

IN THE SUPREME COURT OF FLORIDA

Case No. SC20-676
Lower Tribunal Case No. 5D19-1747

MICHAEL D. SPEAR,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION FROM THE PETITIONER

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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RECEIVED, 05/22/2020 06:59:29 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

Jurisdiction. On April 17, 2020, the Fifth District Court of Appeal certified its decision to be in direct conflict with the decisions of the First and Second District Courts of Appeal and certified a question to be of great public importance. (Appendix 2, 15). On May 11, 2020, Mr. Spear timely filed a *pro se* Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court. On May 21, 2020, the undersigned counsel filed a Second Amended Notice to Invoke Discretionary Jurisdiction. This Honorable Court has jurisdiction. See Fla. R. App. P. 9.030(2)(A)(v), (vi).

Proceedings in the Trial Court. The State of Florida originally charged Mr. Spear in case number 2016-CF-039801 with Count I: Forgery, Count II: Uttering a Forged Instrument, Count III: Forgery, Count IV: Uttering a Forged Instrument, Count V: Forgery, and Count VI: Uttering a Forged Instrument. (R. 50–51.) The State also charged Mr. Spear in case number 2016-CF-047845 with Count I: False Imprisonment and Count II: Battery - Domestic Violence. (R. 321.) He entered a plea of no contest in both cases and was sentenced by the trial court. (R. 123–24, 159, 161–63, 167, 341–42, 371.)

Resentencing. On appeal, the Fifth District reversed¹ for a resentencing hearing, which was held on October 4, 2018. (R. 171–72, 376–77, 409.) In case

¹ [Spear v. State](#), 244 So. 3d 421 (Fla. 5th DCA 2018).

number -039801, the trial court sentenced Mr. Spear to five years' imprisonment on Counts I–V to run consecutive with each count and a five-year term of imprisonment on Count VI to run concurrent with all counts. (R. 198–99, 224, 412, 413.) Mr. Spear received 686 days credit for time served, which applied to each count. (R. 200–01, 417.) In case number -047845, the trial court sentenced Mr. Spear to a five-year term of imprisonment to run concurrent with any other active sentence, 364 days in jail with credit for 364 days on Count II, and sixty days in jail with sixty days credit for time served on the failure to appear charge. (R. 225, 229, 389, 390, 413, 417.) Mr. Spear received 932 days credit for time served on Count I. (R. 225, 229, 390, 413, 417.)

Modification of Credit for Time Served. On April 2, 2019, the Fifth District affirmed.² (R. 215, 403.) On December 7, 2018, the Florida Department of Corrections (“DOC”) wrote the sentencing judge a letter to review the credit for time served. (R. 219, 407.) The DOC informed the trial court that Mr. Spear received a “repeated benefit” in case number -039801 because the trial court applied credit to his consecutive counts. (R. 219, 407.) The DOC also informed the sentencing judge that his credit for time served in case number -047845 was miscalculated and that he was entitled to only “631 days.” (R. 219, 407.)

² [Spear v. State](#), 267 So. 3d 1029 (Fla. 5th DCA 2019).

On April 26, 2019, the sentencing judge entered an order which removed Mr. Spear's credit for time served on Counts II–V in case number -039801 and reduced his credit for time served on Count I in case number -047845 to 632 days. (R. 217–18, 256, 404–06, 436–40.) On May 6, 2019, the trial court amended the credit for time served in case number -039801 as to Count I from 686 days to 656 days. (R. 275–92.)

Appeal. Mr. Spear appealed the trial court's reduction in his credit for time served. (R. 216–18, 293–94.) The Fifth District addressed the question of “whether a trial court, on its own motion, may, at any time after a judgment and sentence becomes final, correct a ministerial error in sentencing documents that overreport the amount of jail credit and prison credit awarded to a defendant.” (Appendix 1).

Mr. Spear argued: (1) [Rule 3.801, Florida Rules of Criminal Procedure](#), was the only mechanism to to adjust jail credit and it did not authorize the trial court to *sua sponte* reduce jail credit; (2) the reduction in jail credit violated the constitutional prohibition against double jeopardy because it resulted in his punishment being increased after he began serving his sentence; and (3) the court had no legal basis to *sua sponte* modify his jail credit. (Appendix 6).

Rule 3.801. The Fifth District rejected this argument because [Rule 3.801](#) only applied to situations that involved the award of “too little jail credit[,]” the rule did not speak to nor did it preclude the correction of “improperly-awarded

excessive jail credit[,]” the plain language of the rule indicated that it did not apply to awards of prison credit; and Rule 3.800(a) was the appropriate vehicle to challenge the incorrect award of prison credit.³ (Appendix 7).

