IN THE SUPREME COURT OF FLORIDA

Case No. 04-1461

Lower Tribunal No. 4D04-1180

STATE OF FLORIDA,

Petitioner,

vs.

SEAN E. CREGAN,

Respondent.

RESPONDENT=S BRIEF ON THE MERITS

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INTRODUCTION

This is an appeal from a decision of the fourth district that conflicts with a decision from the second district on the issue of whether a defendant=s motion for post conviction relief should be summarily denied when the defendant requests credit for time served in a drug treatment program.

Throughout this brief, the Petitioner, STATE OF FLORIDA, will be referred to as APetitioner@ or AState.@ The Respondent, SEAN E. CREGAN, will be referred to as ACregan.@ All references to the record on appeal will be indicated by the symbol A(R).@

Throughout this brief, all emphasis will be added by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

On December 29, 2003, Cregan filed his Amended Motion to Reduce or Modify Sentence pursuant to Florida Rule of Criminal Procedure 3.800(c). (R.1, Amendment to Motion to Reduce or Modify Sentence). Cregan sought credit for 186 days time served at Turning Point Bridge from January 14, 2003, through July 18, 2003. (R.1, Amendment to Motion to Reduce or Modify Sentence). On January 14, 2004, without holding an evidentiary hearing to determine whether Cregan=s confinement in the program met the requirements of '921.161(1), Florida Statutes, the trial court entered an order summarily denying Cregan=s Motion to Reduce or Modify Sentence pursuant to Florida Rule of Criminal Procedure 3.800(c). (R.1, Order on Defendant=s Motion to Reduce or Modify Sentence).

Thereafter, on January 17, 2004, Cregan filed a Motion to Correct Illegal Sentence Credit for Jail Time Served, pursuant to Rule 3.850, Florida Rules of Criminal Procedure. (R.1, Motion to Correct Illegal Sentence Credit for Jail Time Served). In that motion, Cregan again argued that he should receive credit for time

served at Turning Point Bridge from January 14, 2003, until July 18, 2003. In that motion, Cregan argued that Turning Point Bridge was the functional equivalent to jail time in that it was a AD.O.C@ approved program, was highly supervised, and more structured than Florida state prison work release programs. He also indicated that at all times during his confinement at Turning Point Bridge he was in custody and under the control of a State regulated facility. (R.1, Motion to Correct Illegal Sentence Credit for Jail Time Served).

The trial court, on February 11, 2004, summarily denied this motion as well. The trial court found:

In accordance with Florida Statute 921.161(1), as interpreted in *Tal-Mason v. State*, 515 So. 2d 738 (Fla. 1987), a defendant should be given credit for time served in Asecure detention@ where there was a Acomplete deprivation of liberty.@ Here, however, there was no pretrial detention order issued, and no involuntary and coercive deprivation of liberty. *See*, *Licata v. State*, 788 So. 2d 1063 (Fla. 4th DCA 2001), *Chauncey v. State*, 614 So. 2d 18 (Fla. 4th DCA 1993), and *Myers v. State*, 761 So. 2d 485 (Fla. 5th DCA 2000) (Community control is <u>not</u> Athe functional equivalent of jail.).

On March 9, 2004, Cregan sought review by the fourth district of the trial court=s Final Order Denying Defendant=s Motion for Credit for Time Served. (R.1, Notice of Appeal filed in Circuit Court).

The fourth district reversed the trial court=s summary denial of Cregan=s motion as a matter of law without affording him the right to an evidentiary hearing on the issue of whether the confinement in the drug program qualified him for credit against his subsequent sentence for violation of community control. *See, Cregan v. State*, 29 Fla. L. Weekly D1600 (Fla. 4th DCA, July 7, 2004). Further, the fourth district certified conflict to with the decisions of *Toney v. State*, 817 So. 2d 924

(Fla. 2d DCA 2002), and *Molina v. State*, 867 So. 2d 645 (Fla. 3d DCA 2004).

Petitioner served its Notice to Invoke the Discretionary Jurisdiction to the Supreme Court of Florida on July 20, 2004. In that Notice, the State sought review of the opinion of the fourth district in the case *sub judice* which conflicts with the second district decision in *Toney v. State*, 817 So. 2d 924 (Fla. 2d DCA 2002) and the third district decision in *Molina v. State*, 867 So. 2d 645 (Fla. 3d DCA 2004). (R.1, Notice to Invoke Discretionary Jurisdiction).

