IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 73505
DCA NO. 87-2081

MILTON GREEN,

Respondent.

_____/

JURISDICTIONAL BRIEF OF PETITIONER

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JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, Milton Green, appellant in the First District Court of Appeal and defendant in the trial court, will be referred to in this brief as defendant. References to the First District's opinion and the conflicting Fifth District opinion will be contained within the appendix attached to this brief and will be noted by the symbol "(A-)." All references will be followed with the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Defendant pled no contest to two counts of attempted sexual battery and was sentenced to four and one-half years in prison, to be followed by three years' probation (A-2). He received 287 days' credit for time served before sentencing. Defendant remained in the custody of the Department of Corrections (DOC) for only 518 days of the four year sentence due to gain time and was released. Later, his probation was revoked due to violation and he was sentenced to seven years in prison. At resentencing, defendant was given 805 days credit for time served (518 + 287). Defense counsel argued that defendant was entitled to credit for gain time: Because DOC viewed him as having served his four and one-half year sentence, defendant should be given credit for four and one-half years.

Defendant's notice of appeal was filed December 21, 1987, and the First District Court of Appeal filed its opinion on December 28, 1988. The State's Notice to Invoke Discretionary Jurisdiction was timely filed on January 3, 1989.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal's decision in this case is in express and direct conflict with the Fifth District Court of Appeal's decision in Butler v. State, 530 So.2d 324 (Fla. 5th DCA 1988). The First District improperly analogized defendant's revocation of probation to a defendant serving under a void judgment and sentence in reaching the conclusion that defendant, upon resentencing, was entitled to credit for time served and gain time. The Fifth District, however, held that, upon revocation of community service, a defendant is entitled only to credit for time actually spent in jail or in prison, not to gain time.

ARGUMENT

ISSUE PRESENTED

THE FIRST DISTRICT COURT OF APPEAL'S OPINION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH BUTLER V. STATE, 530 SO.2D 324 (FLA. 5TH DCA 1988).

In the case below, the First District held that defendant, upon revocation of his probation, should have received credit for time served and accrued gain time. The holding regarding gain time is in express and direct conflict with Butler v. State, 530 So.2d 324, 325 (Fla. 5th DCA 1988), wherein the Fifth District held a defendant "is entitled to credit only for the actual time spent in jail or prison" (emphasis in original).

In the present case, defendant was sentenced to four and one-half years in state prison, to be followed by three years' probation. Defendant served less than one and one-half years (518 days) in prison due to gain time, and was released on probation. His probation was revoked later, and he was sentenced to seven years in prison, but was given credit for 518 days in custody of the Department of Corrections (DOC) and for 287 days served before sentencing. Defendant now alleges he was also entitled to four and one-half years' credit on his resentencing because DOC viewed him as having served his full prison term of four and one-half years.

This position was expressly rejected by the Fifth District in Butler. There, defendant was sentenced to four years with DOC, to be followed by two years of community control. He later violated his community control and was resentenced to five and one-half years' imprisonment with credit for time already served. On appeal, defendant contended that he was entitled to a full four years' credit on his new sentence although he may not have served that full time because of gain time credit. The Fifth District responded:

> There is no merit to this contention. He is entitled to credit only for the actual time spent *in jail* or *prison*. *State v. Holmes*, 360 So.2d 380 (Fla. 1978); *Chaitman v. State*, 495 So.2d 1231 (Fla. 5th DCA 1986). *See also Walker v. State*, 506 So.2d 78 (Fla. 1st DCA 1987); *Hutchinson v. State*, 467 So.2d 788 (Fla. 2d DCA 1985). He is not entitled to credit for time spent on probation or community control, *Holmes*, and what he requests would produce that result. Appellant makes no contention that he was not given credit for his actual time in jail or prison, so his sentence is
> **AFFIRMED.**

530 So.2d at 325.

In the present case, the First District erroneously analogized defendant's revocation of probation to a defendant serving under a void judgment and sentence. See Milligan v. State, 207 So.2d 24 (Fla. 2d DCA 1968). Completely different considerations are involved in resentencing after discovery of a void judgment and sentence:

> It was not [defendant's] fault that the state's criminal system failed to judge him guilty and sentence him properly in an uninterrupted operation. Under the circumstances of this case it is only fair to give [defendant] full credit for all time he has been in official custody since the time of his first commitment. . . .

Tilghman v. Culver, 99 So.2d 282, 285-86 (Fla. 1957), cert. denied, 356 U.S. 953 (1958). With revocation of probation, however, concerns about what the criminal justice system has done to a defendant are no longer at issue. Rather, a defendant's probation is revoked because of something he or she has done contrary to the criminal justice system.

The First District also erroneously held that Stearns v. State, 498 So.2d 982 (Fla. 2d DCA 1986) followed the Milligan rule. Stearns, however, did not involve a void judgment nor did it hold that gain time must be awarded in a valid judgment context. Instead, the Stearns court found that "the trial court was laboring under the misconception that appellant could not receive credit for time served or accrued gain time because he had committed a second probation violation." Id. at 983. Thus, both Stearns and Milligan were completely inapposite precedent upon which the First District based its holding in the present case..

The First District also devoted much time to a totally tangential issue -- forfeiture of statutory gain time. This is not at issue, as no gain time was forfeited. Defendant accrued gain time for which he was released early. The

circuit court declared no forfeiture, but merely refused to credit defendant at resentencing with previously accrued and used gain time.

Finally, the First District cited Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988) and Poore v. State, 13 F.L.W. 571 (Fla. 1988) as supporting its holding regarding gain time. Again, the First District has misinterpreted these cases. Both Poore and Franklin support the state's contentions that, upon resentencing, courts must give full credit for prior incarceration. Incarceration refers only to time actually spent in prison, not to time awarded as an incentive for good behavior. See Richards v. State, 521 So.2d 292 (Fla. 1st DCA 1988); Walker v. State, 506 So.2d 78 (Fla. 1st DCA 1987); Sapp v. State, 445 So.2d 1088 (Fla. 1st DCA 1984); State v. Holmes, 360 So.2d 380 (Fla. 1978); State v. Jones, 327 So.2d 18 (Fla. 1976); Hollingshead v. State, 292 So.2d 617 (Fla. 1st DCA 1974).

CONCLUSION

For the reasons stated above, the state respectfully requests this Court to invoke its discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Kathleen Stover, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 5th day of January, 1988.

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