IN THE FLORIDA SUPREME COURT

CASE NO: # 77, 324

STATE OF FLORIDA
PETITIONER

-vs-

MICHAEL PERKO
RESPONDENT

****
ON PETITION FOR DISCRETIONARY REVIEW FROM
DISTRICT COURT OF APPEALS FOURTH DISTRICT
STATE OF FLORIDA
****

RESPONDENT'S BRIEF ON THE MERITS

MICHAEL PERKO # 050675
RESPONDENT, PRO SE
AVON PARK CORRECTIONAL
P.O. BOX # 1100
AVON PARK, FLORIDA 33825-1100

INMATE ASSISTING RESPONDENT
JAMES MAJOR # 051559
DESOTO CORRECTIONAL INSTITUTION
P.O. DRAWER # 1072
ARCADIA, FLORIDA 33821

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent Michael J. Perko, was the appellant and the defendant in the Courts below. The Petitioner, the State of Florida, was the Appellee before the Fourth District Court of Appeals, and was the prosecution in the Trial Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In this Brief the parties will be referred to as they appear before this Court, except that the 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 motion to Correct an Illegal Sentence under Rule 3.800(a) of the Florida Rules of Criminal Procedure.

As such, and no hearing having been held on Respondent's motion there was no certified record on appeal prepared by the Circuit Court Clerk's Office, EVEN THOUGH REQUESTED BY RESPONDENFT.

The Abbreviation "EX." followed by the appropriate exhibit letter and page number will be used for the adequate reference to the exhibits attached as respondent's appendix to this brief. NOTE: the Respondent will commence his exhibits starting with the letter (h) as not to confuse respondent's exhibits with those exhibits submitted to this court by petitioner.

All Emphasis has been added by the Respondent

Standard Abbreviations may be used by Respondent.

(PBM) will refer to Petitioner's brief on the merits followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the case and facts with one exception. The respondent would clarify for this Court that the Negotiations below called for the imposition of concurrent sentences with Credit For All Time Served, as explained to the respondent as the defendant below. The Respondent was never explained that various applications of Sec. 921.161(1) Fla. Stat. would produce different effects upon the sentence(s) he would be receiving, but rather the respondent was of A Bona-Fide belief that "Credit for all time Served" was language consistent with a reduction in term equal to the total time served in County Jail and Prison, as well as the Gaintime accrued, prior to the imposition of final sentence below.

The Respondent will further emphasize this point in his argument.

SUMMARY OF ARGUMENT

The Respondent's contention is that a Criminal Defendant, as a matter of substantive law, is entitled towards the reduction of his or her "Overall cumulative sentence", under Sec. 921.161(1) Fla. Stat., A credit equal to one day off sentence for each day time, or the functional equivalent thereof, served incarcerated prior to the imposition of the "Overall Cumulative Final sentence".

Moreover, where the "Overall Cumulative Sentence" imposed against a defendant at Final sentencing, is the product of various concurrent, consecutive, and/or concurrent and consecutive, terms of incarceration. The application of Sec. 921.161(1) Fla. Stat., Utilized by the trial court in granting credit, must be such that the effect thereof is consistent with legislative intent, to the degree that the application produces an Actual Reduction of the "Overall Cumulative Sentence" Equal to the amount of credit granted as determined by all actual time, or the functional eqivalent thereof accrued, prior to the imposition of final sentence, and as relative to any and all periods of incarceration served sister to the offenses before the trial court.

Finally the Respondent contends that of the many holdings rendered throughout Florida Courts, as to various applications of Sec. 921.161(1) Fla. Stat. (Post 1973), only two basic views provide an application consistent with legislative intent as determined by the procedural history of Sec. 921.161(1) Fla. Stat., and consistent with the clear language of Statute. Those being the Holdings rendered in MILLER-vs-STATE, 297 So.2d 36 (Fla. 1st DCA 1974) and DANIELS-vs-STATE, 491 So.2d 543 (Fla. 1986). Whereas other holdings, specifically those petitioner

today relies upon, amount to Dictum which does Not control, and which utterly fail to afford Lay Defendants those protections of law guaranteed each citizen under the Constitution of the United States and Florida Constitutions.

Accordingly the Respondent will argue that this Honorable Court should answer the question certified to this court as PERKO-vs-STATE 16 FLW (d) 194 (January 16, 1991) in the NEGATIVE.

ARGUMENT

Whether Appellant is 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, where the two sentences were to be served concurrently, one with the other?

The Respondent argues that the matter before this honorable court today, reaches constitutional dimensions; where the "Overall cumulative Sentence" imposed against the Respondent below, is the product of a negotiated Plea which called for the respondent to waive specific protected rights, in exhanged for various concurrent sentences with "Credit for all time Served."

And where the consequences of the negotiated plea were inconsistent with the Respondent's understanding, which was determinded by the clear language of the negotiations as explained to the respondent, prior to entering into said negotiations with the State.

The Respondent agrees that the questions to be answered by this Court today, are of Great Public Importance; in that the respondent is certain BEYOND ALL DOUBT, that he is Not the sole entity adversely effected by the Far to Many applications of Sec. 921.161(1) Fla. Stat., utilized by Florida Courts throughout the State.