On August 30, 2004, this court postponed its decision on jurisdiction and ordered the parties to serve their brief on the merits. (Supreme Court of Florida, Order of August 30, 2004).

POINT ON APPEAL

WHETHER THE DISTRICT COURT WAS CORRECT IN REMANDING THIS MATTER TO THE TRIAL COURT FOR A HEARING TO DETERMINE WHETHER RESPONDENT WAS ENTITLED TO CREDIT FOR TIME SERVED WHILE CONFINED IN A DRUG REHABILITATION PROGRAM AGAINST HIS SUBSEQUENT SENTENCE FOR VIOLATION OF COMMUNITY CONTROL?

SUMMARY OF ARGUMENT

This court has jurisdiction to hear appeals where a decision of a district court Aexpressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.@ *See,* Fla. R. App. P. 9.030(2)(A)(iv). Petitioner seeks to invoke this court=s jurisdiction due to the apparent conflict among the fourth district=s decision in this case, the second district=s decision in *Toney v. State*, 817 So. 2d 924 (Fla. 2d DCA 2002), and the decision of the third district in *Molina v. State*, 867 So. 2d 645 (Fla. 3d DCA 2004).

In this case, the fourth district held that the lower court could not summarily deny a defendant=s motion for postconviction relief where the defendant requests credit for time served at a drug rehabilitation program. 29 Fla. L. Weekly D1600 (Fla. 4th DCA July 7, 2004). Accordingly, it remanded the matter back to the lower court for either an evidentiary hearing or record attachments conclusively showing no entitlement to relief. In *Toney*, the second district affirmed the denial of a motion for postconviction relief seeking credit for time served at a drug treatment facility. 817 So. 2d 924 (Fla. 2d DCA 2002). The second district held that an evidentiary hearing should never be afforded and that trial courts henceforth should summarily deny these motions without affording a defendant the opportunity for an evidentiary hearing. While the third district, in *Molina v. State*, held that the defendant was not entitled to relief in a motion to seek credit for time served in an inpatient drug treatment program, it is unclear from that opinion whether the opportunity for a hearing was allowed. 867 So. 2d 645 (Fla. 3d DCA 2004)

However, as conflict exists between the second and fourth districts on this issue, this court has jurisdiction to review this matter.

In its Brief, Petitioner contends that this court should adopt the position of the second district, as set out in *Toney*, that a drug rehabilitation center can never be found to be the functional equivalent to jail. However, Respondent urges that it would be a violation of the defendant=s right to due process of law to deny such a motion without an evidentiary hearing where there is a arguable claim for relief.

Pursuant to Florida Statute '921.161(1), a defendant is entitled to credit for time served in a Acounty jail.@ The Supreme Court in *Tal-Mason v. State*, 515 So. 2d 738 (Fla. 1987), broadened the language of '921.161(1) to allow for credit for time served in any institution Awhich is the functional equivalent of jail@ where the detention Aconstitutes a coercive deprivation of liberty and implicates significant

constitutional rights.@ *Id*. at 739-740.

Prior to its *Toney* decision, the second district had held that an evidentiary hearing was required before a court could make a determination that confinement in a drug treatment facility was the functional equivalent to jail. *See e.g., Graham v. State,* 366 So. 2d 498 (Fla. 2d DCA 1979); *Sims v. State*, 369 So. 2d 431 (Fla. 2d DCA 1979); *Smith v. State*, 615 So. 2d 712 (Fla. 2d DCA 1993); and, *Tennell v. State,* 787 So. 2d 65 (Fla. 2d DCA 2001). Other districts have also held that an evidentiary hearing is required where there is a colorable claim for postconviction relief. *See, Phillips v. State*, 816 So. 2d 1154 (Fla. 4th DCA 2002); *Rasik v. State*, 717 So. 2d 618 (Fla. 4th DCA 1998); *Kamerman v. State*, 765 So. 2d 63 (Fla. 4th DCA 2000); *Columbro v. State*, 777 So. 2d 1208 (Fla. 5th DCA 2001); *Whitehead v. State*, 677 So. 2d 40 (Fla. 4th DCA 1996); and, *Cheney v. State*, 640 So. 2d 103 (Fla. 4th DCA 1994).

