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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Appellant,

v.

CASE NUMBER: 73,505

MILTON GREEN,

Appellee.

REPLY BRIEF

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_____ /

ANSWER BRIEF

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 respondent.

SUMMARY OF ARGUMENT

The trial court correctly credited respondent with only time actually served in prison upon resentencing for probation revocation. Appellant was not entitled to credit for gain time upon resentencing, as he had used his previously accrued gain time to achieve its statutorily defined benefit -- early release. Appellant is not entitled to benefit twice by using "expired" gain time to lessen his sentence upon probation revocation.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT, UPON RESENTENCING RESPONDENT ON PROBATION REVOCATION, PROPERLY CREDITED HIM FOR TIME ONLY ACTUALLY SERVED IN PRISON.

The trial court properly denied respondent credit for accrued gain time upon revocation of his probation. Respondent, however, argued that he should have received credit for previously accrued and used gain time, i.e., four year and one-half years' credit, despite the fact that he only served 518 days in prison. Such a result is untenable and contrary to case law and statutory provisions.

In his answer brief, respondent alleged that the state "inferred too much from silence" in North Carolina v. Pearce, 395 U.S. 711 (1969). Respondent's Answer Brief at 5. The state, however, did not allege that the new trial aspect of Pearce was dispositive there. Instead, the state distinguished Pearce and contended that its differences necessitated its inapplicability in the present case.

The Supreme Court noted in Wasman v. United States, 468 U.S. 559, 567 (1984) that Pearce "was only 'premised on the apparent need to guard against vindictiveness in the resentencing process'" (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973)). Thus, respondent extends Pearce's holding far beyond its original scope in seizing upon footnote 13 and consequentially contending that, "whenever credit for time served is granted, such credit would naturally include credit for gain-time earned." Respondent's Answer Brief at 5-6 (emphasis in original).

Based upon Wasman's and Chaffin's interpretation of Pearce, it is clear that vindictiveness of the trial court was Pearce's focus. Vindictiveness has not been alleged here and is not at issue. Applying Pearce to the present situation serves simply to cloud the real issue at hand--whether gain time must be credited upon resentencing for revocation of probation.

Respondent again contended that the trial court's refusal to credit him with gain time upon resentencing for probation revocation was "inescapably a forfeiture of gain-time." Respondent's Answer Brief at 7. The trial court, however, did not effect such a forfeiture. **Black's Law Dictionary** 332 (5th ed. 1983) defines "forfeiture" as "[s]omething to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty." Respondent did not lose the right to anything. He earned gain time and was given the benefit of such accruals--early release. Thus, his right vested completely when he used his gain time for early release. Nor did the trial court penalize respondent for committing a crime. Rather, it properly sentenced and credited him for time actually served in prison.

Respondent also alleged that the state "profoundly misunderstands or mischaracterizes gain-time." Respondent's Answer Brief at 9. The state, however, in its brief on the merits, agreed with respondent's observations concerning gain time, and cited cases to the effect that gain time rewards good behavior and results in early release for prisoners. Petitioner's Brief on the Merits at 4-5. Respondent also

apparently misunderstood the state's argument regarding the conditional nature of gain time. At no time did the state contend that gain time is conditional upon behavior subsequent to release from prison. Instead, the state cited cases and statutory provisions which reflect the conditional nature of gain time, i.e., conditional upon good behavior while in prison. Petitioner's Brief on the Merits at 6.

The only real issue in this case concerns the nature of gain time--whether it is a vested right which survives release from prison, or a conditional right which vests fully with early release and survives no further. The context in which this issue has arisen is equally as important. Respondent violated his probation, and in so doing, committed an act contrary to the criminal justice system. This situation is markedly distinct from the void judgment and sentence situation of Pearce. While this factor may not have been the dispositive element in Pearce, it certainly cautions against an application of Pearce in the present case.

Respondent also alleged that the state quoted a passage from Duffy v. State, 730 P.2d 754, 757 (Wyo. 1986) "out of context and egregiously misstated the case holding." Respondent's Answer Brief at 10. The state, however, did not even note the holding of Duffy in its brief on the merits, but merely cited to Duffy as analogous. In Duffy, the Wyoming Supreme Court refused to give defendant credit for time served in a Colorado jail on a Wyoming sentence. In disposing of defendant's argument, the Court held:

If we were to hold as [defendant] suggests, he would receive credit against both his Colorado and Wyoming sentences for the time spent awaiting trial in Wyoming. He would receive a special benefit because he happened to commit the Wyoming crime while still incarcerated for a prior Colorado offense. Clearly, the Interstate Agreement on Detainers is not intended to reward a criminal for committing his crimes from prison.

Id.

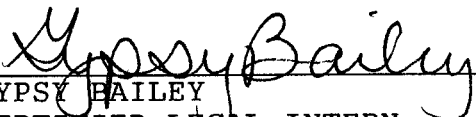
In this same vein, respondent has argued for a special benefit. He accrued gain time and received the intended statutory benefit--early release. Upon resentencing for revocation of his probation, respondent argued that he should again receive credit for previously accrued and used gain time. Such a "special benefit" is contrary to the stated statutory purpose of gain time. Gain time is intended to provide a mechanism for early release, and not to doubly benefit a prisoner who has already received the benefit of early release.

CONCLUSION

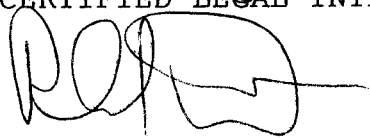
For the reasons stated above, the State requests this Court to reverse the decision of the First District and affirm the judgment of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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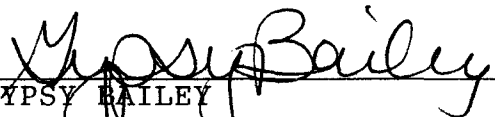
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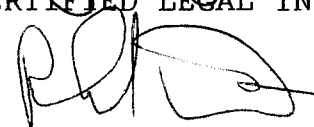
COUNSEL FOR PETITIONER

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 1st day of May, 1989.



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