IN THE SUPREME COURT
STATE OF FLORIDA

FILED 2013 FEB 14 AM 9: BY

CASE NO.: SC12-2669

***ROBERT LEFTWICH*,**

Petitioner,

vs.

FLORIDA DEPARTMENT OF CORRECTIONS

Respondent,

**ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL
CASE NO.: 1D12-1739**

PETITIONER'S ANSWER BRIEF ON JURISDICTION

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Pursuant to Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004), the Second District holds, based on Ex Post Facto principles, that DOC may not use the 1992 legislative clarification of the Provisional Credits Statute to render an inmate ineligible for prison overcrowding credits since the offense rendering him eligible was committed before the legislative clarification. The First District now holds, pursuant to Leftwich v. Florida Department of Corrections, 101 So. 3d 404 (Fla. 1st DCA 2012), that there is no Ex Post Facto violation when DOC does so because the legislation was a clarification, not new law.

DOC agrees with Inmate Leftwich that this Court has jurisdiction to review the First District's decision in Leftwich v. Florida Department of Corrections, 101 So. 3d 404 (Fla. 1st DCA 2012). This Court has jurisdiction because the First District **certified** that its decision in Leftwich, which was based on Mcbride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), **conflicts** with the Second District Court of Appeal's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004).

This Court should exercise its discretion to take the case and resolve the conflict that has been in existence since the Second District issued its 2004 decision in Downs. Currently, if an inmate housed in the First District sues, the Department wins but if the inmate is housed in the Second District, the inmate wins. This results in un-equal treatment of inmates. The Department has identified 333 inmates whose sentences are potentially affected and this continuing conflict should be finally resolved.

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STATEMENT OF THE CASE AND FACTS

Petitioner Robert Leftwich is an inmate in the custody of Respondent Florida Department of Corrections (DOC). Leftwich arrived to begin service of his two non-Habitual Offender (or "guidelines") sentences on August 7, 1989. Because, at the time, the Florida Department of Corrections was experiencing extreme prison overcrowding and Leftwich had not yet been adjudicated an Habitual Offender, he was eligible for Provisional Credits (a type of overcrowding reduction gain time). Thus, between his arrival in prison on August 7, 1989 and September 1990, Leftwich received 410 days of Provisional Credits. However, Leftwich was subsequently adjudicated an Habitual Offender pursuant to a new crime. After that point, he was no longer eligible for Provisional Credits on any of his sentences.

Leftwich filed a writ petition in Leon County claiming he was entitled to the continued receipt of Provisional Credits on his non-Habitual Offender sentences. He relied on Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004) (DOC may not use the July 1992 legislative clarification of the Provisional Credits Statute to render an inmate ineligible for prison overcrowding credits since the offense rendering him eligible was committed before the legislative clarification).

The Leon County Circuit Court denied the petition ruling that it was bound, not by the Second District's decision in Downs, but by the conflicting decision from the First District in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001).[1]

Leftwich sought review in the First District and after briefing, on November 26, 2012, the First District denied the petition. It explained that:

> In accordance with our decision in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), the circuit court correctly concluded that after being sentenced as an habitual offender, petitioner was ineligible for provisional credits on all his sentences, including those imposed before he was designated an habitual offender. Accordingly, we DENY the petition for writ of certiorari on the merits, but **CERTIFY that our decision conflicts** with Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004).

Leftwich v. Florida Department of Corrections, 101 So. 3d 404, 404 (Fla. 1st DCA 2012) (emphasis added).

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[1] The McBride Court stated:

> [T]he 1992 amendment makes it clear that the intent of the prior law was to preclude an award of provisional release credits if the defendant is sentenced as a habitual offender at any time.
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> ***
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> [Thus,] the statute has never distinguished between inmates who had habitual offender sentences, regardless of whether imposed before or after the original sentence.

McBride, 780 So. 2d at 222-223 (Emphasis added).

JURISDICTIONAL ISSUE

This Court has clear jurisdiction to review the First District's decision in Leftwich v. Florida Department of Corrections, 101 So. 3d 404, 404 (Fla. 1st DCA 2012), because the First District certified conflict with the Second District Court of Appeal's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004). This Court has jurisdiction pursuant to Article V, Section 3(b)(4), of the Florida Constitution over decisions of the district courts of appeal that are certified to be in direct conflict with decisions of other district courts of appeal. See also Fla. R. of App. P. 9.030(a)(2)(A)(vi).