Respondent urges this court to quash the opinion of the second district in *Toney,* affirm the decision of the fourth district in the case *sub judice,* and find that an evidentiary hearing should be afforded where there is a colorable claim for relief where a defendant seeks credit for time served at a drug treatment facility.

ARGUMENT, POINT ON APPEAL

I. Conflict Jurisdiction of the Supreme Court

Pursuant to Florida Rule of Appellate Procedure 9.030(2)(A)(iv), this court may review a decision of a district court that Aexpressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.@ This court=s Aconflict jurisdiction@ is conditioned upon its determination of the existence of the jurisdictional fact of conflict. *Susco Car Rental System of Fla. v. Leonard*, 112 So. 2d 832 (Fla. 1959). The conflict between the decisions must be express and direct and must appear within the four

corners of the majority decision. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986).

Here, the Petitioner seeks to invoke the discretionary jurisdiction of this court based on its argument that the district court=s decision in this case conflicts with the decisions of the second district in *Toney v. State*, 817 So. 2d 924 (Fla. 2d DCA 2002), and the third district in *Molina v. State*, 867 So. 2d 645 (Fla. 3d DCA 2004).

In *Toney v. State*, Toney sought review of the lower court=s order denying his motion for jail credit that was filed pursuant to Rules 3.800 and 3.850. In that motion, Toney argued that the residential drug treatment facility was the functional equivalent of jail as that facility was not only staffed by personnel from the Department of Corrections but Toney was also prohibited from leaving that facility. Receding from its decisions in *Hill v. State*, 754 So. 2d 788 (Fla. 2d DCA 2000), and *Hall v. State*, 784 So. 2d 1224 (Fla. 2d DCA 2001), the second district affirmed the denial of Toney=s motion and concluded as a matter of law that time spent in a residential drug treatment facility as a condition of probation or community control was never to be credited against a sentence of imprisonment. The second district observed that, under its new rule:

> [w]e are confident that our decision will benefit both the trial courts and, ultimately, the defendants who are given an opportunity to be rehabilitated during probation. *No longer will the courts be required to determine, through a hearing, the extent of postconviction time spent in a drug treatment facility to be counted against a subsequently imposed prison term*. Nor will the court=s or the defendant=s initial selection of an appropriate treatment facility be influenced by the quantity of potential jail-type credit the program

might provide.

Id. at 926. (Emphasis added).

In *Molina v. State*, 867 So. 2d 645 (Fla. 3d DCA 2004), the third district held that the defendant was not entitled to credit for time served in an inpatient drug treatment program as required as a condition of his probation although it is unclear from that decision whether the defendant had been afforded the opportunity to an evidentiary hearing.

Here, the fourth district held that the trial court erred when it summarily denied postconviction relief to the defendant without affording him an evidentiary hearing. In so holding, the fourth district relied upon *Kamerman v. State*, 765 So. 2d 63 (Fla. 4th DCA 2000). In *Kamerman*, the court reversed a trial court=s order denying a sworn motion for jail time credit and remanded the matter to either attach portions of the record conclusively showing no entitlement to relief or to hold an evidentiary hearing on the issue whether the program qualifies for jail time credit.

Clearly, conflict has arisen between the second district in *Toney* and the fourth district in this case. The intent of the second district in the publishing of its opinion in *Toney* was, as set out above, clearly to authorize the courts to summarily deny a defendant=s motion for relief as a matter of law without affording the defendant an evidentiary hearing to determine whether credit could be awarded. Direct and express conflict appears in the four corners of those opinions warranting review by this court on this issue.

II. An Evidentiary Hearing should be afforded to the Defendant

Florida Statute '921.161(1) requires that Athe court imposing a sentence shall allow a defendant credit for all of the time she or he spent in the county jail before

sentence.@ Under Florida Rule of Criminal Procedure 3.850, a defendant may file a motion seeking postconviction relief with the court to vacate, set aside or correct a sentence. Pursuant to Rule 3.850(d), Athe judge, after the answer is filed, shall determine whether an evidentiary hearing is required. If an evidentiary hearing is not required, the judge shall make appropriate disposition of the motion. If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall cause notice thereof to be served on the state attorney, determine the issues, and make findings of fact and conclusions of law with respect thereto.@