The Respondent can attest, that literally hundreds of Florida Prison Inmates, presently serving prison terms within the State's Correctional system, Bargained for concurrent sentences with "Credit for all time served" only to later realize that "Credit for All time served" by No means necessitates an actual reduction in term consistent with one day off the "Overall Cumulative Sentence" for each day credit granted at final sentencing. Quite the contrary, and far to often, does a defendant find themself in a situation such as that of the Respondent's, where afforded a Deal of concurrent sentences with "Credit for all time previously served", the particular defendant searches his or her mind and recollection, to determine the remainder of time to be served after deducting credit for the actual days, the particular defendant specifically recalls serving within the confines of an institution. To, consistent with a common understandning of words, realize that after deductions aforementioned, not all that much time remains.

Accordingly, and in the premises of such an understanding, the particular defendant, as did the respondent, yields specific protected rights in exchange for the consequences of negotiations, which later prove to be Inconsistent with the common understanding of words. And where such as in the case at Bar, "credit for all time served" results in a reduction in the overall term, equal to only 34 of the 231 days the Respondent served incarcerated and without consideration of the gaintime previously accrued during that incarceration.

The Respondent finds this matter to be far more reaching than the petitioner concludes in her petitioner's brief on the merits. Moreover, the respondent finds the petitioner's argument to consist of many mis-stated facts. However, prior to respondent addressing specifically each of the petitioner's statements. The respondent finds need to address the history of Sec. 921.161(1) Fla. Stat.

Prior to 1973 the granting of credit for time served before sentence, was a matter of Judicial discretion solely within the providence of the Trial Court, and the Judge imposing "Sentence" was free to grant towards the reduction of that "Sentence" credit for all or part of the time served before sentence.

Sec. 921.161(1) Fla. Stat. (Pre 1973) Read Inter Alia;

> "The Judge imposing a sentence may allow a defendant credit for all or part of the time he spent in county jail before sentence."

(See Wests F.S.A. & 921.161(1) (Pre 1973).

However, in 1973 the Florida Legislature amended Sec. 921.161(1) Fla. Stat. to the effect that credit for time served prior to the imposition of final sentence, and the granting thereof by the trial court, was Mandatory, See, Williams-vs-State, 310 So2d 53 at 54 (Fla. 2d DCA 1975).

The 1973 amendment was an amendment Not merely procedural, but rather the effect was a matter of substantive law See: NORTH CAROLINA-vs-PEARCE, 395 U.S. 711, 718-19 N.13 ; 89 S.CT. 2072, 2077 N.13; 23 Led.2d 656 1969. Accordingly Sec. 921.161(1) Fla. Stat. subsequent the laws encompassed therein chapter 73-71 Sec. 1 of the Florida laws Read Inter Alia;

"the Court imposing a sentence Shall allow a defendant credit for All of the time he spent in County Jail before sentence.".

(See: Wests F.S.A. & 921.161(1) (Post 1973).

AS to applying this section of law to a sentence which incorporates various consecutive terms of incarceration, initially there were some misunderstandings as to a proper application. However, in 1974 the first District Court somewhat clarified that a Defendant "is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting dispositon of multiple charges "See: Miller-vs-State, 297 So.2d 36 (Fla. 1st DCA 1974). Pyramiding being to allow the full amount of credit towards each of various consecutive terms of imprisonment.

The Holding in Miller Supra being consistent with legislative intent when amending Sec. 921.161(1) Fla. Stat. in 1973.

For example if a defendant was arrested for two offenses, waited in jail for one hundred (100) days, and was sentenced to serve a sentence which consisted of two consecutive five (5) year terms of imprisonment. The defendant would Not be entitled to have his jail credit pyramided; that is the defendant would Not be entitled to one hundred (100) days credit, applied to each of the two consecutive sentences. Such an application of Sec. 921.161(1) Fla. Stat. would be absurd and would produce a reduction in the overall cumulative sentence equal to two hundred (200) days, whereas, the defendant would have served only one hundred (100) days on All charges prior to the

imposition of final sentence.

As applying Sec. 921.161(1) Fla. Stat., to a sentence which incorporates various concurrent terms of incarceration. The matter of which application was proper, was misunderstood for some thirteen (13) years prior to this Court's Holding in DANIELS-vs-STATE, 491 So.2d 543 (Fla. 1986). The countless number of decisions rendered throughout the five (5) District Courts of Appeals, as to which application of Sec. 921.161(1) Fla. Stat. is proper in the case of the imposition of concurrent Sentences, are far to many to mention each. Accordingly the Respondent will mention only those holdings which Prima Facie establish that the Law encompassed therein DANIELS SUPRA, is Substantive Law which Must Strictly Control in All Cases which incorporate concurrent terms of incarceration.

Respondent contends that any application of Sec. 921.161(1) Fla. Stat., in the Case of concurrent terms of incarceration, other than that set forth in DANIELS SUPRA, would render Meaningless the legislative directives of Sec. 921.161(1) Fla. Stat., that a Defendant receive credit for all time served before the imposition of final sentence.

