IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-936

DCA NO. 3D07-482

VICTOR RIVERA

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

TABLE OF CITATIONS iii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY CONFLICTS WITH *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998); *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006), AND *Tillman v. State*, 693 So.2d 626, 628, n.2 (Fla. 2d DCA 1997). 6-11

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF COMPLIANCE 10

TABLE OF CITATIONS

Benefield v. State,
160 So. 2d 706 (Fla. 1964)..... 10

Briggs v. State,
929 So. 2d 1151 (Fla. 5th DCA 2006) 2, 6, 7, 8, 9

Fulcher v. State,
875 So. 2d 647 (Fla. 3d DCA 2004) 5, 10

Henderson v. State,
720 So. 2d 1121 (Fla. 4th DCA 1998) 1, 6, 7, 9

Hinkel v. State,
937 So. 2d 1201 (Fla. 5th DCA 2006) 1, 6, 7, 8, 9

Mancini v. State,
312 So. 2d 732 (Fla. 1975)..... 10

Reed v. State,
810 So. 2d 1025 (Fla. 2d DCA 2002) 1, 6, 7, 8, 9

Silverstein v. State,
654 So. 2d 1040 (Fla. 4th DCA 1995) 1, 6, 7, 8, 9

Tillman v. State,
693 So. 2d 626 (Fla. 2d DCA 1997) 2, 6, 7, 10, 11

Van Ellis v. State,
455 So. 2d 1065 (Fla. 1st DCA 1984).....1, 6, 7, 9

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INTRODUCTION

Petitioner, Victor Rivera, seeks discretionary review of a decision of the Third District Court of Appeal that expressly conflicts with *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998); *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA

2006); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006), and *Tillman v. State*, 693 So.2d 626, 628, n.2 (Fla. 2d DCA 1997).

The symbol "A." refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner, Victor Rivera, appealed an order denying his petition for writ of habeas corpus. (A. 2). In this petition, Mr. Rivera maintains that he is entitled to additional credit for time served, and with application of this credit, he is entitled to immediate release. (A. 2).

Mr. Rivera pled no contest to charges of attempted second degree murder and aggravated battery. (A. 2). He was sentenced to two years of community control followed by four years of probation, with the special condition that he complete the Dade County Boot Camp Program. (A. 2). Mr. Rivera was then charged with violating his probation. (A. 2). Pursuant to a negotiated plea between the parties, Mr. Rivera was sentenced to three years in prison, with the special condition that he must complete the modality program (a prison substance abuse treatment program).[1] (A. 2).

[1] The trial court, however, can only recommend that a defendant be placed in the modality program. (A. 3). The Department of Corrections makes the final

With regard to credit time served, during the plea colloquy, the trial court stated that he would receive credit for time served between the date he was taken into custody on the probation violation and the probation violation sentencing date. (A. 2). During the plea discussions, there was a discussion regarding the amount of time Mr. Rivera would serve in custody if he accepted the State's plea offer. (A. 3). The court estimated that he would be in custody approximately two and a half years, as the minimum time requirement for completing the Modality program was eighteen months. (A. 3). However, there was no mention during the plea discussions that Mr. Rivera had served an additional 732 days on the underlying charge. After Mr. Rivera accepted the plea offer, the trial court accepted the plea offer and it imposed sentence. (A. 3).

In his petition for writ of habeas corpus, Mr. Rivera claimed that he was entitled to the additional 732 days of credit for time served on the underlying charge. (A. 3). If this time were to be applied to Mr. Rivera's sentence, he would be entitled to immediate release, as his initial sentence would have expired eleven months after sentencing. (A. 3).

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decision. (A. 3). Despite the trial court's recommendation, the defendant was not admitted into the program. (A. 3).

The trial court denied the writ of habeas corpus. (A. 4). The Third District affirmed this denial on the authority of *Fulcher v. State*, 875 So. 2d 647 (Fla. 3d DCA 2004), as Mr. Rivera's claim for additional credit was inconsistent with the terms of his plea agreement. The Third District noted that the plea agreement was a downward departure, and that the trial court explained that Mr. Rivera likely would serve two and a half years. The Third District explained that Mr. Rivera accepted his plea with this understanding, and if he was awarded the additional time served he would only have been incarcerated for eleven months, "which is totally inconsistent with the time frames to which the defendant previously agreed." (A. 5).

The Third District commented that, as in *Fulcher*, "to grant the requested additional credit here would reach an absurd result by undoing the amounts of time the defendant specifically agreed to serve." (A. 5). It then noted that "although the word 'waiver' was not used, the terms of the plea agreement necessarily exclude the award of additional credit for time served." (A. 5). The Third District finally opined that the plea agreement was entered into on a mutual mistake of fact, and that the appropriate remedy is to withdraw the plea, not to apply the additional time served. (A. 5-6).

On May 15, 2007, Mr. Rivera filed a timely notice to invoke discretionary jurisdiction based on an express conflict with decisions of this Court and other District Courts of Appeal.

SUMMARY OF ARGUMENT

The Third District's decision below directly conflicts with the decisions of every other district court of appeal on the same issue in factually similar cases. *See Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998); *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006), and *Tillman v. State*, 693 So.2d 626, 628, n.2 (Fla. 2d DCA 1997).

