

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA**

**KENNETH PURDY,**

**CASE NO.: Not Yet Assigned**

**Petitioner,**

vs.

**JULIE L. JONES, SECRETARY OF FLORIDA  
DEPARTMENT OF CORRECTIONS,**

**Respondent.**

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**PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, the Petitioner, KENNETH PURDY, by and through undersigned counsel, and requests this Court grant his request for a writ of habeas corpus and to order the Department of Corrections (“Department”) to immediately release him. In support, Mr. Purdy states:

**INTRODUCTION**

1. Mr. Purdy was a juvenile unconstitutionally sentenced to life in prison without parole. On December 18, 2015, the court conducted a judicial review proceeding and resentenced Mr. Purdy to a total prison term of 359.1 months. After resentencing, the Department released Mr. Purdy from its custody because it believed his 246.4 months of time served plus gain time satisfied his new sentence. However, two days later the Department determined that it had erroneously calculated Mr. Purdy’s release date and had him rearrested. The Department recalculated Mr. Purdy’s current tentative release date for June of 2022. The Department’s current tentative release date is erroneous because it fails to award Mr. Purdy any gain time for the 246.4 months he served in prison prior to being resentenced. The Department’s actions have resulted in the improper

forfeiture of accrued gain time. A writ of habeas corpus should be issued by this Court because, with credit for time served plus earned gain time, Mr. Purdy is eligible for immediate release.

### **EXHIBITS IN SUPPORT**

2. The court's November 6, 1997 sentencing order is attached as Exhibit "A."
3. Mr. Purdy's successive verified postconviction motion is attached as Exhibit "B."
4. The court's order granting Mr. Purdy of postconviction relief is attached as Exhibit "C."
5. The court's November 18, 2015 resentencing order is attached as Exhibit "D."
6. The transcript of the November 18, 2015 resentencing is attached as Exhibit "E."
7. The court's December 18, 2015 resentencing order is attached as Exhibit "F."
8. The transcript of the December 18, 2015 resentencing is attached as Exhibit "G."
9. The court's December 22, 2015 amended resentencing order is attached as Exhibit "H."
10. Mr. Purdy's Emergency Request for Review filed on December 29, 2015 is attached as Exhibit "I."
11. The Department's January 14, 2015 denial of Mr. Purdy's Emergency Request for Review is attached as Exhibit "J."

### **PROCEDURAL HISTORY**

12. On September 26, 1997, Mr. Purdy was convicted of first degree felony murder, armed robbery, and armed carjacking. On November 6, 1997, Mr. Purdy was sentenced to life without parole for first degree felony murder and 112.7 months for the robbery and carjacking. The 112.7 month terms were ordered to run concurrent with each other but consecutive to the life sentence. (Exhibit "A").

13. On May 21, 2015, Mr. Purdy filed a successive postconviction motion pursuant to *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), which held that *Miller v. Alabama* does apply retroactively. (Exhibit “B”). The Court granted Mr. Purdy relief on June 15, 2015, and set the matter for resentencing. (Exhibit “C”).

14. On November 18, 2015, the court resentenced Mr. Purdy to 40 years in prison for the murder, with credit for time served, but ordered that Mr. Purdy was to receive no gain time.<sup>1</sup> (Exhibit “D” and “E”). The court did not change the consecutive 112.7 month prison sentences for the robbery or carjacking. (Exhibit “D” and “E”).

15. On December 18, 2015, the court conducted a judicial review hearing pursuant to section 921.1402(2)(c), Florida Statutes. (Exhibit “G”). For first degree felony murder, the court resentenced Mr. Purdy to 246.4 months. (Exhibit “F” and “G”). The court did not change the 112.7 month sentences for the robbery and carjacking. (Exhibit “G”). The court awarded Mr. Purdy 246.4 months of credit for time served. (Exhibit “F”).

16. On December 21, 2015, the Department reviewed Mr. Purdy’s sentence and determined Mr. Purdy was eligible, with gain time, for immediate release. (Exhibit “I”). Mr. Purdy was released the evening of December 21, 2015. (Exhibit “I”) (emphasis added).