In 1973 this Court was faced with deciding an issue that was related to the granting of pre-sentence jail credit as applied to concurrent sentences.

In JENKINS-vs-WAINWRIGHT, 285 So.2d 5 (Fla. 1973). The Trial Judge granted Jenkins pre-sentence jail credit under 921.161(1) F.S. in the amount of 304 days. However, the actual sentencing papers reflected that this 304 day credit was expressly granted to only

one of the concurrent sentences that was imposed against Jenkins. Accordingly the trial Court's granting of crecit was in effect meaningless; In that the Florida Department of Corrections (DOC) after receiving Jenkins into its Custody, reduced each of Jenkins terms of incarceration by the credit expressly granted by the Trial Judge as to each specific term of incarceration MILES-vs-STATE, 214 So.2d 101 (Fla. App. 2 DCA 1968).

Accordingly, the (DOC) reduced the term of incarceration which showed the 304 days, however, the term that reflected no credit, was not reduced at all.

Jenkins brought this matter before this Court with the contention that the granting one sentence the credit and not the other, would be meaningless and illogical. Because at the time of the imposition of sentence in Jenkins Supra, the granting of credit was a matter of discretion, this Court was faced with determining what the Trial Judge's intention was.

This Court had to reason that the Trial Judge did not intend to effectuate a meaningless act when granting credit. Accordingly This Court ordered that Jenkins be granted the Full amount of credit Cross Applied to all concurrent sentences, thus effectuating the intention of the trial Judge when imposing Jenkins sentences.

In 1973 the Legislature did amend Section 921.161(1) F.S. to the effect that the aforementioned amendent does reflect the INTENT of legislature to grant a defendant credit for all time served prior to the imposition of final sentence.

In 1986 this Court was faced with deciding direct conflict between two basic views as related to the granting of credit under Section 921.161(1) F.S., and how that section should apply to concurrent sentences. This Court on review of DANIELS-vs-STATE, 477 So.2d 1 (Fla. App. 4 DCA 1985) took the controlling case authority from each of the five (5) Districts Courts of Appeals throughout Florida to form two (2) basic views. The first basic view on the application of section 921.161(1) F.S. was founded by the Third and Fifth District Court of Appeals.

In SHEPARD-vs-STATE, 459 So.2d 460 (Fla. App. 3 DCA 1984), and also GREEN-vs-STATE, 450 So.2d 1275 (Fla. App. 5 DCA 1984). The third and fifth District Court of Appeals views were such that those courts believed that pre-sentence jail credit could be allocated to two or more concurrent sentences in any manner that the trial court saw fit so long as the full amount of credit was granted See: SHEPARD SUPRA at 461 (1-2).

The Fifth District Court in GREEN SUPRA cited as controlling, their opinion cited as AMLOTTE-vs-STATE, 435 So.2d 249 (Fla. App. 5 DCA 1983). In AMLOTTE SUPRA that court stated that no where in Section 921.161(1) F.S. does it even remotely suggest that in the Case of concurrent sentences, the full amount of pre-sentence jail credit must be cross applied to all concurrent sentences. See: GREEN SUPRA at 1277 (2).

The second basic view was that held by the first, second, and fourth District Courts of Appeals in VASQUEZ-vs-STATE, 478 So.2d 76 (Fla. App. 1 DCA 1985), KINNEY-vs-STATE, 458 S0.2d 1191 (Fla. App. 2 DCA 1984), and also DANIELS-vs-STATE, 477 So.2d 1 (Fla. App. 4 DCA

1985). the view held by those courts basically stated that in the case of concurrent sentences the full amount of jail credit MUST be CROSS APPLIED to all concurrent sentences. This Court when deciding the aforementioned direct conflict was faced with approving an application of Section 921.161(1) F.S. that was consistent with LEGISLATIVE INTENT when amending this section of law in 1973.

It is a fundamental rule of construction that LEGISLATIVE INTENT must be ascertained and effectuated. Moreover, where two or more interpretations can reasonalbly be given a Statute, the one that will SUSTAIN ITS VALIDITY should be given and Not the one that will destroy the purpose of Statute. See Case: City Of St. Petersburg -vs-Siebold, 48 So.2d 291 (Fla. 1950) at 293-294, (4-7).

Moreover, this Court when considering this issue of law looked to such provisions of law as that encompassed therein Section 775.021(1) F.S.; wherein the same it reads INTER ALIA:

> 'THE PROVISIONS OF THIS CODE AND OFFENSES DEFINED BY OTHER STATUTES SHALL BE STRICTLY CONSTRUED: WHEN THE LANGUAGE IS SUSCEPTIBLE OF DIFFERING CONSTRUCTIONS, IT SHALL BE CONSTRUED MOST FAVORABILY TO THE ACCUSED!