Every other district court of appeal holds that in a probation revocation proceeding, when a trial court pronounces a sentence of a specific length with a specific amount of credit for time served, a defendant does not waive any additional credit for time served, unless the amount of the waived credit is specifically mentioned as part of the plea agreement. *See e.g. Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995). With its decision below, the Third District Court of Appeal has modified this well-established rule to add an implicit waiver exception. This implicit waiver exception is in direct and express conflict with

every other district court of appeal. This Court should exercise its jurisdiction to resolve this conflict.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY CONFLICTS WITH *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998); *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006), AND *Tillman v. State*, 693 So.2d 626, 628, n.2 (Fla. 2d DCA 1997).

In a probation revocation case, a defendant is entitled to all credit time served on the original sentence and on subsequent sentences, unless the defendant waives this credit. In a probation revocation proceeding, when a trial court pronounces a sentence of a specific length with a specific amount of credit for time served, a defendant does not waive any additional credit for time served, unless the amount of the waived credit is specifically mentioned as part of the plea agreement. *See e.g. Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995). Mr. Rivera is entitled to receive credit for all of his time served on his original sentence and on subsequent sentences, as he did not expressly and specifically waive this credit. *See Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Van Ellis v.*

State, 455 So. 2d 1065 (Fla. 1st DCA 1984); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006).

With its decision below, the Third District Court of Appeal modified this well-established rule to add an implicit waiver exception. The Third District specifically states: "although the word 'waiver' was not used, the terms of the plea agreement necessarily exclude the award of additional credit for time served." The Third District opined that this implicit waiver exception is justified as the award of additional time served "is totally inconsistent with the time frames to which the defendant previously agreed[,]" and "to grant the requested additional credit here would reach an absurd result by undoing the amounts of time the defendant specifically agreed to serve." (A. 5). This implicit waiver exception is in direct and express conflict with every other district court of appeal.

Every other district court of appeal follows the rule of law that a defendant does not waive any additional credit for time served, unless the amount of the waived credit is specifically mentioned as part of the plea agreement. In *Silverstein*, the Fourth District held: "Where a defendant's waiver of credit for time served on the incarcerative portion of a split sentence is not clearly shown on the record, it will not be presumed." 654 So. 2d at 1041 (citation omitted). In

Silverstein, the trial court sentenced the defendant on a probation violation to 364 days in jail with 127 days credit for time served since the current probation violation. *See also Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998) (written plea agreement which stated that defendant will receive credit for 3 years which he has served in jail, was not clear and specific waiver of additional time which the defendant served in prison).

The First, Second, and Fifth District's decisions are in unity with the Fourth District's holding in *Silverstein*. *See Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984) (declining to find such a waiver where the defendant did not 'voluntarily and specifically' relinquish his right to time served when he did not object to his sentence of a specific length with a specific amount of credit for time served); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002) (holding that sentence document alone, which notes that the defendant will receive 251 days stipulated credit, is not a sufficient express and specific waiver); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006) (defendant's written acknowledgement alone, that he would receive credit for 73 days served since his current probation violation, was inconclusive regarding whether defendant waived any additional credit for time served); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006) (defendant's

agreement to waive 178 days credit time served may have overlooked additional days served, if so then these days were not expressly and specifically waived).

A conflict of decisions exists because the Third District is applying a different rule of law than the other district courts of appeal in factually similar situations. *See Mancini v. State*, 312 So.2d 732 (Fla. 1975) (jurisdiction invoked by the application of a rule of law to produce a different result in a case which involves substantially the same facts as prior case); *Benefield v. State*, 160 So.2d 706 (Fla. 1964) (jurisdiction invoked when two cases involved substantially the same controlling facts and identical rules of law were applied to each in such a way as to produce opposite results).

The Third District relied on its earlier decision in *Fulcher v. State*, 875 So. 2d 647 (Fla. 3d DCA 2004) when it applied an implicit waiver exception to Mr. Rivera's application for credit for time served. *Fulcher* and the decision below, however, also directly conflict with *Tillman v. State*, 693 So.2d 626, 628, n.2 (Fla. 2d DCA 1997), on this point. In *Tillman*, the Second District's ruling that Tillman was entitled to credit for the time previously served in prison on the new sentence resulted in a determination that Tillman had already served his sentence in the case. The Second District said: "We recognize that the credit to be awarded exceeds the sentences against which it applies and will, no doubt, result in a

determination that Tillman has completed his sentence in these cases." *Id.* at 628 & n.2. Despite this finding the Second District awarded the additional credit for time served. The Second District did not apply an implicit waiver exception based on *Fulcher's* absurd result reasoning.

CONCLUSION

In light of the foregoing demonstration that the Third District Court of Appeal expressly conflicts with decisions of the other district courts of appeal, Mr. Rivera respectfully requests that this Court exercise its jurisdiction, under Article V, Section 3(b)(3), Florida Constitution, to resolve this conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Douglas J. Glaid, Attorney for the Petitioner, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this ___ day of May, 2007.

BY:_____
SHANNON P. MCKENNA
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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

BY:_____
SHANNON P. MCKENNA
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