Double Jeopardy. Mr. Spear relied on [Wheeler v. State](#), 880 So. 2d 1260 (Fla. 1st DCA 2004) to support his position that rescinding jail credit after imposing it violates double jeopardy. (Appendix 8). This required the Fifth District to recede from its opinion in [Gallinat v. State](#), 941 So. 2d 1237 (Fla. 5th DCA 2006) (finding no double jeopardy violation on a similar issue) and join the First and Second Districts. (Appendix 8).

The Fifth District declined to recede from its opinion in [Gallinat](#) and rejected this argument because it “remain[ed] correct on the merits and is properly applied to the present case.” (Appendix 2, 12).

Trial Court Lacked a Legal Basis to Sua Sponte Modify Jail Credit. The Fifth District rejected this argument because the improper award of prison credit could be corrected by the court at any time under Rule 3.800(a) and a miscalculation in the amount of jail credit is a clerical error which the trial court can correct at any time. (Appendix 13, 14).

³ The Fifth District noted that the trial court “broadly labeled Spear’s time served in the resentencing documents as ‘original jail credit[.]’” and the mathematical miscalculation which gave rise to the instant appeal occurred when the deputy clerk combined jail credit and prison credit. (Appendix 7).

Certifications. The Fifth District certified the following question of great public importance to this Honorable Court:

ONCE A JUDGMENT AND SENTENCE IS FINAL, DOES A TRIAL COURT HAVE THE INHERENT AUTHORITY AT ANY TIME TO SUA SPONTE CORRECT SENTENCING DOCUMENTS THAT OVERREPORT THE AMOUNT OF JAIL TIME SERVED BY A DEFENDANT PRIOR TO SENTENCING OR THE AMOUNT OF JAIL TIME AND PRISON TIME SERVED BY A DEFENDANT PRIOR TO RESENTENCING?

(Appendix 15). The Fifth District also certified its decision to be in direct conflict with the decisions of the First and Second Districts:

Lastly, we certify conflict with the First District Court's decisions in [Cummings v. State](#), 279 So. 3d 818 (Fla. 1st DCA 2019); [Washington v. State](#), 199 So. 3d 1110 (Fla. 1st DCA 2016); and [Wheeler v. State](#), 880 So. 2d 1260 (Fla. 1st DCA 2004), and with the Second District Court's decisions in [King v. State](#), 913 So. 2d 758 (Fla. 2d DCA 2005); [Lebron v. State](#), 870 So. 2d 165 (Fla. 2d DCA 2004); [Platt v. State](#), 827 So. 2d 1064 (Fla. 2d DCA 2002); [Keene v. State](#), 826 So. 2d 327 (Fla. 2d DCA 2002); [Linton v. State](#), 702 So. 2d 236 (Fla. 2d DCA 1997); and [Gilmore v. State](#), 523 So. 2d 1244 (Fla. 2d DCA 1988).

(Appendix 2, 15).

SUMMARY OF THE ARGUMENT

This Honorable Court should accept jurisdiction because the Fifth District Court of Appeal certified its decision to be in direct conflict with the decisions of the First and Second District Courts of Appeal and certified a question to be of great public importance.

LEGAL ARGUMENT

I. THIS HONORABLE COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT COURT OF APPEAL CERTIFIED ITS DECISION TO BE IN DIRECT CONFLICT WITH THE DECISIONS OF THE FIRST AND SECOND DISTRICT COURTS OF APPEAL AND CERTIFIED A QUESTION TO BE OF GREAT PUBLIC IMPORTANCE.

Standard. This brief on jurisdiction is submitted in accordance with [Rule](#)

[9.120\(d\), Florida Rules of Appellate Procedure](#), which provides, in pertinent part:

The petitioner’s brief, limited solely to the issue of the supreme court’s jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice . . . If jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts of appeal to the supreme court), no briefs on jurisdiction shall be filed.

In the instant case, the above-mentioned rule does not require the undersigned counsel to argue certified questions of great public importance. Notwithstanding, Mr. Spear requests this Honorable Court to accept jurisdiction on the certified question. The following analysis focuses on the certification of conflicts between the First, Second, and Fifth Districts.

Applicable Rule of Law. “A trial court may not sua sponte rescind jail credit previously awarded at any time even if the initial award was improper.”

