IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-936

VICTOR RIVERA,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEWB
DIRECT CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963

Shannon Patricia McKenna
Assistant Public Defender
Florida Bar Number 0385158
Counsel for Petitioner

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INTRODUCTION

This case is before this Court on discretionary review of an express conflict of decisions between the Third District Court of Appeal's decision below and the decisions of the other district courts of appeal in *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 Petitioner, Victor Rivera, was the Appellant/Defendant in the proceedings below and the Respondent, State of Florida, was the Appellee/Plaintiff in the proceedings below. In this brief, the parties will be referred to as they stood in the lower courts, by proper name, or as Petitioner and Respondent.

The symbol "SR." will denote the supplemental record which was filed with the Third District Court of Appeal. The symbol "SSR." will denote the supplemental record which was filed with this Court simultaneously with this brief on the merits.

STATEMENT OF THE CASE AND FACTS

Mr. Rivera is currently serving a three-year prison sentence after admitting to violations of his probation. (SR. 2). In his sentence, Mr. Rivera was only given credit for time served since his November 21, 2005 arrest on the current probation violations. (SR. 3). Mr. Rivera was not credited with an additional 732 days he served in county jail since his initial arrest on the underlying charges. (SR. 3). If Mr. Rivera would receive credit for these additional 732 days, then his sentence would have expired, assuming his receipt of gain time, in November of 2006 (after serving approximately eleven months) and he would be entitled to immediate release. (SR. 3, 18-33).

Procedural History

On July 19, 2006, Mr. Rivera filed a petition for writ of habeas corpus alleging that he was entitled to this additional credit for time served. (SR. 1). The trial court denied the petition without an evidentiary hearing, and denied a motion for rehearing. (SR. 1). Mr. Rivera appealed the trial court's decision. On February 21, 2007, the Third District Court of Appeal reversed the trial court's denial, in *Rivera v. State*, 949 So. 2d 324 (Fla. 3d DCA 2007), holding that the trial court's summary denial was devoid of any record attachments and, therefore, the court was unable to determine the validity of claim. The Third District ordered the trial court to reconsider the petition for writ of habeas corpus in an expedited manner.

On remand, the trial court held a hearing, and again denied Mr. Rivera's petition for writ of habeas corpus. (SR. 1-33). The trial court held that Mr. Rivera waived his credit for time served, and that the awarding of any additional credit for time served would be contrary to the intent of the plea bargain and sentence. (SR. 3, 4). On appeal, the Third District affirmed the trial court's denial of Mr. Rivera's writ of habeas corpus 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. *See Rivera v. State*, 954 So. 2d 1216 (Fla. 3d DCA 2007).

This Court granted Mr. Rivera's request to review the Third District's decision based on an express conflict with decisions of the other district courts of appeal.

Facts

Mr. Rivera was sixteen years old at the time of his arrest. (SSR. 1). Initially, he was charged as a juvenile with one count of aggravated battery. (SSR. 1). The state then elected to direct file charges, of attempted second degree murder and two counts of aggravated battery, against Mr. Rivera as an adult. (SSR. 1; SR. 2). Mr. Rivera entered a plea to these charges; the trial court withheld adjudication and sentenced him to two years of community control with special conditions followed by four years of probation. (SSR. 10-16).

As a special condition of community control, Mr. Rivera was sentenced to 364

days in jail to be mitigated after 270 days and his acceptance into the county boot camp program. Additionally, upon his release from boot camp, Mr. Rivera was to enter and complete a dual diagnosis program and a substance abuse program with placement. (SSR. 3, 13-16). Ultimately, Mr. Rivera was not accepted into the boot camp program due to mental health issues. (SSR. 3).

His community control was modified to delete the boot camp provision and to mitigate his sentence upon acceptance into the Village South program. (SSR. 3). Mr. Rivera was released from jail to the Better Way Program to await his acceptance into his program. (SSR. 5). After an initial violation, the court modified Mr. Rivera's community control/probation to include the special conditions of 364 days in county jail with TASC (Treatment Alternatives to Street Crime), the county jail's substance abuse treatment program, and alternative program residence. (SSR. 5).

