

IN THE SUPREME COURT OF FLORIDA

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FILED  
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STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 74,336

JOHN ANDREW CARTER,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR #0513253  
LEON COUNTY COURTHOUSE  
FOURTH FLOOR, NORTH  
301 SOUTH MONROE STREET  
TALLAHASSEE, FL 32301  
(904) 488-2458

ATTORNEY FOR RESPONDENT

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STATE OF FLORIDA,

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VS .

CASE NO. 74,336

JOHN ANDREW CARTER,

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent appealed the trial court's denial of credit for gain-time earned during his first term of incarceration, when he was resentenced to prison a second time on the same charge because he violated the probation portion of a split sentence. On rehearing, the district court reversed, citing Green I, infra, but certified a question. This court granted review of the district court opinion below, Carter v. State, \_\_\_\_ So.2d \_\_\_\_, 14 FLW 1375 (Fla. 1st DCA June 6, 1989).

The transcript and record on appeal will be referred to as "R."

## II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate.

## III SUMMARY OF ARGUMENT

This issue has recently been decided by this court in respondent's favor. Green 11, infra. Credit for time served constitutionally and statutorily must include credit for gain-time earned during the first term of incarceration.

#### IV ARGUMENT

##### ISSUE PRESENTED

THE TRIAL COURT ERRED IN NOT GRANTING RESPONDENT CREDIT FOR GAIN-TIME EARNED DURING HIS FIRST TERM OF INCARCERATION, WHEN HE WAS RESENTENCED TO PRISON A SECOND TIME ON THE SAME OFFENSE BECAUSE HE VIOLATED PROBATION.

This issue has recently been decided by this court in respondent's favor. State v. Green, \_\_\_ So.2d \_\_\_, 14 FLW 362 (Fla. July 20, 1989) (Green 11), approving Green v. State, 539 So.2d 484 (Fla. 1st DCA 1988) (Green I).

Respondent was originally sentenced to 5 years in prison followed by 10 years probation. When he had served actual time and earned sufficient gain-time credits to total 5 years, he was released from prison. After release from prison, respondent violated probation and was sentenced to 10 years in prison to be followed by 5 years probation. He was given credit for 923 days served, which included his actual time served in jail and prison. Respondent requested, but was denied, credit for gain-time earned during his first term of incarceration.

This was error. In Green 11, this court pointed out that:

Receipt of gain-time is dependent on a prisoner's behavior while in prison, not on satisfactory behavior once the prisoner has been released from incarceration. Therefore, accrued gain-time is the functional equivalent of time spent in prison.

The court also noted that:

Upon resentencing after violation of the probation, Green was clearly entitled to credit for the time served on the original sentence.

Id., citing State v. Holmes, 360 So.2d 380 (Fla. 1978) and North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In the instant case, however:

The trial court only counted the time Green actually spent in prison as time served. This denial of credit for gain-time already accrued was essentially a retroactive forfeiture of gain-time.

Green 11.

Gain-time forfeitures are governed by section 944.28, Florida Statutes. While the statute permits forfeiture of gain-time upon revocation of parole, "there is no statutory authority ... for forfeiture of gain-time upon revocation of probation." Id. Finally, the court recognized that:

The statute places in the hands of the department [of corrections] the ability to award, forfeit, or restore gain-time. There is no statutory authority for the court to initiate the forfeiture of gain-time by denying credit for accrued gain-time at sentencing.

Id. **As** a result, therefore, Green was

... entitled to include earned gain-time when computing time served to credit against the sentence imposed after revocation of probation which is part of a probationary split sentence.

Id.

While this court used the phrase "earned gain-time," where perhaps, it might better have used DOC's phrase, "unforfeited gain-time," Green II stands for the principle that, for purposes of crediting gain-time, inmates may not be treated differently from their peers because they are serving a sentence

on a violation of probation (VOP), rather than on a substantive offense.

To illustrate, suppose there are two inmates, each serving a 10-year sentence, except that one is serving a sentence on a substantive offense and one served five years initially and is now serving another five years on a VOP, and each has earned the same amount of gain-time. Unless the VOP inmate gets credit for all the gain-time he earned during his initial incarceration, he is being treated differently from the other inmate. Green forbids this.

A defendant sentenced to incarceration a second time on a violation of probation has no less earned his prior gain-time than any other. Gain-time is not dependent on how one got to prison; it is conditional only upon behavior in prison. It has never been conditional upon the satisfactory completion of a subsequent term of probation. Nor does any court have the authority to order that gain-time be granted, denied or forfeited; only DOC has such authority. Sec. 944.28, Fla. Stat.

Besides the statutory ground for granting respondent gain-time, there is also a constitutional ground. While there is no constitutional right to receive gain-time, meaning that states are not obliged to give gain-time to any prisoner, once a state grants gain-time, it also creates in prisoners a substantive constitutional right to have the statute applied fairly. U.S. Const., am. VI, XIV; Fla. Const., art. I, sec. 9; Weaver v.



Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Of credit for gain-time, the United States Supreme Court has said:

Such credit must, of course, include the time credited during service of the first prison sentence for good behavior, etc.

North Carolina v. Pearce, 395 U.S. at 719, n.13.

Without reciting them, many cases cited by the state having to do with the nature of and a prisoner's interest in and right to gain-time (describing it in such terms as "act of grace") predate Weaver v. Graham, supra, the leading U.S. Supreme Court case on the issue. Any case which conflicts with Weaver's holding, that once granted, prisoners have a substantive constitutional right to gain-time, has been overruled.

The state cited a Wyoming case, Duffy v. State, 730 P.2d 754, 757 (Wyo. 1986), for the proposition:

... gain time is "not intended to reward a criminal for his crimes."

(State's Merit Brief, 7). This quote was taken out of context and misstated the case holding. Duffy was serving a prison sentence in Colorado, when he allegedly committed, from prison, certain conspiracy and aiding and abetting offenses in Wyoming. He was later convicted of the Wyoming offenses. He made a claim for credit for time served on the Wyoming offenses which concerned time he was still incarcerated in Colorado. The Wyoming court denied this claim, saying:

... the Interstate Agreement on Detainers is not intended to reward a criminal for committing his crimes from prison.

Id.


Green II is directly on point. No less than Green, respondent is entitled to credit for gain-time earned during his first term of incarceration.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this court affirm the district court opinion below.

Respectfully submitted,

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT



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KATHLEEN STOVER  
Assistant Public Defender  
Leon County Courthouse  
Fourth Floor, North  
Tallahassee, Florida 32301  
(904) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to John Koenig, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. John Andrew Carter, Inmate no. B044122, Calhoun Correctional Institution, P.O. Box 2000, Blountstown, Florida 32424, this 14 day of August, 1989.



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KATHLEEN STOVER