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FILED

IN THE SUPREME COURT OF FLORIDA

SID J. WHITE

MAY 27 1997

CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

V.

Case No. 90,358

GARY SWYCK,

Respondent.

_____ /

REBUTALL BRIEF OF RESPONDENT

[Signature]
Gary Swyck
Respondent pro se'
DC# 909823 MB# 2066
Hendry Correctional
Institution Work Camp
12551 Wainwright Drive
Immokalee, Florida
34142-9747

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STATEMENT OF THE FACTS & CASE

The respondent concurs with the attorney general's version of this case and the statement of facts and case contained within thier brief.

ARGUMENT

ISSUE I

THE SECOND DISTRICT COURT OF APPEAL
ACTED PROPERLY IN REMANDING THIS CASE
FOR RESENTENCING BECAUSE THE RESPOND-
ENT DID NOT RECEIVE THE PROPER JAIL
CREDIT RESULTING IN AN ILLEGAL SEN-
tence.

The Second District Court of Appeal ruled properly in this case by remanding it back for resentencing, as the failure of the trial court to give the respondent credit for 12 days of jail time resulted in a sentence that was both illegal and one with a structural defect.

Both the Second District Court of Appeal in McDowell V. State, 684 So.2d 250 (2nd DCA 1996) and the Third District Court of Appeal in Gonzalez V. State, 678 So.2d 433 (3rd DCA 1996) have well settled this issue stating that the improper amount of jail time credited a defendant results in an illegal sentence and as such must be reversed and remanded for resentencing with the proper credit for jail time served and making said sentence proper and legal.

The state in their response concur that the defendant in this case is entitled to the 12 days jail time credit pursuant to s. 921.161(1), Florida Statutes (1984).

Respondent further submits that since both the Third and Second district Courts of Appeal concur that 3.800(a) is the proper vehicle for this correction on jail time credit to make the sentence in this case correct and without structural defect, that this honorable court (Fla. Sup. Ct.) affirm the decision of the Second District Court of Appeal in this case since that court was the proper court of jurisdiction in this appeal.


Also, law in Florida is well settled that the courts have the authority to interpret "prisoner pro se" petitions as if the proper remedy were sought if in the interests of justice to do so, see Hall V. State, 19 Fla. L. Weekly, D837 (1st DCA 1994), Fenter V. State, 19 Fla. L. Weekly, D448-449 n.1 (2nd DCA 1994), Arnett V. State, 591 So.2d 1014 (1st DCA 1992) and Priest V. State, 483 So.2d 900 (1st DCA 1986). Justice in this case entitles the defendant to resentencing in this case and the credit for the 12 days jail time. The Second district Court of Appeal acted and ruled properly in this case and as they and the Third DCA have in the past on similar cases. The state is merely trying to grasp at straws in this appeal asking this court to deny the relief, yet while in their brief they "acknowledge" the fact that the defendant is entitled to his 12 days jail time pursuant to s. 921.161(1) Florida Statutes (1984).

The state further states in thier brief that the defendant should instead file a habeas corpus in this case. Respondent asserts this is not the case, as this correction of 12 days does not entitle him to an immediate release, a pre requisite for habeas corpus proceedings.

WHEREFORE, based on the foregoing facts and law in support, the respondent respectfully requests and prays that this honorable court will affirm and uphold the decision of the Second District Court of Appeal in this case and the relief ordered by the court and entitled the defendant pursuant to Florida Statutes and well settled case law from the Second and Third District Courts of appeal on this issue.

Dated May 22, 1997

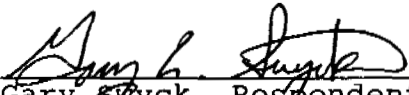
Respectfully Submitted,



Gary Swyck
Respondent pro se'
DC# 909823 MB# 2066
Hendry Correctional Inst.
work Camp
12551 Wainwright Drive
Immokalee, Florida
34142-9747

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Mr. Ronald Napolitano, AAG, 2002 N. Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607-2366 this 22nd day of May, 1997.



Gary Swyck, Respondent