In 2005, Mr. Rivera was again charged with violating his probation. (SSR. 9, 17). This probation violation was based on his failure to report to the probation office and to submit to drug testing on April 5, April 16 and May 6, 2005; his moving without the consent of his probation officer, and his failure to pay court costs. (SSR. 17-20). Pursuant to a negotiated plea, Mr. Rivera admitted to these violations and the trial court sentenced him to three years in prison with a special condition that he be placed in the

modality program (a prison substance abuse program). (SSR. 21-25).[1]

Prior to the entry of the plea, defense counsel told the court that she spoke with Mr. Rivera about the plea offer, but that Mr. Rivera wanted to know if the court would consider a sentence of 364 days in county jail with TASC, and with house arrest and aftercare as follow-up. (SR. 9). Defense counsel explained that Mr. Rivera was concerned with early termination of his sentence after his completion of the program.

The trial court responded that it would consider early termination of Mr. Rivera's three year sentence after he completes the modality program. (SR. 9, 10, 15). The trial court noted that it would most likely be two to two and a half years before Mr. Rivera would complete the 18 month modality program, as it may take him four to six months to be processed into the prison system. (SR. 10).

During the plea colloquy, the trial court noted that the maximum sentence the trial court could impose on Mr. Rivera would be sixty years, and that the minimum guidelines sentence was approximately 8.5 years. (SR. 9, 14). The trial court also noted that Mr. Rivera was sentenced to two years of community control followed by four years of probation, which Mr. Rivera acknowledged. (SR. 12). At no time, did the trial court

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[1] The trial court, however, can only recommend that a defendant be placed in the modality program. *See Rivera v. State*, 954 So. 2d 1216, 1217 & fn. 1 (Fla. 3d DCA 2007). The Department of Corrections makes the final decision. *See id.* Despite the trial court's recommendation, the defendant was not admitted into the program. *See id.*

mention that Mr. Rivera had served significant periods of time in the county jail as special conditions of his previous community control/probation sentence. (SR. 8-17).

In fact, the issue of credit for time served was only briefly mentioned twice during the plea colloquy. After sentencing the defendant to three years in prison, the court simply stated: "You will receive credit for the time that you've served. Apparently, you were taken into custody November 21st of '05. Would that be correct?" (SR. 14). Mr. Rivera responded yes to the court's question regarding when he was taken into custody. (SR. 14). At the end of the plea colloquy, credit for time served was again briefly mentioned when the court told Mr. Rivera: "With credit for time that you served since November 21st of 2005. Okay? You can have a seat, sir." (SR. 16.). At no point during the colloquy was it mentioned that Mr. Rivera had served approximately 732 additional days in jail on the underlying charge. Mr. Rivera served these days either pending trial on these charges and probation violations or as special conditions of his community control/probation sentence. (SR. 18-33).

STANDARD OF REVIEW

The sentencing error at issue in this appeal presents a pure question of law subject to review *de novo*. *See*, *e.g.*, *State v. Glatzmayer*, 789 So. 2d 297, 301 n. 7 (Fla. 2001).

SUMMARY OF ARGUMENT

In a probation revocation case, a defendant is entitled to all credit time served on the original sentence and on subsequent sentences. This statutory right to credit for all time served may be waived, however, this waiver must be knowing and voluntary, and it must be clearly shown on the record. All of the District Courts of Appeal, except for the Third District, consistently follow the rule of law that a defendant does not waive any additional credit for time served, unless the waiver of this credit is specifically mentioned as part of the plea agreement.

In its decision below, the Third District disagreed with its sister courts, and modified the well-established rule which requires a knowing and voluntary waiver to include an "implicit intent" waiver exception for credit for time served. This implicit intent waiver exception is in direct and express conflict with every other district court of appeal and it is contrary to well-established Florida law which requires all waivers to be knowing and voluntary.

