department applied 1915 days of credit only once to the overall prison term. Initially it identified part of the 1915 days as credit for gain time and then forfeited that amount of gain time. Pursuant to a reaudit, the entire 1915 days has

[6] The Second District in this case was mistaken when it stated that Stang "would serve about two months in prison." Stang, 34 Fla. L. Weekly at D1541.

been applied as credit for time incarcerated, and the gain time forfeiture has been removed. (A. 258)

Mistakes in sentencing orders must be corrected if the Department is to execute the sentence as was intended and to avoid an inmate serving too little or too much time incarcerated. The mistakes, however, will generally not be corrected unless the Department is permitted to alert the sentencing judge to the potential mistake. The Department's current practice is to fax or e-mail the sentencing judge a letter with a copy to the attorney who represented the offender and a copy to the prosecutor assigned the case. The Department explains the ambiguity, how it has been resolved by the Department, and asks for an amended order if the Department has misconstrued the order. (A. 257) The sentencing transcript is available to the judge to determine whether the written order corresponds to the oral pronouncement (either to the inmate's benefit or detriment). The parties can resolve the issue at a hearing, and if the judge issues an amended sentencing order, the losing party has the option of seeking review in the appellate court.

Stang's case itself illustrates why the Department must seek clarifying orders from the court to avoid a miscarriage of justice. In preparation of this brief, the Department has obtained a copy of the transcript of the VOP sentencing

hearing held on March 30, 2005.[7] (A. 1-121) After a very lengthy hearing, the judge inquired about the credit due, took a recess to get the facts straight, and then obtained a stipulation from the attorneys that the correct amount of credit was 1915 days. (A. 114-115) The judge then pronounced the sentence, including the amount of credit that was awarded:

> I think you're a consummate con-man and unfortunately for you the time is up. I hereby sentence you in case number 95-3736, I find you guilty of the violation of probation and I sentence in counts 44, and 65, to five years in the Department of Corrections, to be served consecutively. To count 72, to which I sentence you to five years in the Department of Corrections. On Count 78 and 48, I sentence you to five years consecutive in the Department of Corrections. On counts 70, 77, and 81, I sentence you to five years consecutive and in count 75, **I sentence you to two years consecutive for a total of twenty-seven years in the Department of Corrections with credit for 1,915 days.**

(A. 118) (emphasis supplied) A recess was taken, and the Court for clarification again pronounced the sentence:

> For clarification, my intent is to give the top of guidelines without bumping a grid for twenty-seven years. So, you're hereby sentenced to five years in the Department of Corrections on counts 44, and 65. Five years in the Department of Corrections on count 72, consecutive. Five years in the Department of Corrections on count 78 and 48, consecutive. Five years on counts 70 and 77, consecutive. Five years on counts 81 consecutive. Two years consecutive on count 75, **for a total of twenty-seven years in the Department of Corrections with 1,915 days credit.**

[7] This copy was e-mailed to the Department on February 4, 2010. (A. A-B) The Clerk's Office is mailing the Department a certified copy, and the Department will be asking for permission to file the certified copy with the Court when it arrives.

(A. 119) (emphasis supplied)

The oral pronouncement of the sentence conclusively demonstrates that page two of the written order was the product of a clerical error, which had to be corrected. See Drumwright v. State, 572 So.2d 1029 (Fla. 5th DCA 1991) (clerk mistakenly typed 30 *months* on sentencing order instead of the orally pronounced sentence of 30 *years* as habitual offender; judge was entitled to correct the written order at any time [including after 30-month term ended] to reflect the oral pronouncement without offending Double Jeopardy Clause). [8]

The Florida courts are aware of the Department's communications with the sentencing courts, but when it is mentioned, it is usually to criticize the Department. In this case, the Second District stated that the Department was "confused" when it received the VOP sentencing order. Stang, 34 Fla. L. Weekly at D1541. By putting this word in quotation marks, the purpose was to denigrate the Department. With all due respect, if a correctional facility receives a prisoner with a 27-year sentence, but upon examination of all the documents, it appears that the prisoner may not have a sentence to serve, what correctional facility would not

[8] The Second District in this case reinstated the original VOP sentencing order and implicitly determined that no conflict existed between the first and second pages of the sentencing order, or, alternatively, resolved that conflict by rejecting what was written on the first page and accepting what was written on the second page and ordered the inmate's immediate release from custody. This was done without any knowledge of what was orally pronounced at the sentencing hearing.