SEE: Section 775.021(1) F.S. (1989)

In deciding direct conflict, this Court disapproved the view held by the Third and Fifth District Courts of Appeals which was founded in both SHEPARD SUPRA and GREEN SUPRA, and approved the view held by the first, second, and Fourth District Courts of Appeals of Florida, which was founded in Cases VASQUEZ SUPRA, KINNEY SUPRA, and DANIELS SUPRA.

Accordingly the controlling position as relative to the proper application of Section 921.161(1) F.S. when concurrent sentences are involved is found in DANIELS-vs-STATE, 491 So.2d 543 (Fla. 1986). at 545(3), and is such that this Court has RIGHTLY stated that in the case of concurrent sentences, the FULL amount of pre-sentence jail credit for timed served must be CROSS APPLIED to All concurrent sentences.

The Honorable Justice Mr Ben Overton when speaking on behalf of this Court did state INTER ALIA:

> WHEN DEFENDANT RECEIVES JAIL CREDIT UNDER 921.161(1) ON A SENTENCE THAT IS TO RUN CONCURRENT WITH OTHER SENTENCES, THOSE SENTENCES MUST ALSO REFLECT THAT CREDIT.

SEE: DANIELS-vs-STATE, 491 So.2d 543 (Fla. 1986) at 545 (1-2).

In a subsequent opinion this Court reaffirmed its position as relative to the proper application of Section 921.161(1) F.S. where this court answered the below certified question as being a question of great public importance;

> "IN CREDITING JAIL TIME SERVED ON CONCURRENT SENTENCES, MUST TIME SERVED BE APPLIED IN FULL TO EACH CONCURRENT SENTENCE?"

"Again this court said YES".

SEE: WALLACE-vs-STATE, 495 So.2d 165 (Fla. 1986), at 166.

This is RIGHTLY so in that ONLY this application of Section 921.161(1) F.S. creates an EFFECT tantamount to a reduction in term equal to one day Off an individuals overall cumulative sentence, for each day credit time served, granted at final sentencing.

However, various District Courts of Appeals throughout Florida have yet failed to understand fully, the premises of Daniels Supra; and accordingly these courts attempt to take exception to the DANIELS SUPRA application.

In this attempt such opinions have been formed as YOHN-vs-STATE, 461 So.2d 263 (Fla. App. 2 DCA 1984); LETTLE-vs-STATE, 519 So.2d 1139 (Fla. App. 2 DCA 1988); KEENE-vs-STATE, 500 So.2d 592 (Fla. App. 2 DCA 1986); TYNER-vs-STATE,508 So.2d 565 (Fla. App. 2 DCA 1987); WHITNEY-vs-STATE, 493 So.2d 1077 (Fla. App. 1 DCA 1986), and also (BUSH-vs-STATE), 519 So.2d 1014 (Fla. App. 1 DCA 1987). However, appellant would note that these opinions and others like them are UNSOUND.

First, ALL of these opinions which attempt to take exception to the Daniels Supra application cite Yohn Supra as authority. Yohn Supra is founded in and cites as authority both Shepard Supra and Green Supra.

As appellant has Prima Facie shown, both Shepard Supra and Green Supra were disapproved by this Court when deciding direct conflict in Daniels Supra. SEE: DANIELS-vs-STATE, 491 So.2d 543 (Fla. 1986) at 544. Therefore, the PRINCIPLE of YOHN SUPRA has no foundation upon which to stand; In that it Must be accepted that this Court understood what it was doing when the court disapproved the view founded in Shepard Supra and Green Supra.

Respondents position is such that those Courts that presently attempt to take exception to Daniels Supra, do so because they have failed to fully understand the premises of Daniels Supra.

Respondent's agrees that at First Appearance it would seem illogical to grant credit for time served to a concurrent sentence for an offense that was committed subsequent the time being served. Nevertheless, Thats exactly what took place in the Daniels case. For Only this application of Section 921.161(1) F.S. produces an EFFECT tantamount to a one (1) day reduction in overall sentence, for each day credit granted at final sentencing, as to concurrent sentences. In Daniels Supra the defendant originally was arrested for tresspassing and he remained in the county jail a certain number of days prior to being placed on probation. This period of incarceration as being period (A), thereafter Daniels was released.

While free on probation Daniels committed various crimes. Namely, Kidnapping, Burglary, and Attempted Sexual Battery. Daniels was arrested for the new offenses on July 10, 1983, He then remained incarcerated in county jail until final sentencing on All charges. Namely, Tresspassing, Kidnapping, Burglary, and Attempted Sexual Battery. This latter incarceration as being period (B).

The trial Judge when sentencing Daniels added together both periods of pre-sentence incarceration, that is periods (A)&(B), to reflect one overall period of pre-sentence jail credit, which the judge granted only to the tresspassing sentence even though All sentences were imposed concurrent one with the other. SEE: (DANIELS I) 477 So.2d 1 (1985).

The Fourth District Court on review stated that the trial Court ERRED by failing to CROSS APPLY this overall credit to ALL sentences in that the sentences were imposed concurrent with each other. This Court on review agreed with this application of

Section 921.161(1) F.S. in the case of concurrent sentences. SEE: DANIELS-vs-STATE, 491 So.2d 543 (Fla. 1986).