Mr. Rivera did not knowingly and voluntarily waive his entitlement to credit for time served when he was sentenced to a sentence of a specific length with a specific amount of credit for time served, when the sentence was silent with respect to his additional credit for time served.

In the case below, there was a mutual mistake regarding the amount of credit time served to which Mr. Rivera was entitled. Arguably, the mistake had a material effect on the agreed exchange of performances. The plea agreement, however, is not voidable by the state as the state bears the risk of this mistake regarding entitlement to credit for time served. First, it is reasonable for the court to allocate the risk to the state. Secondly, the state should be aware at the time the plea agreement is made that it only has limited knowledge with respect to the facts regarding a defendant's entitlement to credit for time served, yet it treats this limited knowledge as sufficient. This holds especially true when the state does not ensure that all credit for time served is addressed by either crediting it to the defendant and/or ensuring that the defendant properly waived the credit.

In Mr. Rivera's case, the state acted in conscious ignorance of his entitlement to additional credit for time served. Throughout the court file it was noted that Mr. Rivera served numerous periods of time in county jail on the underlying charge. The state's willingness to blindly accept the trial court's determination that Mr. Rivera only was entitled to the 37 days he served in county jail since his arrest on his probation violation is unreasonable. Mr. Rivera is entitled to receive this credit for additional time served.

ARGUMENT

I. A DEFENDANT'S WAIVER OF CREDIT TIME SERVED WILL NOT BE PRESUMED, IT MUST BE KNOWING AND VOLUNTARY.

Since 1973, Florida has required that a "court imposing a sentence shall allow a defendant credit for **all time** she or he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence." § 921.161(1), Fla. Stat. (2005) (emphasis added). *See* Laws of Florida, Chapter 73-71 (amending Section 921.161(1) to require mandatory jail credit, rather than permissive, and to require court to provide for the credit in the sentence, and not during the term of court the sentence was imposed). In a probation revocation case, a defendant is entitled to all credit time served on the original sentence and on subsequent sentences. *See e.g. Ryan v. State*, 837 So. 2d 1075 (Fla. 3d DCA 2003).

This statutory right to credit for all time served may be waived by the defendant. *See e.g., Epler v. Judges of the Thirteenth Judicial Circuit, Hillsborough County*, 308 So. 2d 134 (Fla. 2d DCA 1975); *Prangler v. State*, 470 So. 2d 105 (Fla. 2d DCA 1985). This waiver, however, must be knowing and voluntary, and it must be clearly shown on the record. *See generally Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (reiterating the general definition of waiver: "We have defined 'waiver' as the voluntary and intentional relinquishment of a known right or conduct

which implies the voluntary and intentional relinquishment of a known right.") (citation omitted).

There can be no waiver of a right if a defendant does not know about this right. *See Cochron v. State*, 117 So. 2d 544 (Fla. 3d DCA 1960) . Silence about an unknown right is not a waiver. *See Lawrence v. State*, 306 So. 2d 561 (Fla. 4th DCA 1975). In *Lawrence*, the defendant spent time in county jail during three separate periods of time before he was sentenced. The defendant entered a plea to his charges and the trial court granted him credit for time served for two of the three periods of time. There was no reference during the sentencing regarding the third period of time served. The court specifically noted that "silence on this matter would seem to negate any waiver by the defendant of the credit for jail time mandatorily prescribed in section 921.161(1), F.S." *Id.* at 562 & n.2.

All of the District Courts of Appeal, except for the Third District, consistently follow the rule of law that a defendant does not waive any additional credit for time served, unless the waiver of this credit is specifically mentioned as part of the plea agreement.[2] In *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995), the trial court

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[2] In addition to the cases discussed in the text of the brief, several other decisions also have found that the defendant did not waive his credit for time served when he/she agreed to a sentence of a specified length with a specified amount of credit for time served. *See also Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984) (declining to

sentenced the defendant pursuant to a plea agreement on a probation violation to 364 days in jail with 127 days credit for time served, which was the amount of time the defendant served since he was arrested on the current probation violation. While the defendant's attorney mentioned to the trial court that there was additional time served, the attorney did not object to the sentence as imposed. The **Fourth District** found that this failure to object was not a sufficient waiver and 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). The court reversed and remanded the case to the trial court to award the defendant credit for time served previously in custody.