This Court should exercise that jurisdiction and resolve the continuing conflict between the decisions of the First District and the Second District as to whether Habitual Offenders are eligible to receive Provisional Credits on their non-Habitual Offender sentences which pre-dated their Habitual Offender sentences. Currently, if an inmate housed in the First District sues, the Department wins but if the inmate is housed in the Second District, the inmate wins. This results in un-equal treatment of inmates. The Department has identified 333 inmates whose sentences could be affected by a decision on this matter. Thus, this case is significant and the Court should exercise its jurisdiction, take the case and finally resolve the conflict.

ARGUMENT

This Court has clear jurisdiction to review the First District's decision in Leftwich v. Florida Department of Corrections, 101 So. 3d 404 (Fla. 1st DCA 2012), because the First District certified that its decision, which was based on McBride v. Moore, 780 So.2d 221 (Fla. 1st DCA 2001), conflicts with the Second District Court of Appeal's decision in Downs v. Crosby, 874 So. 2d 648 (Fla. 2d DCA 2004). The Florida Constitution specifically vests jurisdiction in this Court to "review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal. See Fla. Const. Art. V, § 3(b)(4); see also See also Fla. R. of App. P. 9.030(a)(2)(A)(vi). See also Fla. R. of App. P. 9.030(a)(2)(A)(vi).

This Court should exercise its discretion to take the case and resolve the conflict that has been in existence since the Second District issued its 2004 decision in Downs. This Court previously accepted jurisdiction to review the conflict between McBride and Downs in 2004, but when inmate Downs was released from prison, it dismissed the petition as moot. See SC04-1153. The Department continues to maintain that a conflict in the law that effects a large number of inmates does not become moot when the particular inmate that brought the conflict

to light is released from prison - as that is the standard for mootness in habeas cases - not conflict cases.

Since this Court refused to resolve the conflict in 2004, the Department, being a state-wide agency, had to determine which decision it would apply to its inmates as it is impossible, and of course, highly undesirable, to continually calculate, recalculate and change inmate release dates depending on which facility they may be in at the time (i.e., whether the inmate happens to be incarcerated within the territorial jurisdiction of the Second District or another district). It has chosen the First District's decision in McBride and applies that decision across-the-board to all inmates in its custody when calculating their sentences as it believes that decision is correct. In other words, if an inmate is adjudicated as an Habitual Offender, the Department now deems him to be ineligible for Provisional Credits. Nonetheless, if an inmate housed in the First District sues, the Department wins but if the inmate is housed in the Second District, the inmate wins. This results in unequal treatment of inmates. Further, inmates are often transferred from one facility (appellate district) to another based on training, protection, medical and other reasons. Thus, they do not stay in one particular appellate district. This Court has previously held that "the overriding purpose of conflict review remains the elimination of inconsistent views within Florida about the same question of law."

Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). There are inconsistent views about this same question of law in the Second District and the First District, and the First District has now **certified** this **conflict**. The Department is aware that this Court sometimes declines to exercise its jurisdiction if the conflict issue does not appear to be significant or important. The Department advises that this lack of clarity affects an entire class of inmates and a decision on this matter could potentially change the release dates of 333 inmates.

Since it is clear that this Court has jurisdiction, the real question for this Court is whether to accept jurisdiction and exercise its discretion to take and review the case. Since this depends on the significance of the case, the following section is a short discussion of the background and underlying issues.

BACKGROUND/UNDERLYING LEGAL ISSUE

In 1988, the Legislature enacted the Provisional Credits statute. § 944.277, Fla. Stat. (Supp. 1988); ch. 88-122, § 5, 6, at 535-37, 572, Laws of Fla. This statute authorized the award of a special kind of gain time that was used to advance the release of inmates and thereby alleviate prison overcrowding, which was a problem in Florida at the time. The Legislature determined that certain types of offenders, including Habitual Offenders were not eligible. In 1992, the First District, in Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992), interpreted the

Habitual Offender disqualification of the Provisional Credits statute as making Habitual Offenders ineligible for Provisional Credits on non-Habitual Offender sentences only if the offender had previously been adjudicated an Habitual Offender (in another case). In Anderson's case, since his Habitual Offender sentence was for a crime committed AFTER his non-Habitual Offender sentences, the First District held that he should be continue to be eligible to receive Provisional Credits on the non-Habitual Offender sentences even though he was now an Habitual Offender. Dugger v. Anderson, 593 So. 2d 1134 (Fla. 1st DCA 1992).