At first appearance it would seem illogical to grant Daniels on the concurrent sentence of the kidnapping, Burglary, and Attempted Sexual Battery credit for the incarceration related to period (A); in that Daniels served that time before the commission of the new offenses. However, Not to do so, that is Not to CROSS APPLY the Full amount of pre-sentence jail credit to All concurrent sentences would in EFFECT allow Daniels a reduction in his overall sentence equal to Only that period of pre-sentence incarceration reflected by period (B) and therefore Daniels would be denied in Effect that portion of pre-sentence incarceration relative to period (A).

The petitioner in her brief on the merits,, mis-states the facts of Daniels to this court. The petitioner at (PBM-8) States INTER ALIA:

> "A CORRECT READING OF DANIELS SHOWS THAT THE DEFENDANT SIMPLY RECEIVED CREDIT ON EACH SENTENCE EQUIVALENT TO THE AMOUNT OF PRE-SENTENCE TIME ACTUALLY SPENT IN JAIL AS A RESULT OF THAT PARTICULAR OFFENSES, SINCE DANIELS SPENT THE SAME PRE-SENTENCE TIME IN JAIL FOR ALL THREE FELONIES, HE RECEIVED CREDIT FOR THE PERIOD OF TIME FROM JULY 10, 1983, TO SENTENCING. AGAINST THE SENTENCE FOR TRESSPASSING, 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".

THE aforegoing statement by petitioner is errorneous, in that the above are Not the facts in Daniels Supra. Nevertheless, the petitioner does Not stop there. Again at (PBM-8) petitoner states INTER ALIA:

> "THIS COURT'S OPINION IN DANIELS DOES NOT STATE WHETHER THE CREDIT ON THE TRESSPASSING CHARGED EXCEEDED THAT ON THE THREE FELONIES OR WHETHER THE FELONY CREDITS WERE GREATER THAN THE CREDIT AGAINST THE TRESSPASSING. 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 AGAINST ALL SENTENCES FOR THE MAXIMUM AMOUNT OF PRE-SENTENCE TIME SPENT IN JAIL FOR ANY ONE CRIME:

What is apparent is that the petitioner has failed in her studies. The indication the petitioner states does not exist in this courts opinion in Daniels Supra, are the facts of the Daniels case as set forth in the District court of Appeals, Fourth District, opinion cited as DANIELS-vs-STATE, 477 So.2d 1 (Fla. 4 DCA 1985).

The Fourth District Court in (Daniels I) stated INTER ALIA:

> "THE TRIAL COURT REVOKED DANIELS PROBATION #82-11172 AND IMPOSED ONE YEAR. THE COURT UNDER 921.161(1) FLA. STAT. ALLOWED DANIELS CREDIT FOR THE TIME ALREADAY SERVED ON THAT PARTICULAR CASE (TRESSPASSING), PLUS CREDIT FOR THE TIME (DANIELS) HAD SERVED IN JAIL AWAITING TRIAL IN THE INSTANT CASE (THE NEW OFFENSES).

The error was that the full Credit aforementioned, was Not Cross Applied to all concurrent sentences. The District Court reversed and remanded with instructions to apply the full credit to all concurrent sentences, for not to do so effectively denied Daniels an actual reduction in his overall cumulative sentence equal to one day off for each day of incarceration served prior to the imposition of final sentence. The fourth district cited to

KINNEY-vs-STATE, 458 So.2d 1191 (Fla. 2d DCA 1984); MARTIN-vs-STATE, 452 So.2d 938 (Fla. 2d DCA 1984) and BLACKWELL-vs-STATE, 449 So.2d 1296 (Fla. 2d DCA 1984) CONTRA SHEPARD-vs-STATE, 459 So.2d 460 (Fla. 3d DCA 1984).

The respondent would Note that the second District Court in MARTIN SUPRAM Quoting MILLER SUPRA, took exception to Miller in cases where "sentence" incorporated concurrent terms of incarceration. The exception was that in the case of concurrent sentences, a defendant was entitled to have his or her jail credit PYRAMIDED. For only such an application will produce an actual reduction in overall sentence equal to the amount of time served incarcerated prior to final sentence. The respondent contends that such an application is consistent with legislative intent, and constitutionally required under NORTH CAROLINA-vs-PEARCE, SUPRA.

When a defendant remains incarcerated on multiple charges, often the SENTENCE imposed against him or her, is series of concurrent, consecutive, or concurrent and consecutive terms of incarceration.

Simply put the OVERALL PRONOUNCMENT OF THE COURT CONSTITUTES the term "SENTENCE", be that sentence a single term of incarceration or various terms of incarceration imposed concurrent, consecutive, or concurrent and consecutive,

As a matter of law, a defendant is entitled to an application of section 921.161(1) F.S. that will produce an EFFECT tantamount to one day OFF a defendant's overall cumulative sentence for each day credit granted at final sentencing. (EMPHASIS ADDED).

A defendant is entitled to No more of a reduction, nor is the defendant required to suffer any less a reduction in term under section 921.161(1) F.S. (EMPHASIS ADDED).