Similarly, in *Davis v. State*, 2007 WL 4208267 (Fla. 5th DCA Nov. 30 2007), the **Fifth District** held that a written plea agreement, which stated: "[c]redit for time served

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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); *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998) (in deciding whether an affidavit of violation of community control was timely filed the court stated in *dicta* that 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); *Williams v. State*, 711 So. 2d 1369 (Fla. 4th 1998) (in *dicta* court commented that plea agreement which provided for 35 months in prison with 115 days of credit did not constitute waiver of additional credit for time served); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006) (in *dicta* the court noted that defendant's written acknowledgement alone, that he

as of 7/31/2006 is 1,531 days[,]" was insufficient evidence that the defendant knowingly and voluntarily waived credit for additional time served. The court remanded the case to the trial court to award the additional time served or to attach portions to the record that conclusively refute the defendant's entitlement to the credit. *See also 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, court remanded for the awarding of any additional days).

The **First District** also agrees. In *Wells v. State*, 751 So. 2d 703 (Fla. 1st DCA 2000), the defendant entered into a negotiated plea agreement for a sentence of specific length for the violation of probation and for a specific amount of credit for time served waiting disposition on the violation of probation. The plea agreement, however, was silent regarding the amount of credit for time served on the original sentence. The First District held that this plea agreement and sentence failed to establish the defendant's waiver of credit for time previously served. The First District remanded for the awarding of this credit or for the attachment of documentation showing a waiver of this credit.

The **Second District** additionally follows the reasoning of these other district

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would receive credit for 73 days served since his current probation violation, was inconclusive regarding whether defendant waived any additional credit for time served).

courts of appeal. In *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002) the court held that the defendant's motion was facially insufficient for failure to allege that the court records showed her entitlement to additional jail credit. In so doing, however, in *dicta*, it emphasized that the defendant's sentence document alone, which notes that the defendant will receive 251 days stipulated credit, is not a sufficient express and specific waiver of any remaining credit for time served. The Second District also commented: "It seems to this court that a defendant should not lose credit for jail time actually served due to a mistake by the defendant, defense counsel, or the State." *Id.* at 1027.

The *Silverstein*, *Davis*, *Briggs*, *Wells*, and *Reed* decisions make sense. When a defendant is not aware of his entitlement to additional credit for time served, there cannot be a knowing and voluntary waiver of this additional credit for time served. Similar to the defendants in *Silverstein*, *Davis*, *Briggs*, *Wells*, and *Reed*, Mr. Rivera entered a plea to a sentence of a specified length (3 years) with a specified amount of credit for time served (37 days). (SR. 2, 3, 14, 16). Also similar to these defendants, Mr. Rivera's plea agreement was silent regarding his entitlement to an additional 732 days for credit for time served. (SR. 2, 3, 14, 16). In accord with *Silverstein*, *Davis*, *Briggs*, *Wells*, and *Reed*, Mr. Rivera should be granted these additional 732 days for credit for time served as he did not knowingly and voluntarily waive his statutory right to this credit for time served.

In its decision below, the Third District Court of Appeal disagreed, and modified the well-established rule which requires a knowing and voluntary waiver to include an "implicit intent" waiver exception. In its opinion, the Third District specifically stated: "although the word 'waiver' was not used, the terms of the plea agreement necessarily exclude the award of additional credit for time served." *Rivera*, 954 So. 2d at 1218. The Third District opined that this implicit intent 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." *Id.* This implicit intent waiver exception for credit for time served is in direct and express conflict with every other district court of appeal.[3] This Court should find that this implicit