Immediately after the Anderson decision, and in fact because of the decision, the Florida Legislature added additional language to further clarify its original intent that Habitual Offenders not be released early from prison. The First District took notice of the Legislature's actions in McBride v. Moore, 780 So. 2d 221 (Fla. 1st DCA 2001), and held:

> [T]he 1992 amendment makes it clear that the intent of the **prior law** was to preclude an award of provisional release credits if the defendant is sentenced as a habitual offender at any time.
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> The decision in Mamone[2] also refutes McBride's contention that applying the amended statute to prevent him from receiving

[2] See Mamone v. Singletary, 619 So. 2d 36 (Fla. 5th DCA 1993) (the 1992 amendments to section 944.277(1)(g) negated the effect of the Anderson decision because the Legislature **clarified its** original intent that inmates who had 'been sentenced at any time' as an Habitual Offender were not entitled to receive

> provisional credits violates the ex post facto clause, because his crimes were committed before the 1992 amendment.
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> In summary, since the 1992 amendment merely clarified the intent of the legislature with regard to section 944.277(1)(g), the trial court correctly ruled that the statute has **never** distinguished between inmates who had habitual offender sentences, regardless of whether imposed before or after the original sentence.

McBride v. Moore, 780 So. 2d at 222-223 (emphasis added).

In the Second District's 2004 decision in Downs, the court appeared to recognize that the First District had, in its 2001 decision in McBride v. Moore, essentially receded from Anderson based on 1992 legislation clarifying that the Legislature had always rendered Habitual Offenders ineligible for Provisional Credits – even on non-Habitual Offender sentences such inmates may also be serving. The Second District also recognized that the Fifth District in Mamone v. Singletary, 619 So. 2d 36 (Fla. 5th DCA 1993), had also held that applying this clarifying legislation retroactively "does not violate the Ex Post Facto Clause." Downs, 874 So. 2d at 648. Nevertheless, the Second District disagreed with the First and the Fifth Districts and decided to follow the reasoning of the First District's prior, (now-receded-from) decision in Anderson. In fact, the Second

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administrative gain-time or Provisional Credits).

District instructed the lower court to apply the First District's decision in Anderson. See Downs, 874 So. 2d at 650.

After the Second District issued its decision in Downs, in 2004, the Department sought discretionary review in this Court. This Court initially accepted jurisdiction, but when inmate Downs was released, it dismissed the petition as moot. Nonetheless, the conflict issue remains to this day. As was the case with Mr. Downs, Mr. Leftwich will also be released in about a year and a half - potentially before a final opinion on this issue could be published. Nonetheless, the issue will surface again and again as there are at least 333 other potential litigants in the Department's custody. This Court has held that "even when a controversy between the parties has been rendered moot, this Court should nonetheless address the issue presented where it is "capable of repetition, yet evading review." See Kight v. Dugger, 574 So. 2d 1066, 1068 (Fla. 1990); see also J.M. v. Gargett, 101 So. 3d 352, 355 (Fla. 2012) (certified conflict case where petitioner had been released but Court agreed the conflict between the district courts would continue to result in inconsistent application of the law). Accordingly, this Court should exercise its jurisdiction to resolve the continuing conflict in the law.

CONCLUSION

The First District has certified that its decision in Leftwich is in direct conflict with the Second District's decision in Downs as to inmate eligibility for Provisional Credits. DOC is unable to apply both cases consistently and fairly across its entire inmate population and urges this Court to accept review. See Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985) (true purpose of conflict review is to eliminate inconsistent views about the same question of law).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, on the 12th day of February, 2012, to:

Robert Leftwich, DC# 061242
Calhoun Correctional Institution
19562 S.E. Institution Drive
Blountstown, FL 32424-9700

BARBARA DEBELIUS

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition has been prepared in New Times Roman 14, in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

BARBARA DEBELIUS