In the case of concurrent sentences only the Daniels Supra application of section 921.161(1) F.S. will produce an EFFECT tantamount to a proper reduction of overall sentence. The principle found in Yohn Supra, which gives life to what the state today relies upon, is rooted in both Shepard Supra and Green Supra; the same is an application of section 921.161(1) F.S. that is to the EFFECTIVE DENIEL of some portion of credit.

It is a fundamental truth, that when a defendant is offered a PLEA BARGAIN which incorporates CREDIT FOR ALL TIME SERVED, that credit MUST be to the EFFECT OF AN ACTUAL REDUCTION IN OVERALL TERM or the defendant has NOT been graced with a bargain at all, quite the contrary, when a defendant who is lay as to applications of law is told that he or she may enter into negotiations which call for a plea in exchange for various concurrent sentences with CREDIT FOR ALL TIME SERVED. That credit for time sered must be to the EFFECT THAT IS CONSISTENT WITH THE INDIVIDUAL DEFENDANT'S BELIEF THAT THE CREDIT WILL PRODUCE AN ACTUAL REDUCTION IN SENTENCE EQUAL TO THE CREDIT BEING GRANTED, or the defendant has been mislead and coerced into accepting a plea that is adverse to his or her best interests.

A defendant that sits in open Court to hear a Judge pronounce "CREDIT FOR ALL TIME SERVED" believes whole heartedly that such credit will in fact produce an actual reduction in their overall sentence equal to one day OFF that sentence for each day that

individual spent incarcerated prior to the imposition of final sentence.

Accordingly the Daniels application of Section 921.161(1) F.S. is substantive law which Must be followed by all Florida Courts. In that there is NO EXCEPTION to this application of section 921.161(1) F.S.

In the case where "SENTENCE" constitutes consecutive terms of imprisonment, it has been held that a defendant is NOT entitled to have their jail credit PYRAMIDED (That is a defendant is Not entitled to credit on each consecutive term) In that to do so would in EFFECT produce a reduction in overall sentence by more than one day OFF for each day the defendant spent incarcerated prior to the imposition of final sentence. SEE: MARTIN-vs-STATE, 452 So.2d 938, at 938 & 939 (Quoting MILLER-vs-STATE, 297 So.2d 36, at 38 (Fla. App. 1 DCA 1974).

Therefore we see a WORKABLE APPLICATION of section 921.161(1) F.S. in Daniels Supra; That is that in those cases where sentence incorporates various concurrent terms of incarceration, it is proper for a Trial Judge to add all consecutive periods of pre-sentence incarceration together to reflect one overall cumulative credit for time served; and to then CROSS APPLY this overall credit to ALL CONCURRENT SENTENCES thereby producing an EFFECT tantamount to an actual reduction in overall cumulative sentence which is equal to one day OFF sentence for each day served prior to final sentencing.

We see another WORKABLE APPLICATION of section 921.161(1)F.S. in Miller Supra. That is that in those cases where sentence

constitutes various consecutive terms of incarceration, a defendant is entitled to credit on only one of those terms of incarceration thereby producing an EFFECT tantamount to an actual reduction in overall cumulative sentence which is equal to one day OFF sentence for each day served prior to the imposition of final sentence.

Today the Petitioner relies upon WHITHEY-VS-STATE, 493 So.2d 1077 (Fla. 1st DCA 1986) and Bush-vs-State, 519 So.2d 1014 (Fla. 1st DCA 1987). and argues that based on the authority thereof, this Court should answer the certified question before this court cited as PERKO-vs-STATE, 16 FLW (D) 194 (January 16, 1991) in the AFFIRMATIVE: the petitioner further sets before this court various case analogies in the state attempts to either put to rest the holding in Daniels Supra, or alternatively to authorizes an exception to the application of 921.161(1) Fla. Stat. founded in Daniels Supra. The respondent contends that the authority the state relies upon, amounts to nothing more than Dictum in light of the Substantive Law encompassed in Daniels Supra. In the case of concurrent terms of imprisonment Only the Daniels application produces and effect, consistent with legislative intent, and Only the application in Daniels protects the lay defendant at sentencing, where the result of granting "Credit for all time served", amounts to an actual reduction in term each to one day off the "overall cumulative-sentence" for each day credit granted at final sentencing.

The application of 921.161(1) Fla. Stat. expressed in the cases cited by the petitioner, results in the EFFECTIVE Denial of some portion of credit, in that such application do Not produce an actual reduction in SENTENCE, equal to the time served before

sentence. Thus such application are applications which produce absurd results which are inconsistent with legislative intent.

