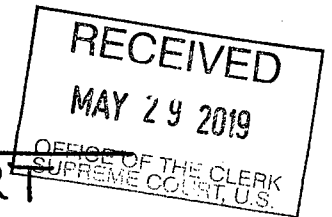


Case No. ~~19-5386~~



IN THE SUPREME COURT
OF THE UNITED STATES

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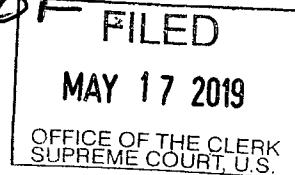
DAVID CHARLES SUSSMAN, Petitioner,

vs.

SECRETARY, DEPT. OF CORRECTIONS;
and FLA. ATTORNEY GENERAL,
Respondents.

ORIGINAL

ON PETITION FOR A WRIT OF
CERTIORARI TO THE FIRST
DISTRICT COURT OF APPEALS
IN THE STATE OF
FLORIDA



PETITION FOR WRIT OF CERTIORARI

David Charles Sussman,
aka "El Maestro",
Petitioner.
DC # J06481
Florida State Prison
P.O. Box 800
Starke, FL 32083

QUESTION PRESENTED

Where a prison inmate files a petition in a trial court seeking the restoration of gain time credits that were lost in a prison disciplinary proceeding; and where the restoration of those gain time credits would shorten the length of that inmates time in prison, did said trial court violate art. I, sec. 9, cl. 2 (the Suspension Clause) of the U.S. Constitution when it ordered said inmate to secure the assistance of (or otherwise hire and pay money for) an attorney, and then dismissed his petition solely for his failure (or inability) to do so?

LIST OF PARTIES

All parties appear in the caption of the cover page.

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 APPENDIX K: U.S. Const., art. I, sec. 9, cl. 2; 28 U.S.C.
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I. OPINIONS BELOW

The opinion of Florida's First Dist. Court of Appeals (1st DCA), which is Florida's final court of review¹, appears at App. A of this instant petition, and is not published. Rehearing was denied on 19 Feb. 2019. See App. B. The opinion of Florida's 2nd Jud. Cir. Court in Leon County (the trial court) is located at App. C, and is not published.

II. JURISDICTION

The date on which Fla's 1st DCA (my court of final review) decided my case was 21 Dec. 2018.¹ App. A. A timely motion for rehearing was denied on 19 Feb. 2019. App. B. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. I, sec. 9, cl. 2 of the U.S. Const.; 28 U.S.C. § 2255; Fla. R. Crim. Proc. 3.850(m); and D.C. Code 23-110(g) (1973) all appear at Appendix K to this instant petition.

IV. STATEMENT OF CASE AND FACTS

IV. 1. In Aug. 2016, Petitioner filed a Petition For Writ of Mandamus in the trial court, named the Fla. Dept. of Corrections (DOC) as the Respondent, and sought the restoration of gain time credits that were lost in a DOC disciplinary proceeding.² See App. D. As relief, he sought to shorten the length of time he must serve in prison. App. D at 9.

IV. 2. After Petitioner had litigated said petition aggressively in the trial court for over a year, App. E; and after the case was ripe for its adjudication, App. E, the DOC, on 6 Oct. 2017, filed a motion to dismiss said petition based on an order that directed Petitioner to secure the assistance of

1. Said opinion is actually a per curiam affirmance without a written opinion, see App. A, which precludes Petitioner from seeking any further appellate review in Fla.

2. Sometime between 1979 and 1992, Florida substituted habeas corpus with mandamus as a means to seek the restoration of gain time credits that were lost in a DOC disciplinary proceeding. For an explanation of how the remedy of habeas corpus evolved into mandamus in Fla., see Sec. V, par. 4-5, infra.

counsel.³ App. F. On 15 Nov. 2017, the trial court granted the DOC's motion, and dismissed Petitioner's collateral criminal petition. App. C.

IV. 3. Soon thereafter, Petitioner appealed to Fla's 1st Dist. Court of Appeals (DCA) arguing, inter alia, that the trial court violated the Suspension Clause of the U.S. Const. when it dismissed his collateral criminal petition for nothing more than his failure to hire an attorney. App. G at 3-7. The DOC answered, App. H, and Petitioner replied. App. I. On 21 Dec. 2018, the DCA affirmed the trial court's order.⁴ A timely rehearing motion, App. J, was denied. App. B. This instant certiorari petition follows.

V. REASONS FOR GRANTING THE WRIT

V. 1. Pursuant to this Supreme Court's Rule 10(a), Petitioner asserts a compelling reason for this Court to grant its writ; to wit: When Fla's DCA affirmed the trial court's order dismissing Petitioner's collateral criminal petition, it sanctions said trial court's act of suspending his access to habeas corpus. In addition, said DCA "so far departed from the accepted... course of judicial proceedings... as to call for an exercise of this [Supreme] Court's supervisory power." Supreme Court Rule 10(a).