The Florida Supreme Court broadened the language of Florida Statute '921.161(1) in *Tal-Mason v. State*, 515 So. 2d 738.(Fla. 1987). There, David Tal-Mason was arrested in 1977 for first-degree murder and two counts of grand larceny and thereafter indicted. The trial court committed him to the Department of Health and Rehabilitative Services for evaluation on his competence to stand trial. He was then transferred to the forensic unit of the South Florida State Hospital. During his stay, he was found not to be competent to stand trial. Finally, in 1983, Tal-Mason was found competent to stand trial. He ultimately pled guilty to a charge of second-degree murder and was given a life sentence. Thereafter, Tal-Mason filed a Rule 3.850 motion to request credit for the time spent in the county jail prior to his hospitalization and for the time spent in the hospital for evaluation. The trial court granted Tal-Mason=s motion for credit for time served finding that Florida Statute '921.161(1) violated his equal protection and due process rights. The fourth district reversed, citing to *Pennington v. State*, 398 So. 2d 815 (Fla. 1981). In *Pennington*, this Court announced that A[h]alfway houses, rehabilitative centers, and state hospitals are not jails. Their purpose is structured rehabilitation and treatment, not incarcerationY@ *Id.* at 817. Nevertheless, this Court overturned the ruling of the fourth district in *Tal-Mason* and found that a defendant should be

given credit for time served in an institution which is the functional equivalent of jail where the detention Aconstitutes a coercive deprivation of liberty and implicates significant constitutional rights.@ *Tal-Mason* at 739-740.

In its Brief, the State cites to the *Pennington* case for the proposition that Ahalfway houses, rehabilitative centers, and state hospitals are not jails. Their purpose is structured rehabilitation, and treatment, not incarceration.@ (See, Page 4 of Petitioner=s Brief on the Merits). Petitioner also relies on the following passage in support of its contention that defendant=s motion for post-conviction relief should be summarily denied without affording the opportunity for an evidentiary hearing:

> We are aware that some courts have determined that credit for rehabilitation center confinement must be given. See, e. g., *Lock v. State*, 609 P.2d 539 (Alaska 1980); *People v. Rodgers*, 79 Cal.App.3d 26, 144 Cal.Rptr. 602 (1978); *People v. Stange*, 91 Mich.App. 596, 283 N.W.2d 806 (1979). Those jurisdictions, however, have controlling statutes that require that result. Our statute, section 921.161(1), states: "(T)he court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence" (emphasis ours). We decline to extend the statute's plain language to require that credit be given in other circumstances.

Petitioner, however, misapprehends the analysis of this court when it cited to the *Pennington* opinion in *Tal-Mason*. The Petitioner, Doretha Pennington, had sought review of the decision of the fourth district which denied credit for time served at a drug rehabilitation center where such confinement was a condition of probation. She contended that such a ruling was a denial of equal protection under the United States Constitution and violated double jeopardy under the United States and Florida Constitution. This Court found that time served in a rehabilitation

center was not required to be credited under equal protection mandates nor was a violation of double jeopardy. In its analysis, however, the court noted that the district court had failed to address whether the rehabilitation center confinement constituted a jail term that required credit. It opined that it would not extend the statute=s plain language to require that credit be given in such circumstances. In doing so, however, it did not create a bright-line rule that confinement in a rehabilitation center can never be the equivalent to incarceration as is the issue here.

The second district, in *Toney*, improperly relies upon *Tal-Mason* in establishing a bright-line rule that evidentiary hearings should never be afforded when a defendant is seeking to receive credit for time served at a drug rehabilitation facility. *Tal-Mason* properly stands for the proposition that confinement in an institution for treatment can be the equivalent of incarceration. A court should not be allowed to determine as a matter of law, based upon its own impression or belief, that rehabilitative institutions are less restrictive than jail or prison. A defendant should be granted the opportunity to establish, through an evidentiary hearing, that a drug treatment facility can be just as restrictive as incarceration. During such a hearing a defendant is afforded an opportunity to offer evidence that the confinement that he is seeking credit for constitutes the functional equivalent to jail.

The *Toney* court argues that probationary rehabilitative programs cannot be equivalent to incarceration because they are Achosen.@ However, a defendant=s option to choose to be on probation does not necessarily change the coercive character of the confinement as a condition of probation. It is the court that orders that a defendant be confined to a treatment facility as a condition of probation. And

a defendant thereafter risks still further incarceration if the order is violated.