At (PBM-8) the State Submits to this Court;

> "THAT THE FACTS AT BAR ARE DISTINGUISHABLE FROM THE FACTS IN DANIELS. THUS AS HELD IN HARRIS-vs-STATE, 557 So.2d 198 (FLA. 2d DCA 1990); KEENE-vs-STATE, 500 So.2d 592 (FLA. 2d DCA 1986); STATE-vs-SMITH, 525 So.2d 461 (FLA. 1st DCA 1988); BUSH-vs-STATE 519 So.2d 1014, 1016 (Fla. 1st DCA 1987). REV. DENIED 528 So.2d 1181 (Fla. 1988); KNIGHT -vs-STATE, 517 So.2d 87 (Fla. 1st DCA 1987); WHITNEY-vs-STATE, 493 S0.2d 1077 (Fla. 1st DCA 1986) REV. DENIED 503 So.2d 328 (Fla.1987) DANIELS DOES NOT APPLY TO THE FACT AT BAR. THUS THE TRIAL COURT WAS CORRECT IN DENYING THE 3.800 MOTION ON THE AUTHORITY OF WHITNEY, REJECTING THE RESPONDENTS RELIANCE ON DANIELS.

The respondent would note that the Fourth District Court of Appeals, reversed and remanded (16 FLW(d) 2770) on November 14, 1990,. The reason for this was set forth in the opinion where the language provided "we find Merit" in the respondent's argument which was and is based upon a Total view of the matter before this court today, and which amounts to;

> "WHICH APPLICATION OF SECTION 921.161(1) FLA. STAT. PRODUCES AN ACTUAL REDUCTION IN THE OVERALL CUMULATIVE SENTENCE EQUAL TO ONE DAY OFF "SENTENCE" FOR EACH DAY SERVED BEFORE SENTENCE. IN THE CASE OF CONCURRENT TERMS OF INCARCERATION?

The Whitney Court failed to provide an application consistent with the aforegoing. The following facts Prima Facie establish that;

1). Whitney at final sentencing received a sentence which incorporated four concurrent four and one-half (4½) years term's of incarceration.

2). That prior to the imposition of final sentence Whitney served incarcerated (426) days.

3). That the Trial Court granted credits to each concurrent term, as follows (111) days, (109) days, (0) days, and (426) days.

4). That the sentence with (0) days credit was reduced by (0) days, and Whitney was Not able to realize any reduction in sentence at all, in that his release Date was (4½) years subsequent sentencing, reduced by (0) days jail credit.

5). That the Whitney application utterly failed to effectuate legislative intent, where the same is that a defendant shall receive credit for all time served, and the application rendered that directive meaningless!

What the Respondent finds remarkable, and what the Whitney Court, as well as the other courts the state relies upon, Utterly Failed to Address. Is that No Where in any case was it required or mandatory for the trial courts to impose the concurrent sentences they did. The trial court in Whitney was free to determine another punishment for Whitney's criminal activity other than the imposition of four concurrent four and one-half (4½) year sentences, ie. As to the sentence which Whitney had served (426) days already on, the trial court could have imposed a sentence of (426) days thereby terminating that sentence so that neither it, nor the 'Credit for time served' would be a factor incorporated into the new sentence imposed; or Whitney could have waived his credit time served PRANGLER-vs-STATE, 470 So.2d 105 (Fla. 2d DCA 1985). the court could have imposed concurrent sentences in the remainder of the cases with

credit consistent with Daniels, and both the Trial Court's intention as well as the legislative Mandate of 921.161(1) Fla. Stat. would have been met.

The petitioner in all the analogies she puts before the court, utilizes language which purports to establish as fact, that the trial courts, in the cases relied upon by the state, were in a position where No Other Sanction Was Possible. This would be and is ludicrous!

Florida Legislature has provided a spectrum of alternatives under 921.187 Fla. Stat. it is incumbent upon the trial court's to excercise creativity when determining the sentence to be imposed against any particular defendant. Moreover, it is Substantive that the sentence imposed at final sentenceng utilizes an application of section 921.161(1) Fla. Stat., that produces an effect consistent with what any particular defendant is lead to beleive "Credit for all time served" means, as determined by legislative intent.

The Whitney Court refers to Dates of Arrests as determined by the service of warrants against Whitney. This information was utilized by the Trial Court to determine how much time Whitney served in Each Case before final sentence was imposed.

The Respondent returns this Court to the analogy the respondent put before this court previously in this brief. Consistent with Whitney. Lets assume a defendant is arrested and charged with a single offense relative to a specific criminal act or episode. After remaining in jail for (90) days the State files a Second charge relative to the same criminal Act or episode, (10) days later

the matter is brought before the court for final disposition and pursuant to negotiation which call for the imposition of two Concurrent sentences of five (5) years with "credit for all time served", the court imposes two concurrent five(5) year sentences with "credit for all time served". When the actual sentence is reduced to writing, the defendant's concurrent sentences will produce an effect which amounts to five(5) years with an actual reduction in term of ten (10) days. In that under Whitney Supra, Harris Supra, Keene Supra, Smith Supra, Bush Supra, Knight Supra, a defendant is entitled to Only that credit for time spent incarcerated under that particular offense. This would be and is absurd where all time served before final sentence, is just that, time served before final sentence. And it is irrelevant as to if the time credit was served before the commission of another crime before the court or when the arresting Document was filed.

