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OCT 12 1998

IN THE FLORIDA SUPREME COURT

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

CLEON GREENWOOD,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA)
)
 Appellee.)
 _____)

CASE NO. 94, 142

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Cleon Greenwood, was the Defendant and Respondent, State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

The symbol "T" will denote trial.

STATEMENT OF THE CASE AND FACTS

Appellant, Cleon Greenwood, was charged by way of an information filed in the Nineteenth Judicial Circuit, in and for St. Lucie County, with Count I aggravated stalking of Debra Greenwood, a third degree felony in violation of Section 784.048(4), *Florida Statutes* (1997), and Count II, aggravated stalking of Debra Greenwood. R 4-5. Appellant went to jury trial on the two charges. He was found guilty of Count I, aggravated stalking and acquitted of Count II, aggravated stalking. R 32, T 178.

Petitioner was scored pursuant to the *Fla. R. Crim. P.* 3.703 sentencing guidelines to a "total sentence points" of 83.8 which results in a recommended guidelines sentence of 55.8 months in prison. R 37. Petitioner's recommended guideline sentence range is 69.75 maximum state prison months and 41.85 minimum state prison months. R 37, T 185.

The Trial Judge sentenced Appellant to 69.75 months in prison with credit for six (6) months time served. T 191. However, the written sentencing order failed to reflect the exact credit for time served ordered by the trial court.

Timely Notice of Appeal was filed by Petitioner to the Fourth District Court of Appeal. R 47.

The Fourth District in a written opinion, *Greenwood v. State*, 23 Fla. L. Weekly D1882 (Fla. 4th DC Aug. 12, 1998) [Appendix 2], affirmed Petitioner's conviction but refused to correct the sentencing error as to the credit for time served ruling:

"Although the written judgment of sentence does not conform to the oral pronouncement, no motion to correct the sentence was filed. See Fla. R. Crim. 3.800(b). The issue is thus not preserved for appeal. See Fla. R. Crim. P. 9.140(d); *Hyden v. State*, 23 Fla. L. Weekly D1342 (Fla. 4th DCA June 3, 1998)¹." Petitioner's motion for rehearing was denied by the Fourth District on October 6, 1998.

Timely Notice of Discretionary Review was filed by Petitioner. See Appendix 3.

¹*Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1988), question certified, Aug. 18, 1998. See Appendix 4.

SUMMARY OF ARGUMENT

This Honorable Court has the authority pursuant to Article V, Section 3 (b) (3) of the *Florida Constitution* to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this Honorable Court on the same question of law. The instant decision of the Fourth District directly and expressly conflicts with this Honorable Court decision in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998).

In addition, this Honorable Court has jurisdiction over the instant cause on the authority of *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), because the decision cited for authority by the Fourth District on the pertinent issue, *Hyden v. State*, *supra*, is presently pending before this Honorable Court, *Hyden v. State*, Case No. 93,966.

Therefore, on either ground submitted by Petitioner this Honorable Court has jurisdiction over the instant case.

ARGUMENT

THIS HONORABLE COURT HAS AUTHORITY PURSUANT TO ARTICLE V, SECTION 3(B)(3) OF THE FLORIDA CONSTITUTION (1980) TO REVIEW THIS DECISION OF A DISTRICT COURT OF APPEAL THAT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT ON THE SAME QUESTION OF LAW.

Petitioner respectfully submits that this Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).

At bar, this Court had discretionary jurisdiction over the instant case on the basis of direct and express conflict **on the same question of law** with the decision of this Court in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). See Appendix 4.

This Court in *Mancino* recently held: " A sentence which does not grant proper credit for time served is an illegal sentence which may be corrected anytime."² Further, this Court went on to

² Further, this Court explained "that a claim of credit for jail time served is cognizable in a rule 3.800 motion to the extent that court records reflect an undisputed entitlement to credit and a sentence that fails to grant such credit." *Mancino*, 714 So. 2d at 433.

rule:

As is evident from our recent holding in *Hopping*, [708 So. 2d 263] we have rejected the contention that our holding in *Davis* mandates that only those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal. Further, we agree with the observations of Judge Barkdull in the Third District's decision in *Hopping* that a sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served. A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal." As noted by the Fourth District in *Sullivan*, a prisoner who can demonstrate her entitlement to release when properly credited with time served would be entitled to relief by habeas corpus.

For these same reasons we agree with the holding of the Second District in *Mancino*. The entitlement to time served is not a disputed issue of fact in the sense that an evidentiary hearing is needed to determine whether there is such an entitlement. Hence, if the record reflects that a defendant has served time prior to sentencing on the charge for which he was tried and convicted, and a sentence that does not properly credit the defendant with time served, then that sentence may be challenged under rule 3.800 much in the way that the double jeopardy issue was raised in *Hopping*.

As noted by Judge Altenbernd in *Chojnowski*, since a defendant is entitled to credit for time served as a matter of law, "common fairness, if not due process, requires that the State concede its error and correct the sentence 'at any time.'" 705 So.2d at

918 (Altenbernd, J., concurring specially). For that reason, a prisoner should ordinarily first seek prompt administrative relief in the correction's system before going to the circuit court for relief under rule 3.800(a), mandamus or habeas corpus. Of course, the trial court and counsel for the State and the defendant should be alert to see that provision is always made in sentencing for a defendant to receive credit for all time already served.

Accordingly, we approve *Mancino*. We hold credit time issues are cognizable in a rule 3.800 motion when it is affirmatively alleged that the court records demonstrate on their face an entitlement to relief.

Id. at 433. [Emphasis Added].

JURISDICTION ON THE BASIS OF *JOLLIE V. STATE*, 405 SO. 2d 418 (FLA. 1981).

In addition, this Honorable Court has jurisdiction over the instant decision because the Fourth District cited as controlling its case, *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998), (rehearing denied question certified) which is presently pending review by this Honorable Court. *Jollie, supra*; *Walker v. State*, 682 So. 2d 555 (Fla. 1996), *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987).

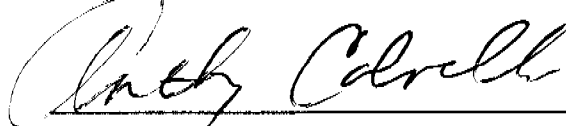
Therefore, on either ground submitted by Petitioner this Honorable Court has jurisdiction over the instant cause. Hence, this Court should grant Petitioner's petition for

discretionary review and decide this cause on the merits.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Honorable Court to accept discretionary review over the instant cause.

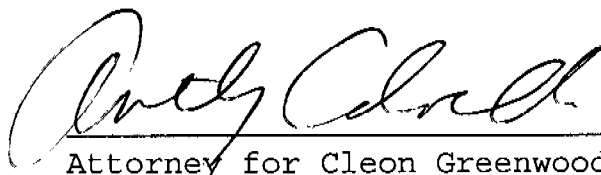
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof the Petitioner's Brief on Discretionary Jurisdiction has been furnished to Ettie Feistmann, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier this 9th day of October.



Attorney for Cleon Greenwood