Prior to the *Toney* decision, the second district took the position that an evidentiary hearing must be held in order to determine whether time can be credited against a defendant=s sentence. *See, Graham v. State*, 366 So. 2d 498 (Fla. 2d DCA 1979) (an allegation contained in defendant=s post conviction relief motion that he should have been given credit for time served at a rehabilitation center entitled him to an evidentiary hearing); *Sims v. State*, 369 So. 2d 431 (Fla. 2d DCA 1979) (a defendant was entitled to an evidentiary hearing to determine whether his incarceration at Florida=s Turning Point Ranch was equivalent to incarceration)[1]; *Smith v. State*, 615 So. 2d 712 (Fla. 2d DCA 1993) (a trial court has the discretion to grant jail credit for time served on community control under circumstances justifying the credit); *Tennell v. State*, 787 So. 2d 65 (Fla. 2d DCA 2001) (the second district reversed the lower court=s ruling denying defendant=s application for jail credit for time served in a drug treatment center and remanded the matter back to the lower court=s for further proceedings to determine whether the confinement was the functional equivalent of jail.).

Some district courts have generally suggested that an evidentiary hearing should be afforded where there is a question whether to credit a defendant for time served in a facility which may be deemed the equivalent to jail.

P The fourth district in *Phillips v. State*, 816 So. 2d 1154 (Fla. 4th DCA 2002), indicated that an evidentiary hearing is required to determine whether the defendant was entitled to jail credit for attending a family service program while on

[1] That court in a footnote stated, Aa defendant is incarcerated when he is confined in a governmental institution and his liberty is circumscribed to the extent that he is not free to leave without official permission.@

probation.

P The fourth district in *Rasik v. State*, 717 So. 2d 618 (Fla. 4th DCA 1998), ordered an evidentiary hearing in order to determine whether the defendant was entitled to credit for time spent at the Village South Drug and Alcohol Rehabilitation Center.

P The fourth district in *Kamerman v. State*, 765 So. 2d 63 (Fla. 4th DCA 2000) reversed and remanded the lower court with instructions that it either attach portions of the record, which conclusively shows no entitlement to relief, or order an evidentiary hearing to determine whether the program qualifies the defendant for jail time credit.

P The fifth district in *Columbro v. State*, 777 So. 2d 1208 (Fla. 5th DCA 2001), suggested that a motion for post conviction relief is a proper tool to seek credit for time served in a drug treatment program which was claimed to be coercive and restrictive as jail. *That court further held that the claim raised questions of fact which required an evidentiary hearing.*

P In *Whitehead v. State*, 677 So. 2d 40 (Fla. 4th DCA 1996), the fourth district ordered that an evidentiary hearing was required in order to determine whether a Adrug farm@ that the defendant had served time in would qualify for time served. There, the fourth district noted on the record that the sheriff operated the Adrug farm@ and the participants were more closely confined than traditional independent live-in drug programs. The court felt that an evidentiary hearing was necessary to determine whether the facility was sufficiently restrictive to be the equivalent to incarceration.

P The fourth district in *Cheney v. State*, 640 So. 2d 103 (Fla. 4th DCA

1994), has held that a drug farm program was treated as term of imprisonment for purpose of determining legality of sentence.

The second district is clearly trying to circumvent the dictates of Florida Rule of Criminal Procedure 3.850, and Florida Statute ' 921.161(1), by fashioning an inflexible rule that a defendant=s claim for credit for time served in these situations can never be granted. This tactic is in violation of the defendant=s right to due process. The courts should allow the defendant the opportunity to state his position and present evidentiary support of it in order that a court can make a reasonable decision. Judicial expediency should never be an excuse for depriving a defendant of this fundamental right.

CONCLUSION

Respondent respectfully requests that this court resolve the conflict of the districts by affirming the fourth district here, rejecting the contrary position of the second district in *Toney,* and remanding this matter to the trial court for either an evidentiary hearing on the issue of whether his time in the Turning Point Bridge program qualifies him for credit for time served or, at the minimum, requiring record attachments conclusively showing no entitlement to relief on his claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed on November 29, 2004, to MELANIE A. DALE SURBER, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401. Telephone: 561-837-5000; and Facsimile: 561-837-5099.

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CERTIFICATE OF TYPEFACE COMPLIANCE

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