IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,324

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL PERKO,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Bureau Chief
West Palm Beach, Florida

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee before the District Court of Appeal, Fourth District, and was the prosecution in the trial court, Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent, Michael J. Perko, was the Appellant, and the defendant, respectively, in the courts below.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner may also be referred to as "the State."

This case originated as an appeal to the District Court of Appeal, Fourth District, from the trial court's denial of Respondent's Motion to Correct an Illegal Sentence under Fla. R. Crim. P. 3.800. As such, and no hearing having been held on the motion, there was no certified record on appeal prepared by the Circuit Clerk's Office. The abbreviation "ex." followed by the appropriate exhibit letter and page number will be used for adequate reference to the exhibits attached as Petitioner's Appendix to this Brief.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On July 24, 1989, Respondent was arrested for grand theft auto in Broward Circuit Court Case No. 89-15883 CF 10 (Ex. A, p. 5). On August 23, 1989, Respondent entered a negotiated plea of guilty, and was sentenced to two and a half years of incarceration to be followed by six months of probation (Ex. A, p. 5). Then on January 26, 1990, Respondent was released from prison to begin serving the six month probationary period imposed pursuant to the negotiated plea (Ex. A, p. 5).

While out on probation, Respondent was arrested and charged with possession of cocaine **on April 4, 1990**, in Broward County Circuit Case No. 90-07458 CF 10A. (Ex. A., p. 6). On May 7, 1990, in exchange for two **concurrent** sentences on the two separate cases, Respondent acknowledged the allegations in the violation of probation affidavit in Case No. 89-15883 CF 10; and plead guilty to the possession of cocaine in Case No. 90-07458 CF 10A.

Pursuant to the negotiated plea, the trial court gave Respondent a **New Sentence** in Case No. 89-15883 CF 10 of "four (4) years Florida State Prison with credit for 231 days time served to run concurrent with 90-7458 CF 10A" (See attached Exhibit B); and sentenced Respondent to concurrent "four (4) years F.S. Prison with credit for 34 days time served to run concurrent with 89-5883 CF 10" (See attached Exhibit C).

Respondent filed a Motion to Correct Sentence pursuant to Fla. R. Crim. P. 3.800, which was denied by the trial court (See attached Exhibit D). Respondent appealed the denial of the 3.800

motion to the District Court of Appeal, Fourth District, alleging he is entitled to receive credit for the time served in Case No. 89-15883 CF 10 on the sentence for the new crime committed subsequently thereto in case No. 90-7458.

In its opinion filed November 14, 1990, the District Court of Appeal found merit in Respondent's contentions and remanded the case

> to the trial court for correction of [Respondent's] sentences so that all may reflect all time served and gain time acquired when [Respondent] was originally jailed and imprisoned for the grand theft offense, as well as any jail time served following [Respondent's] April 1, 1990, arrest.

(See Exhibit E). Alleging misinterpretation of the holdings propounded by this Court in Daniels v. State, 491 So.2d 543 (Fla. 1986), and Green v. State, 547 So.2d 925 (Fla. 1989), the Petitioner then moved the District Court of Appeal for rehearing (See Exhibit F). As a result, the District Court of Appeal, Fourth District, by opinion filed January 16, 1991, granted rehearing and modified its November 14, 1990, opinion to include certification of the following question, as one of great public importance:

> DID CREDIT GRANTED FOR TIME SERVED ACCORD WITH THE HOLDING IN DANIELS V. STATE, 491 SO.2D 543 (FLA. 1986), WHEN, IN IMPOSING ON DEFENDANT CONCURRENT SENTENCE FOR VIOLATION OF PROBATION ON A PRIOR GRAND THEFT CONVICTION AND FOR COCAINE POSSESSION COMMITTED WHILE ON THAT PROBATION, THE TRIAL COURT GAVE DEFENDANT CREDIT TOWARD THE SENTENCE FOR COCAINE POSSESSION ONLY FOR TIME IN JAIL WHILE AWAITING DISPOSITION OF THAT CHARGE, WHILE ALLOWING ADDITIONALLY TOWARD THE PROBATION VIOLATION SENTENCE

TIME PREVIOUSLY SERVED AS A CONDITION OF PROBATION ON THE GRAND THEFT CONVICTION?