V. 2. In spite of the fact that Petitioner had already been deemed to have been indigent in the trial court, see R17-19 in Exhibit E, said court dismissed his collateral criminal petition (CCP) for the sole reason that "he ha[d] not secured counsel..." Exhibit C at 1. Moreover, despite the fact that his CCP seeks the return of gain time, and would shorten his time in prison if successful, said court ruled that it "is not a bona fide petition for habeas corpus..." Exhibit C at 1. Appellant disagrees, and will now show that his CCP is, indeed, a "bona fide" habeas petition, so that the trial court's order dismissing it, and DCA's order affirming that dismissal, violate the Suspension Clause of the U. S.

3. It should be noted that this order was issued in trial court case 2016-CA-1656, but not in the trial court case in controversy sub judice. App. C at 2-3.

4. See footnote 1, supra.

and Fla. Constitutions.

V.3. In 1961, the U.S. Supreme Court recognized that "habeas corpus... is ... a collateral [criminal] proceeding," Smith v. Bennett, 365 U.S. 708, 711 (1961); id. at 712 ("We shall not quibble as to whether, in this context [of a parole violation], it be called a civil or criminal action..."), and ruled that, "When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise." Id. at 713; see also id. at 714 ("In failing to extend... the Great [Habeas] Writ to its indigent prisoners, Iowa denies them equal protection of the law.").

V.4. "Many years ago, ... habeas corpus [was] [the only] proper [venue] to challenge [a] collateral criminal issue [in Fla.] ...". Fla. Prison Legal Perspectives, Vol. 12, Issue 5/6, p. 3 (Sept./Dec. 2006) (EPLP); see also Roy v. Wainwright, 151 So.2d 825, 826-827 (Fla. 1963) (Before 1963, "the only practicable procedures available in Florida for a post conviction assault on a [criminal] judgment were by habeas corpus..."). In addition, "a collateral criminal proceeding is nothing more than [a] habeas corpus action by a different name." EPLP, p. 4. Thus, because "a gain time challenge [is] a collateral criminal [issue]," Schmidt v. Crusoe, 878 So.2d 361, 367 (Fla. 2003), it logically follows that a mandamus petition challenging a loss of gain time in Fla. "is nothing more than [a] habeas corpus action by a different name," EPLP at 4, so that Petitioner's Petition is, indeed, a "bona fide" habeas petition. Id.; ^{see} also Moore v. Wainwright, 366 So.2d 183, 183 (1st DCA 1979) ("[Moore] filed a petition for writ of habeas corpus ... alleg[ing] he was deprived due process... in [a DOC] disciplinary proceeding." "We reverse."); Adams v. Wainwright, 512 So.2d 1077, 1078 (1st DCA 1987) (After Adams had "suffered gain time losses" in a DOC DR proceeding, "the trial judge correctly perceived [his] petition to be one for habeas corpus [and/] or mandamus, and we [the 1st DCA] will treat it as such.") As an additional example, in Brown v. Fauver, 819 F.2d 395, 397 (3rd Cir. 1987), because "Brown... sought restoration of his gain-time credits ...", id., the 3rd Cir. ruled "[t]his [was] a form of habeas corpus relief...", id., and explained how, "[i]n Preiser v. Rodriguez, the [U.S. Sup.] Court recognized that a challenge to a prison disciplinary proceeding aimed at restoring good-time credits 'is just

as close to the core of habeas corpus as an attack on the prisoner's conviction." Id. (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)).

V. 5. In Florida, laws like Fla. Crim. Rule 3.850 eventually "substituted a new collateral process... for the pre-existing habeas corpus procedure...". Bush v. Bowmediene, 553 U.S. 723, 775 (2008) (citing 28 U.S.C. §2255; and citing D.C. Code 23-110(g) (1973)); see also Roy v. Wainwright, *supra* (describing how Fla. Crim. Rule 1 (renumbered to 3.850) replaced habeas corpus in 1963, but, before that, "the only procedures... in Fla[.]... were by habeas corpus"). However, as the U.S. Sup. Court explained in Bush v. Bowmediene, what made collateral attack laws like 28 U.S.C. §2255 and D.C. Code 23-110(g) — both of which have "savings clauses" that are identical to Fla. Rule Crim. Proc. 3.850(m) — "constitutionally sufficient replacements for habeas corpus," Bush, at 792, is that they both "ha[ve] a savings clause providing that a writ of habeas corpus would still be available if the alternative process proved [to be] inadequate or ineffective," Bush at 776, that are identical to Fla. Rule 3.850(m). Unfortunately, as Florida's exclusive remedy of habeas corpus to challenge a loss of gain time gradually evolved from habeas corpus to mandamus, Moose, 366 So.2d at 183 (In 1979, "habeas corpus" proper avenue); Adams, 512 So.2d at 1078 (In 1987, "the trial judge... perceived petition to be one for habeas corpus or mandamus,"); Holcomby, 609 So.2d 751 (1st DCA) (by 1992, mandamus only viable avenue); but see Sheley v. Fla. Parole Comm'n, 703 So.2d 1202, 1205 n. 2 and its accompanying text (1st DCA 1997) (question the wisdom of using mandamus as a substitute for habeas corpus), no "savings clause" like those discussed in Bush, *supra*, or like the one legislatively enacted in Fla. Rule 3.850(m), was ever provided for. Regardless, any law — or, sub judice, any court order — that does not provide "a constitutionally sufficient replacement for habeas corpus, Bush, 553 U.S. at 792, "effect[s] an unconstitutional suspension of the writ...". Id.