be “confused”? Clearly, the reasonable thing to do would be to seek clarification. In Canete v. Florida Dept. of Corrections, 967 So.2d 412, 416 (Fla. 1st DCA 2007), the First District concluded that “DOC had no call to seek ‘clarification’ of those sentences, nor did it have authority to modify the sentences based on the sentencing judge's letter.” Perhaps the most favorable comment on this subject is found in Fuston v. State, 838 So.2d 1205, 1207 (Fla. 2nd DCA 2003), but even there the Department was admonished not to try to correct an illegal sentence:

> We are aware that the Department regularly sends such letters to the trial courts. The Department often receives confusing sentencing documents, and it undoubtedly has the authority to request clarification of those sentences in order to assure that it does not keep a prisoner longer than the time specified in the sentence. Moreover, the Department has considerable expertise in sentencing and can often alert a trial judge to the existence of an illegal sentence. On the other hand, we know of no power given to the Department to reverse a sentence, or to disobey a sentence, when it is not ambiguous. The Department has no authority to impose a more onerous sentence upon a prisoner than the sentence actually imposed by the trial court. If the State believes a sentence is erroneous, it is obligated to preserve this issue and appeal it to an appropriate appellate court. Otherwise, the sentence imposed by the court stands, and the Department must comply with that sentence.

The Department understands that it is bound by the written commitment it receives, but through its vast experience with executing sentencing orders, it also knows that mistakes are made. See generally Gallinat v. State, 941 So.2d 1237 (Fla.5th DCA 2006) (discussing mistakes that occur in the award of credit for time

served). If the Department is to execute sentences as was intended, communication with the court is an indispensible tool.

The problems associated with the execution of sentences are not unique to Florida. Other states have had to deal with the same type of problems. See, for example, Matter of Chatman, 796 P.2d 755 (Wash. App. Div. 1 1990) (Department of Corrections is authorized by statute to appeal illegal sentences after exhausting all efforts to resolve the dispute in the sentencing court); People v. Robinson, 2009 WL 3489987 (Cal. App. 1 Dist. October 29, 2009) (unpublished) (Pursuant to statute, the sentencing court may "at any time upon the recommendation of the secretary [of the Department] or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is not greater than the original sentence.") [brackets added by court]; Wilkins-El v. Marberry, 340 Fed.Appx. 320, 2009 WL 2132667 (7th Cir. July 15, 2009) (unpublished) ("To its credit, the BOP[9] attempted to contact the sentencing court for clarification of the sentence. But the court did not respond, and the BOP determined that Wilkins-El was subject to post-1987 law."); and State v. Bishop, 2009 WL 7441931 (Kan.App., March 13, 2009) (unpublished) (Department of Corrections notified court and counsel by letter of the omission of

[9] BOP is the Federal Bureau of Prisons.

postrelease supervision, which prompted the State to file motion to correct an illegal sentence).

CONCLUSION

As amicus curiae, the Department respectfully requests this Honorable Court to disapprove the Second District's opinion, reaffirm the well-established collateral remedy for challenging the validity of sentences, and approve the Department's practice of seeking clarification of sentencing orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing amicus curiae brief, together with the documents listed in the appendix, were furnished by **U.S. mail** to **JOHN R. BLUE, ESQUIRE,** Carlton Fields, Post office Box 2861, Saint Petersburg, Florida, 33731-286; attorney for Respondent; by **U.S. mail** to **SARA MACKS, ASSISTANT ATTORNEY GENERAL,** Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida, 33607-7013, attorney for Petitioner; and by **overnight delivery service** to **DAVID L. LUCK, ESQUIRE,** Carlton Fields 4000 International Place, 100 S.E. Second Street, Miami, Florida, 33131-2114, attorney for Respondent this 5th day of February, 2010.

_____
Carolyn J. Mosley
Counsel for Amicus FDOC

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Carolyn J. Mosley

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
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FSC CASE NO. SC09-1409,
2D08-3536, 2008-CA-000401

WARREN STANG,
Respondent.
_____/

FLORIDA DEPARTMENT OF CORRECTIONS' INDEX TO APPENDIX[10]

[10] Pages 1-120 are typed in the upper right-hand corner. All other page numbers and letters are hand written in the lower right-hand corner.

PAGE TWO
FLORIDA DEPARTMENT OF CORRECTIONS INDEX TO APPENDIX

PALM BEACH COUNTY CASE NO. 95-3736