[3] In fact, the Third District's decision in *Rivera*, is also in conflict with other decisions of the Third District. In *Ryan v. State*, 837 So. 2d 1075 (Fla. 3d DCA 2003), the defendant was sentenced on a court offer to a two year youthful offender sentence with two years community control with credit for time served since his arrest on the probation violation. The defendant claimed that he was entitled to additional credit for time served on the underlying charge. The Third District held that the record did not reflect a voluntary and specific waiver and remanded for the trial court to award the additional credit for time served. Similarly, in *Sommers v. State*, 829 So. 2d 379 (Fla. 3d DCA 2002), the defendant entered into a plea agreement which provided that the he would receive credit for all time served since his arrest on his most recent probation violation. In a footnote, the Third District observed: "This, however, does not amount to a global waiver of credit for all time served, as the state suggests." *Id.* at 380 & n.1. Then, contrary to *Ryan* and *Sommers*, in *Hines v. State*, 906 So. 2d 1137, (Fla. 3d DCA 2005), the Third District held that, when pursuant to a negotiated plea a defendant agrees

intent waiver exception is contrary to well established Florida law which requires all waivers to be knowing and voluntary.

II. IF THERE IS A MUTUAL MISTAKE REGARDING THE AMOUNT OF CREDIT TIME SERVED IN A PLEA AGREEMENT, THE DEFENDANT IS ENTITLED TO RECEIVE ALL CREDIT DUE AS THE STATE BEARS THE RISK OF ANY MISTAKE.

Relying on the doctrine of mutual mistake, as discussed in *Fulcher v. State*, 875 So. 2d 647 (Fla. 3d DCA 2004), the Third District held that Mr. Rivera was entitled to withdraw his plea, but he was not entitled to receive all credit for time served. In *Fulcher*, the trial court sentenced the defendant on a probation violation to 36 months in prison, with 504 days credit for time served in county jail. There was no discussion of the defendant's entitlement to any prison credit in either the written admission or the plea colloquy. The defendant filed a motion requesting that he be awarded credit for his time served in prison (approximately five years). Finding that the defendant would have been entitled to immediate release at the time of sentencing if he would have been granted this credit for time served, the Third District denied relief finding: "[F]or Fulcher to receive the 'windfall' of immediate release by application of five year's credit for time already

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to a sentence of a specific length with a specific amount of credit for time served, the defendant waives any additional credit time served to which he may be entitled. In the case below, the Third District specifically declined to address the claim of decisional

served would be an absurd result."

Concurring specially, Judge Cope (with whom Judge Wells concurred) more fully detailed the court's reasoning. Judge Cope explained that the defendant could either (1) accept the terms of his present sentence or (2) withdraw his plea on the basis that it was induced by a mutual mistake of fact. *Id.* at 648-649 (Cope, J. concurring specially). Judge Cope acknowledged that the defendant did not affirmatively waive his credit for time served, which would have entitled the defendant to immediate release upon sentencing. However, he stated that it was clear that there was a mutual mistake of fact in the plea agreement, as no one contemplated the defendant's immediate release. Judge Cope then explained "[a] plea bargain is a contract which can be set aside for a mutual mistake of material fact." *Id.* at 650 (citations omitted). Therefore, the defendant is not entitled to immediate release, he may either accept the bargained for plea agreement or can withdraw his plea and proceed to a probation revocation hearing.

It is true that the rights and responsibilities of parties to a plea bargain may be determined by contract law. *See generally State v. Frazier*, 697 So. 2d 944 (Fla. 3d DCA 1997) and cases cited therein. It is also true, that a mutual mistake in a plea agreement, either one of law or fact, which leads to an illegal sentence **may** entitle the

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conflict as it was basing its holding on *Fulcher*.

defendant either to accept his/her initial bargain or to withdraw his/her plea.[4] When the correction of an illegal sentence, pursuant to a negotiated plea, results in a reduction of the sentence the courts do not always permit automatic resentencing because "[i]f the plea agreement is not binding upon the defendant, then it is not binding upon the state." *Latif*, 787 So. 2d 834, 837 (Fla. 2001) (quoting *Sidell v.* State, 787 So. 3d 139, 140 (Fla. 3d DCA 2001).