Notice to Invoke the Discretionary Jurisdiction of this Court pursuant to the certified question was timely filed January 17, 1991. This Court accepted jurisdiction and issued a briefing schedule February 6, 1991. This proceeding follows.

SUMMARY OF THE ARGUMENT

Daniels does **not** stand for the proposition that a defendant who is arrested for different offenses on different dates is entitled to have his jail time credit applied equally to concurrent sentences imposed by the trial court. Thus, under the circumstances of the present case, the District Court erroneously reversed the trial court's denial of Respondent's motion to correct the sentence imposed on the 1990 possession of cocaine conviction. The certified question should be answered in the **affirmative**, the District Court's opinion of November 14, 1990, should be **quashed**, and the trial court's denial of the 3.800 motion **affirmed.**

ARGUMENT

APPELLANT IS NOT ENTITLED TO HAVE THE TIME SERVED ON THE 1989 GRAND THEFT CHARGES CREDITED AS TIME SERVED ON THE SENTENCE RECEIVED ON THE NEW 1990 POSSESSION OF COCAINE CONVICTION, EVEN THOUGH THE TWO SENTENCES WERE TO BE SERVED CONCURRENT WITH EACH OTHER.

Relying on Daniels v. State, 491 So.2d 543 (Fla. 1986), the Fourth District Court of Appeal held that Respondent is entitled to credit on his four year sentence on the 1990 possession of cocaine conviction in Case No. 90-7458 CF 10A **equivalent to the total of time served and gain time earned** on the four year new sentence imposed on the 1989 grand theft auto conviction in Case No. 89-15883 CF 10 imposed on him May 7, 1990, as a result of the violation of probation in the 1989 case; for the simple reason that both sentences were to be served concurrently. The District Court of Appeal however did certify the following question as one of great public importance:

> DID CREDIT GRANTED FOR TIME SERVED ACCORD WITH THE HOLDING IN DANIELS V. STATE, 491 SO.2D 543 (FLA. 1986), WHEN, IN IMPOSING ON DEFENDANT CONCURRENT SENTENCE FOR VIOLATION OF PROBATION ON A PRIOR GRAND THEFT CONVICTION AND FOR COCAINE POSSESSION COMMITTED WHILE ON THAT PROBATION, THE TRIAL COURT GAVE DEFENDANT CREDIT TOWARD THE SENTENCE FOR COCAINE POSSESSION ONLY FOR TIME IN JAIL WHILE AWAITING DISPOSITION OF THAT CHARGE, WHILE ALLOWING ADDITIONALLY TOWARD THE PROBATION VIOLATION SENTENCE TIME PREVIOUSLY SERVED AS A CONDITION OF PROBATION ON THE GRAND THEFT CONVICTION?

The State submits that the certified question, should be answered in the **affirmative**. A review of the case law clearly shows that the trial court was correct in refusing, on the authority of Whitney v. State, 493 So.2d 1077 (Fla. 1st DCA 1986); and Bush v. State, 519 So.2d 1014 (Fla. 1st DCA 1987), to grant the relief as requested in the Rule 3.800 Motion. (See Exhibit D).

In Daniels the defendant was arrested on July 10, 1983, and held in jail on charges of kidnapping, burglary, and attempted sexual battery. Because he was on probation for trespassing at the time of his arrest, a warrant was issued on July 25, 1983, for violation of probation. He was eventually convicted on the three felony charges, and his probation was revoked. At sentencing, the court imposed one year's imprisonment for trespassing with credit for time served. The court then imposed sentences of twenty-two years for kidnapping, five years for burglary, and five years for attempted sexual battery, each to be served concurrently with the others and with the trespassing sentence. However, the court did not credit any time served toward the sentences for the three felony offenses. The district court of appeal reversed, holding that because the sentences were concurrent the trial court had erred in failing to credit the time served toward all of the defendant's sentences. This Court approved the district court's opinion, holding that when "a defendant receives presentence jail-time credit on a sentence that is to run *concurrently* with other sentences, those sentences must also reflect the credit for time served." 491 So.2d at 545.