17. On December 22, 2015, the Court, *sua sponte*, entered corrected order/minutes that stated it did not permit Mr. Purdy gain time as to first degree felony murder.<sup>2</sup> (Exhibit “J”). This occurred even though the court never orally pronounced on December 18, 2015 that Mr. Purdy would not be entitled to gain time. (Exhibit “G”).

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<sup>1</sup> Only the Department of Corrections has the authority to regulate gain time and any comment by a court must be treated as surplusage and stricken. *Miller v. State*, 882 So. 2d 480 (Fla. 5th DCA 2006).

<sup>2</sup> See footnote 1.

18. On December 23, 2015, the Department determined that it had miscalculated Mr. Purdy's release date and had Mr. Purdy rearrested and taken back into custody. (Exhibit "I").

19. On December 29, 2015, Mr. Purdy challenged the Department's actions and requested that he be immediately released. (Exhibit "I"). In sum, Mr. Purdy argued that his 246.4 months of credit for time served plus accrued gain time was sufficient to satisfy his new total prison sentence of 359.1 months.<sup>3</sup> (Exhibit "I").

20. The Department denied Mr. Purdy's request on January 14, 2016. (Exhibit "J"). The Department determined that (1) the court's resentencing order on December 18, 2015 brought Mr. Purdy's first degree felony murder sentence to an end on December 18, 2015 and, therefore, Mr. Purdy did not begin to serve his consecutive robbery and carjacking sentences until December 18, 2015 and (2) Mr. Purdy was not entitled to any gain time because first degree felony murder is a capital offense and the 1994 guidelines do not permit gain time for capital offenses. (Exhibit "J").

21. The Department has now recalculated Mr. Purdy's release date for June 30, 2022. (Exhibit "J").

22. This petition for writ of mandamus follows.

### **ARGUMENT**

23. 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

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<sup>3</sup> 246.4 months + 112.7 months = 359.1 months

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.

*Bush v. State*, 945 So. 2d 1207, 1210 (Fla. 2006). The Department of Corrections “is the proper respondent challenging a sentence-reducing credit determination rendered by the Department” of Corrections. *Id.* at 1212. The circuit court in Leon County is the proper venue for such cases. *Id.* at 1213.

24. In this case, a writ of habeas corpus is the appropriate relief because, as explained below, Mr. Purdy is entitled to immediate release.

25. Mr. Purdy’s emergency request for review to the Office of the Secretary for the Department of Corrections was denied on January 14, 2016. Mr. Purdy has no other available administrative remedy to pursue. Accordingly, Mr. Purdy has exhausted all available administrative remedies.

26. Pursuant to *Bush*, venue for this Petitioner is proper in the circuit court for Leon County.

**1) Section 921.1402, Florida Statutes, does not preclude application of gain time.**

27. The Department decided Mr. Purdy was not entitled to gain time because first degree felony murder is a capital offense and the 1994 Sentencing Guidelines preclude the Department from awarding gain time for capital offenses. The Department’s decision to find Mr. Purdy ineligible for gain time is erroneous.

28. First, Mr. Purdy did not commit a capital offense. He was a juvenile at the time of the offense and could not be sentenced to death or mandatory life without parole. *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (citing *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132

S. Ct. 2455 (2012); *State v. Hogan*, 451 So. 2d 844 (Fla. 1984) (a capital case is one where death is a possible penalty).

29. Second, Mr. Purdy was not resentenced on December 18, 2015 pursuant to the 1994 Sentencing Guidelines, but pursuant to chapter 2014-220, Laws of Florida. *See Horsley v. State*, 160 So. 3d 393 (Fla. 2015) (the appropriate remedy applicable to a juvenile illegally sentenced to life without the possibility of parole is to apply the new juvenile sentencing statutes, chapter 2014-220, Laws of Florida).

30. Under chapter 2014-220, Law of Florida, Mr. Purdy is entitled to gain time because the applicable law does not specifically preclude the availability of gain time. *See, e.g., Melvin v. State*, 177 So. 3d 648 (Fla. 1<sup>st</sup> DCA 2015) (holding that mandatory minimum provision for life felony of lewd and lascivious molestations of a child under 12 did not preclude application of gain time to sentence). This is especially true because the court legally determined Mr. Purdy to not be the person who actually killed, intended to kill, or attempted to kill the victim. Therefore, Mr. Purdy was not subjected to any mandatory minimum sentence under chapter 2014-220, Law of Florida.