921.161(1) Fla. Stat. Mandates credit for time served before sentence, therefore, all time served before final sentence, must be applied to effectuate a reduction in "Overall Cumualutive Sentence" equal to the actual time served. SEE: DANIELS SUPRA for any other application renders Meaningless the legislative directive of 921.161(1) Fla. Stat. where application consistent with WHITNEY SUPRA, are to the Effective Denial of Some Portion of Credit For Time Served.

Prior to concluding this brief the respondent would note the following;

In STATE-vs-SMITH, 525 S0.2d 461 (Fla. 1st DCA 1988) that court stated INTER ALIA:

> "THE APPELLANT IN SMITH DID NOT ATTEMPT TO EXPLAIN WHY WHITNEY IS NOT CONTROLLING BUT MERELY RELIED UPON DANIELS".

The Respondent here, has Prima Facie established why Daniels Supra, must control and Whitney must be disapproved.

Whitney, through its history returns to Shepard Supra, and Green Supra, via, Yohn Supra. This authority is mere dictum where this court disapproved those holdings when deciding Daniels Supra (Daniels II).

In Harris-vs-State, 557 So.2d 198 (Fla. 2d DCA 1990) that court clearly mis-stated the facts in Daniels-vs-State, 477 So.2d 1 (Fla. 4th DCA 1985) SEE Also (EX-H) this Appendix.

Nor does the matter rest in sentences being co-terminous, certainly Daniels were Not! (Ehmphasis Added).

BUSH-vs-STATE, 519 So.2d 1014 (Fla. 1st DCA 1987) also mis-states the facts of Daniels as does the Petitioner relying upon Bush in her brief. Moreover, Bush relies upon the same dictum as does Whitney, in that Bush relies upon Whitney.

KEENE-vs-STATE,500 So.2d 592 (Fla .2d DCA 1986), that court stated INTER ALIA;

> "RECEIVING CONCURRENT SENTENCES AT THE SAME TIME DOES NOT MANDATE THAT LONGEST JAIL CREDIT BE APPLIED AGAINST ALL SENTENCES".

921.161(1) Fla. Stat. does mandate an application which produces reduction in term equal to the time served before final sentence.

Finally respondent points to the amount of gain time that he had to his credit at the time he terminated his initial incarcerated portion of the original probationary split sentence Broward County Case # 89-015883 CF-10

This Court in STATE-vs-GREEN, 547 So.2d 925 (Fla. 1989) has decided that Gain-time received on the original incarcerated portion of a probationary split sentence is the FUNCTIONAL EQUIVILENT TO TIME SERVED. Therefore, upon revocation of probation that is a part of a probationary split sentence, a defendant is entitled to that credit under 921.161(1) F.S.

Moreover, In STATE-vs-GREEN SUPRA, the court went on to express that such credit is dependant upon good behavior while incarcerated in prison, Not upon satisfactory behavior after a defendant is released from prison to begin the probation portion of the split sentence.

Because the Appellant's violation of probation was before September 1, 1990. The Court is bound by STATE-vs-GREEN IN that the subparagraph (6) of section 948.06 F.S. in effect at the time of the appellant's violation of probation states that the trial Judge can take a violaters gain time only if no law to the contrary exists. STATE-vs-GREEN, SUPRA is such a law to the contrary and accordingly the trial judge is bound by the requirements of STATE-vs-GREEN,SUPRA and the appellant is entitled to his full credits for gain time under 921.161(1) F.S. and pursuant to DANIELS SUPRA those total credits should be CROSS APPLIED TO ALL CONCURRENT SENTENCES.

The Respondent would further Note that legislature has provided another alternative for the trial court to utilize when constructing sentencing. And that is for violation of probation committed subsequent to September 1, 1990. The trial Courts are free to forfeit previously earned credits as realized during the initial incarceration.

CONCLUSION

The Respondent concludes by stating that this Court should answer the certified question cited as PERKO-vs-STATE, 16 FLW (d) 194 (January 16, 1991) in the NEGATIVE, where it is Prima Facie established in this brief, that in the case of concurrent sentences DANIEL SUPRA controls and is Not distinguishable from the facts of the case at Bar other than that the credit in question incorporates GREEN factors. Which this court has held are the functional equivalent of time spent in prison.

The Respondent further contends that this court should clarify the proper application of section 921.161(1) Fla. Stat. so that the confusion that has existed as to applying jail credits, for the past (18) years, will come to an end.

Two workable applications can be found in this brief at pages 20 & 21.

CERTIFICATES OF SERVICE

I James Major # 051559, the inmate assisting the Respondent in this cause, hereby certify that true copies of this brief were mailed to the Petitioner, Georgina Jimenez-Orosa, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida. 33401 on this 18 day of March 1991. The same action was by permission and request of respondent Michael Perko, Pro Se.

James Major

James Major # 051559
DeSoto Correctional Institution
P.O. DRAWER # 1072
Arcadia, Florida 33821

NOTARY CERTIFICATION

SWORN to and SUBSCRIBED before me the undersigned authority on this 18 day of March.

Notary Public: State of Florida

My Commission expires:

Notary Public, State of Florida
My Commission Expires March 6, 1994
Bonded Thru Troy Fain - Insurance Inc.