A correct reading of Daniels shows that the defendant simply received credit on each sentence equivalent to the amount of presentence time actually spent in jail as a result of that particular offense. Since Daniels spent the same presentence time in jail for all three felonies, he received credit for the period of time from July 10, 1983, to sentencing against the sentences for each of them. With respect to his sentence for trespassing, Daniels received credit for any time he spent in jail prior to being put on probation plus the time he spent in jail from July 25, 1983, to sentencing. This Court's opinion in Daniels does not state whether the credit on the trespassing charge exceeded that on the three felonies or whether the felony credits were greater than the credit against the trespass. However, there is no indication that the greater credit was applied to all of the crimes. To put it another way, it does not appear that Daniels received credit against *all* sentences for the *maximum* amount of presentence time spent in jail for any *one* crime.

The First and Second District Courts of Appeal have interpreted Daniels in a manner inconsistent with the Fourth District Court of Appeal's interpretation of Daniels in the case at bar. The State submits that the facts at bar are **distinguishable** from the facts in Daniels, thus as held in Harris v. State, 557 So.2d 198 (Fla. 2d DCA 1990); Keene v. State, 500 So.2d 592 (Fla. 2d DCA 1986); State v. Smith, 525 So.2d 461 (Fla. 1st DCA 1988); Bush v. State, 519 So.2d 1014, 1016 (Fla. 1st DCA 1987), rev. denied 528 So.2d 1181 (Fla.

1988); Knight v. State, 517 So.2d 87 (Fla. 1st DCA 1987); Whitney v. State, 493 So.2d 1077 (Fla. 1st DCA 1986), rev. denied 503 So.2d 328 (Fla. 1987), Daniels does not apply to the facts at bar. Thus the trial court was correct in denying the 3.800 motion on the authority of Whitney, rejecting the Respondent's reliance on Daniels.

In Whitney, a case decided after Daniels, the defendant had been given a four and one-half year sentence for each of the four crimes to run concurrently, with respective jail time credit of 111 days, 109 days, 0 days, and 426 days. The defendant filed a motion to correct sentences on the premise that since they ran concurrently he was entitled to 426 days' credit for time served in each case. The motion was denied, and the district court of appeal affirmed. The district court distinguished Daniels by pointing out that the defendant in Whitney did not spend the same time in jail awaiting sentence on each offense because he had been arrested for each crime on different dates (February 26, March 1, and April 2, 1985). The Whitney court held that for each sentence the defendant was only entitled to credit for the same time actually served in jail on the charge for which he was being sentenced.

Agreeing with the First District, the Second District in Keene v. State, 500 So.2d at 593, held:

> To apply *Daniels* as Keene contends in this appeal would produce absurd results. Suppose a defendant is arrested for burglary and spends ninety days in jail before being found guilty. He is then placed on five years' probation with the condition that he serve 180 additional days in jail. A

> year after his release from jail he is arrested for robbery, but he bonds out immediately and remains at liberty until sentencing. Following his conviction of robbery, his probation is revoked, and he is given concurrent sentences for both crimes. If the broad interpretation of *Daniels* advanced here were to be applied, the defendant in the foregoing hypothetical would be entitled to 270 days' credit against his robbery conviction even though he had never spent a day in jail for that crime prior to sentencing.

The facts at bar are the exact facts in the hypothetical set out in Keene above. In the case at bar, Respondent **was out on probation**, after having completed the jail portion of his sentence on the 1989 grand theft conviction, **when he committed and was arrested on the possession of cocaine offense in April 4, 1990, more than two (2) months after being released on probation on the 1989 grand theft conviction.** As stated in Keene to apply the broad interpretation of Daniels Respondent suggests would be absurd. Accord, Bush, 519 So.2d at 1016. Under that interpretation, Respondent would be entitled to the time served on the grand theft conviction even though Respondent had **not** yet committed the crime of possession of cocaine when the time was served. The State maintains that is not what this Court intended by its ruling in Daniels. The fact that a defendant receives concurrent sentences on separate offenses at the same time does not mandate that the longest of the jail time credits be applied against all of the sentences, Id., at 594. This is so because, "'concurrent' does not necessarily mean 'coterminous' in the event the prisoner has 'earned' more credit-time against one sentence than against others," Harris, 557 So.2d at 199.