The courts in *Silverstein*, *Davis*, *Briggs*, and *Wells*, however, did not apply this reasoning to the application of credit for time served in the absence of a knowing and voluntary waiver for credit for time served. In each of these cases, the courts reversed and remanded the cases for automatic application of any credit for time served which is due.[5] Unlike the Third District, these courts do not require the defendant to withdraw his/her plea in order to obtain the statutorily mandated credit for time served. While these

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[4] *See e.g. Latif v. State*, 787 So. 2d 834, 837 (Fla. 2001) (mutual mistake that defendant's sentence was lawful under the 1995 guidelines, which were later invalidated under *Heggs v. State*, 759 So. 2d 620 (Fla. 2000)); *Jolly v. State*, 392 So. 2d 54 (Fla. 5th DCA 1981) (mutual mistake that offense required the imposition of three year mandatory minimum sentence) and its progeny; *Brown v. State*, 245 So. 2d 41 (Fla. 1971) (mutual mistake regarding expected sentence); *Handley v. State*, 890 So. 2d 529 (Fla. 2d DCA 2005) (mutual mistake regarding minimum sentence).

[5] In *Wells* and *Davis*, the courts also provided the trial court another opportunity to deny the defendants' claims by attaching documentation to the record which would show a knowing and voluntary waiver. In the absence of any such documentation, however, the courts required the automatic application of all credit for time served which is due.

courts do not explain their reasoning, their decisions, importantly, comport with the requirements of contract law.

According to the Restatement (Second) of Contracts, a mistake is "a belief that is not in accord with the facts." Restatement (Second) of Contracts § 151 (1981). "An erroneous belief with respect to the law comes within these rules." *Id.* at cmt. b. "Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154."[6] Restatement (Second) of Contracts §152(1) (1981). "A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts § 154 (1981).

In the case below, there was a mutual mistake regarding the amount of credit time served to which Mr. Rivera was entitled. Arguably, the mistake had a material effect on

the agreed exchange of performances. The plea agreement, however, is not voidable by the state as the state bears the risk of this mistake regarding entitlement to credit for time served. First, it is reasonable for the court to allocate the risk to the state. *See* Restatement (Second) of Contracts § 154 (1981). Secondly, the state should be aware at the time the plea agreement is made that it only has limited knowledge with respect to the facts to which the mistake relates but treats this limited knowledge as sufficient. *See id.* This holds especially true when the state does not ensure that all credit for time served is addressed by either crediting it to the defendant and/or ensuring that the defendant properly waived the credit.

It is reasonable for the court to allocate the risk to the state as the application of credit for time served is mainly a ministerial/clerical function, and it does not usually involve any factual disputes. Additionally, the state is not an unknowing adversary. There is also a strong policy that defendants should be granted credit for all jail time served, as evidenced by this Court's decision in *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998) [(holding that a claim of credit for jail time was cognizable under Florida Rule of Criminal Procedure 3.800(b) when the court records reflect an undisputed entitlement to this credit)]." *See Hildago v. State* 729 So. 2d 984, 986 (Fla. 3d DCA 1999).

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[6] Of course, in a plea agreement, based on due process and double jeopardy concerns, the state only has the option of voiding the agreement when the defendant

In *Mancino*, this Court noted that "at sentencing hearings, judges are often forced to make a quick 'guesstimate' of jail credit with assistance from the defendant and counsel. . . . When the trial court guesses law, invariably the defendant discovers this error while in prison and files a motion requesting relief." *Mancino*, 714 So. 2d at 433 (quoting *Chojnowski v. State*, 705 So. 2d 915, 917-919 (Fla. 2d DCA 1997) (Altenbernd, J. concurring specially)). *See also Amendments to Florida Rules of Criminal Procedure 3.670 and 3.700(b)*, 760 So. 2d 67 (Fla. 1999) (recognizing that there are numerous problems associated with determining the proper amount of jail credit and asking the Criminal Appeal Reform Act (CARA) Committee to determine whether it is feasible for the state to include jail credit on the defendant's scoresheet and whether statewide systems may be implemented to assist in tracking jail credit). Additionally, "trial judges use several different procedures to determine jail credit at sentencing. Some court files contain a detailed log of jail credit and others have little or no information about time served in the local county jail." *Id.*