[Wheeler v. State](#), 880 So. 2d 1260, 1261 (Fla. 1st DCA 2004) (citations omitted); see also [Stang v. State](#), 24 So. 3d 566, 570 (Fla. 2d DCA 2009); [Linton v. State](#),

702 So. 2d 236, 236–37 (Fla. 2d DCA 1997). “[T]o increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution” [Wheeler](#), 880 So. 2d at 1261 (citations omitted). “[T]he rescinding of previously awarded jail credit is an enhancement of appellant’s sentence” [Id.](#) (citation omitted).

In [Wheeler](#), the First District held, “the trial court cannot rescind jail credit after imposing it. Thus, the trial court’s reduction in previously awarded jail credit illegally enhanced the appellant’s sentence and violated his double jeopardy rights.” [Wheeler](#), 880 So. 2d at 1261.

In [Cummings v. State](#), 279 So. 3d 818 (Fla. 1st DCA 2019), the First District relied on its opinion in [Wheeler](#) to hold that it was error for the trial court to sua sponte rescind jail credit previously awarded. [Id.](#) at 820 (citations omitted). The court added:

This court views the rescission of previously awarded jail credit as an increased penalty and a violation of the defendant’s rights under the Fifth Amendment of the United States Constitution. Accordingly, the question of legal entitlement to jail credit is immaterial where it has already been granted.

[Id.](#) (internal quotation marks and citations omitted).

However, the Fifth District in [Gallinat](#) disagreed with the [Wheeler](#) court, reasoning that “correcting an erroneous jail credit calculation in no way increases the sentence imposed[.]” with a few exceptions. [Id.](#) at 1239. The Fifth District

affirmed and certified conflict with the First and Second District Courts of Appeal. [Id.](#) at 1242. However, the appellant in [Gallinat](#) never appealed to this Honorable Court. (Appendix 15).

Argument. In the instant case, the Fifth District declined to recede from its opinion in [Gallinat](#) and maintained that it “remain[ed] correct on the merits and is properly applied to the present case.” However, the First and Second Districts continue to hold that a trial court may not sua sponte rescind jail credit previously awarded at any time even if the initial award was improper because it amounts to a double jeopardy violation. See [Cummings](#), 279 So. 3d at 820 (quoting another source) (“This Court has long recognized that a trial court may not sua sponte rescind jail credit previously awarded at any time even if the initial award was improper.”); [Washington](#), 199 So. 3d at 1112 (“Moreover, ‘[t]his court views the rescission of previously awarded jail credit as an increased penalty and a violation of the defendant’s rights under the Fifth Amendment of the United States Constitution[.]’ . . . Thus, we prohibit the rescission of jail credit, even when it was awarded in error.”); [Wheeler](#), 880 So. 2d at 1261 (holding that a trial court may not sua sponte rescind jail credit previously awarded at any time even if the initial award was improper because it increases the penalty in violation of double jeopardy); [King](#), 913 So. 2d at 760 (holding that the trial court erred when it rescinded the appellant’s original award of credit for time served); [Lebron](#), 870 So.

[2d at 165](#) (“[T]his court has repeatedly held that a trial court may not rescind jail credit previously awarded even if the initial award was improper.”); [Platt, 827 So. 2d at 1064–65](#) (“The trial court erred because rescission of previously awarded jail credit is a sentence enhancement that violates the prohibition against double jeopardy.”); [Keene, 826 So. 2d at 327](#) (reversing the trial court’s order that revoked the previously awarded jail credit and directing the trial court to reinstate the credit); [Linton, 702 So. 2d at 237](#) (“The trial court’s action in rescinding appellant’s previously awarded jail credit constitutes an illegal enhancement of appellant’s sentence.”); [Gilmore, 523 So. 2d at 1245](#) (“We reverse the trial court’s modification of appellant’s sentence and remand for reinstatement of the sentence pronounced on December 17, 1986.”).

Therefore, this Honorable Court should accept jurisdiction to resolve the conflicts between the First, Second, and Fifth District Courts of Appeal. See Fla. R. App. P. 9.030(2)(A)(vi).

CONCLUSION

BASED ON the foregoing facts, authorities, and arguments, Mr. Spear respectfully requests this Honorable Court to accept jurisdiction in this matter because the Fifth District Court of Appeal certified its decision to be in direct conflict with the decisions of other district courts of appeal and certified a question to be of great public importance. See Fla. R. App. P. 9.030(2)(A)(v), (vi).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I **HEREBY CERTIFY** that the font used in this brief is 14 point, proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on May 21, 2020, this document was filed electronically through The Florida Courts E-Filing Portal at <https://www.myflcourtaaccess.com> in the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and served upon the parties below in the following manners:

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