Another case with very similar facts to the case at bar is State v. Smith, 525 So.2d 461 (Fla. 1st DCA 1988). In Smith, the defendant pled nolo contendere to burglary of a structure and grand theft in 1985. He was placed on probation for five years with the special condition that he serve 364 days in jail. After serving the jail-time, and while still on probation, he was charged with violation of probation. One of the alleged probation violations also resulted in his being charged by information with possession of a firearm by a convicted felon. Smith entered into a plea agreement whereby he pled nolo contendere to violating probation and to attempted possession of a firearm by a convicted felon. The trial court revoked probation and imposed concurrent sentences of two and a half years' imprisonment, within the recommended range of 12-30 months under the guidelines scoresheet approved by the trial court over defense counsel's objection. At sentencing, the state contended Smith was entitled to jail-time credit on the firearm offense only for the time he spent in jail awaiting disposition of that charge. This would not include the 364 days served by Smith as a special condition of probation. The trial court, however, allowed jail-time credit of 422 days for each concurrent sentence, a figure which included the 364 days.

Agreeing with its ruling in Whitney, the Smith court reversed the jail-time credit of 364 days, holding:

> Here, since the jail-time served as a condition of probation was served before the firearm offense was charged and even before it was committed, the defendant was not entitled to have it credited to the sentence for that offense.

Based on the above and foregoing the State submits that the District Court of Appeal, Fourth District, misinterpreted this Court's holding in Daniels, and as such the opinion filed November 14, 1990, should be quashed, and the trial court's denial of Respondent's 3.800 motion affirmed on the authority of State v. Smith, 525 So.2d 461 (Fla. 1st DCA 1988); Bush v. State, 519 So.2d 1014, 1016 (Fla. 1st DCA 1987), rev. denied 528 So.2d 1181 (Fla. 1988); and Whitney v. State, 493 So.2d 1077 (Fla. 1st DCA 1986), rev. denied 503 So.2d 328 (Fla. 1987) as being the correct interpretation of Daniels under the facts and circumstances of the case at bar.

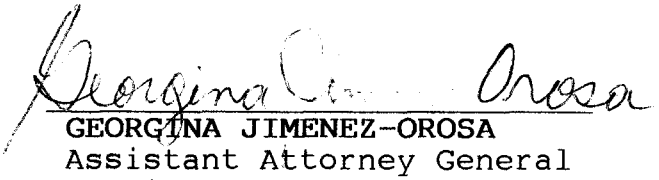
CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court answer the certified question in the **AFFIRMATIVE, QUASH** the opinion of the District Court of Appeal, Fourth District, filed November 14, 1990, and **AFFIRM** the trial court's denial of Respondent's 3.800 Motion.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

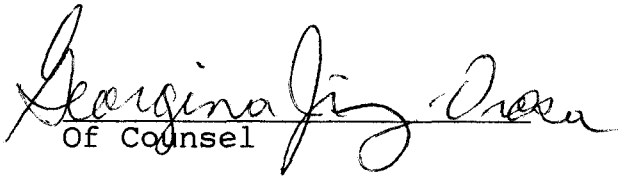
JOAN FOWLER
Bureau Chief
West Palm Beach, Florida



GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by U. S. Mail to: MICHAEL J. PERKO, RESPONDENT, PRO SE RESPONDENT, DOC No. C-050675 at Avon Park Correctional Institution, P. O. Box 1100, Avon Park, FL 33825-1100, this 1st day of March, 1991.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,324

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL PERKO,

Respondent.

APPENDIX TO

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Bureau Chief
West Palm Beach, Florida

GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510
111 Georgia Avenue
West Palm Beach, FL 33401
(407) 837-5062

Counsel for Petitioner

INDEX TO APPENDIX