V. 6. Sub judice, given Petitioner's hopeless indigence, and the consequential fact that he can not afford to pay for an attorney; and given the high improbability that he would be able to secure one for free, it is axiomatic that the lower court's order dismissing his CCP, which seeks the restoration of 60 days of gain time credits, placed an insurmountable "financial hurdle"

between him and his access to habeas corpus, thereby suspending the Great Writ, as was contemplated by the U.S. Supreme Court in Smith v. Bennett, supra.

V.7. To the extent the DOC may argue a gain time challenge in Fla. is, somehow, not a "bona fide" habeas action as the trial court posits in its order, App. C, Petitioner has already shown in par. 4-5, supra, that it is; nevertheless, even if it were not (which it is), it would be of no consequence because Florida would still have to afford Petitioner "a constitutionally sufficient replacement for habeas corpus," Bush, 553 U.S. at 792. Moreover, as discussed above, by requiring him to secure counsel, the lower court was effectually requiring him to hire an attorney, which it knew placed an insurmountable "financial hurdle" before him, Smith v. Bennett, and which, in turn, "effect[ed] an unconstitutional suspension of the [habeas] writ...". Bush at 792. Additionally, just as this instant gain time challenge is cognizable through a "bona fide" habeas corpus action in the federal courts under 28 U.S.C. § 2254 if this Court should deny Petitioner the relief he requests herein, Medberry v. Crosby, 351 F.3d 1049, 1060 (11th Cir. 2003); Walker v. O'Brian, 216 F.3d 626, 633 (7th Cir. 2000) ("... § 2254 [is] correct vehicle for contesting loss of gain time credit in [a state] prison disciplinary proceeding..."), it logically follows that Florida's habeas substitute of mandamus to retrieve gain time is also a "bona fide" habeas action as the U. S. Sup. Court has stated "[t]he availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." Smith v. Bennett, 365 U.S. at 712; see also Fla. Prs. Leg. Persp., Vol. 12, Issue 5/6, p. 4 (Sept./Dec. 2006) ("[A] collateral criminal proceeding is nothing more than habeas corpus actions by a different name.").

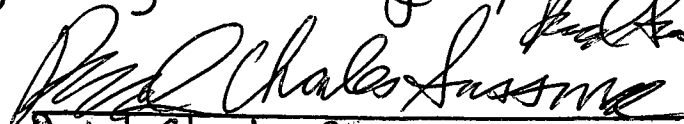
V.8. Finally, because Florida's habeas corpus substitute of mandamus contains no judicially or legislatively created "savings clause providing that... habeas corpus would [still] be available [to Petitioner] if the alternative [mandamus] proved [to be] inadequate or ineffective," Bush, 553 U.S. at 776, as it so obviously has for Petitioner; and based on the facts, arguments and authorities herein, this Honorable Court should rule that, when the trial court dismissed Petitioner's collateral

criminal petition that seeks restoration of gain time, said dismissal, in and of itself, violated the Suspension Clause of U.S. Const., art. I, sec. 9, cl. 2.

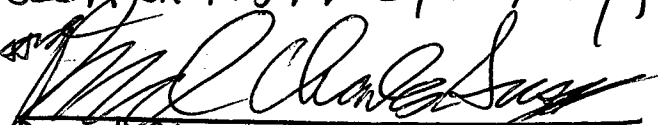
VI. CONCLUSION

WHEREFORE, Petitioner very respectfully asks this Honorable Supreme Court to issue its Writ granting certiorari jurisdiction.

UNDER PENALTY OF PERJURY, I declare the foregoing facts are true on May 17, 2019, and on July 18, 2019.


David Charles Sussman

I CERTIFY I gave true copies of this Petition to the DOC mailroom for 1st class U.S. mailing to Kristen Lonergan, % Fla. Atty. Gen., The Capitol PL-01, Tallahassee, FL 32399; and to DOC Gen. Counsel, 501 S. Calhoun St., Tallahassee, FL 32399 on this 17th day of May, 2019, and on 7/18/19.


David Charles Sussman