31. Accordingly, contrary to the Department's determination, Mr. Purdy is statutorily eligible for gain time.

**2) Mr. Purdy is entitled to receive gain time for the 246.4 months of time served.**

32. At the conclusion of the December 18, 2015 resentencing hearing, Mr. Purdy's prison sentence was 246.4 months for first degree felony murder and 112.7 months for robbery and carjacking. The prison sentences for robbery and carjacking were run consecutive to the first degree felony murder sentence. Therefore, Mr. Purdy's total prison sentence was 359.1 months. The court granted Mr. Purdy 246.4 months of credit for time served.

33. The Department determined Mr. Purdy, even if statutorily eligible for gain time, was not eligible for any gain time for his 246.4 months of incarceration because the court's resentencing order on December 18, 2015 brought Mr. Purdy's first degree felony murder sentence to an end on December 18, 2015 and, therefore, Mr. Purdy did not begin to serve his consecutive robbery and carjacking sentences until December 18, 2015. The Department's reasoning is flawed and would result in the improper forfeiture of accrued gain time.

34. Upon resentencing, a defendant who has "been resentenced through no fault of their own are entitled upon resentencing to credit for all actual time served and gain time earned during their initial prison term." *Davidson v. State*, 780 So. 2d 984 (Fla. 1st DCA 2001) (citing *Corpus v. State*, 744 So. 2d 594 (Fla. 2d DCA 1999); *Brown v. State*, 584 So. 2d 209 (Fla. 1st DCA 1991)) (emphasis added). In *Miller v. State*, 882 So. 2d 480 (Fla. 5th DCA 2004), the Fifth District Court of Appeal noted:

Time served is time a defendant has actually been incarcerated and should be credited against the original sentence without any reduction in the sentence imposed by the court. The courts have the authority to order credit for time served. Only incidentally does such an award encompass gain time, because once a court orders credit for time served, the defendant becomes entitled to an allowance of gain time by operation of law.

*Id.* at 482 (citing *Smith v. State*, 682 So.2d 147, 148 (Fla. 4th DCA 1996). § 944.275(3)(b)) (emphasis added). Section 944.275(3)(b), Florida Statutes (2015), provides:

When an initial tentative release date is reestablished because of additional sentences imposed before the prisoner has completely served all prior sentences, any gain-time granted during service of a prior sentence and not forfeited shall be applied.

(Emphasis added).

35. In this case, Mr. Purdy was resentenced through no fault of his own. Thus, he is entitled to credit for all actual time served and gain time earned prior to resentencing. Failing to

award Mr. Purdy any gain time for the 246.4 months served in prison prior to resentencing results in the improper forfeiture of accrued gain time.

**3) Mr. Purdy is entitled to be immediately released.**

36. At the conclusion of resentencing on December 18, 2015, Mr. Purdy's prison sentence was 246.4 months for first degree felony murder and 112.7 months for robbery and carjacking. Mr. Purdy's total prison sentence was 359.1 months. Mr. Purdy was granted credit for 246.4 months of time served. At the time of resentencing, Mr. Purdy had accrued approximately 162 months of gain time.<sup>4</sup> Mr. Purdy's total credit for time served plus gain time at the time of resentencing equaled 408.4 months. 408.4 months is greater than Mr. Purdy's total sentence of 359.1 months. Mr. Purdy should be immediately re-released from prison. The Department's initial decision to release Mr. Purdy after the December 18, 2015 resentencing was the correct decision.

WHEREFORE, the Petitioner, Kenneth Purdy, requests this Court to grant this petition for a writ of habeas corpus and to order the Department to immediately release Mr. Purdy or grant any relief this Court finds just and proper.

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<sup>4</sup> 20 days x 246.4 months = 162 months.



DATED this 2nd day of February, 2016.

Respectfully submitted,

/s/ Matthew R. McLain

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via mail and facsimile to Julie L. Jones, Secretary of Florida Department of Corrections, this 2nd day of February, 2016 at:

Julie L. Jones, Secretary of Florida Department of Corrections  
Office of the Secretary  
501 South Calhoun Street  
Tallahassee, FL 32399-2500  
Facsimile: 850-922-4355

/s/ Matthew R. McLain

Matthew R. McLain, Esquire