By allocating this risk of mistake to the state, it will equalize any vagaries of local record keeping systems. *See Hildago v. State* 729 So. 2d 984, 986 (Fla. 3d DCA 1999) (noting that in some courts the jail card has been physically incorporated into the court file, while it has not been incorporated in other courts)." It was also help to ensure that

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chooses not to accept his/her initial bargain and to withdraw the plea agreement.

defendants will uniformly receive all credit time served to which they are entitled. Additionally, any disputes regarding the computation and/or waiver of credit for time served can be handled at the time of the oral pronouncement of sentence, rather than in post-conviction proceedings. This serves to ensure the finality of a defendant's sentence.

The state also bears the risk of this mistake as it should be aware, at the time the plea agreement is made, that it only has limited knowledge with respect to the facts to which the mistake relates but treats this limited knowledge as sufficient, especially when the state does not ensure that all credit for time served is addressed by either crediting it to the defendant and/or ensuring that the defendant properly waived the credit. *See* Restatement (Second) of Contracts § 154 (1981).

It is well settled law that a defendant is entitled to all time served in the county jail. Therefore, when the state enters a plea agreement which fails to fully address the defendant's credit for time served, or which fails to ensure that the defendant knowingly and voluntarily waived any additional credit for time served, the state is acting in "conscious ignorance" rather than making a mistake. *See* Restatement (Second) of Contracts § 154, cmt. c (1981). This holds especially true in a community control or

probation revocation case, as it is more likely that there will be credit for time served before the defendant's most recent arrest.

When the state acts in conscious ignorance of a defendant's possible entitlement to additional credit for time served, the state assumes the risk of any possible mistake. In Mr. Rivera's case, the state acted in conscious ignorance of his entitlement to additional credit for time served. Throughout the court file it was noted that Mr. Rivera served two separate terms in county jail as conditions of his community control/probation sentences. (SSR. 3, 5, 13-16). Additionally, it was also clear that he had been arrested on several occasions for various community control/probation violations. The state's willingness to blindly accept the trial court's determination that Mr. Rivera only was entitled to the 37 days he served in county jail since his arrest on his probation violation is unreasonable.

The state bears the risk of the mistake regarding the amount of credit time served to which Mr. Rivera is entitled as it is reasonable for the court to allocate this burden to the state, and the state acted in conscious ignorance when it failed to ensure that Mr. Rivera was either credited for all time served and/or knowingly and voluntarily waived his entitlement to any credit for time served. As the state bears the risk of this mistake, it is not entitled to void the plea agreement. Therefore, Mr. Rivera is entitled to have his illegal sentence corrected to include the proper amount of credit for time served. Furthermore, this remedy is equitable as the defendant in a plea agreement cannot be

returned to his/her original position as he/she has already served time on his sentence and surrendered basic constitutional rights by entering the plea agreement.

Finally, in its ruling below, the Third District held that it would be an absurd result to apply the credit time served which is due to Mr. Rivera. The Restatement (Second) of Contracts incorporates this consideration in its determination of whether a mistake is material. In fact, "[r]elief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract." *See* Restatement (Second) of Contracts § 152, cmt. a (1981). In order to show that a mistake has a material effect, the party "must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out. Ordinarily he will be able to do this by showing that the exchange is not only less desirable to him but is also more advantageous to the other party." *See* Restatement (Second) of Contracts § 152, cmt. c (1981).

The Restatement (Second) of Contracts requires that there be a severe imbalance in the contract before any type of relief may initially be sought. After this initial threshold is reached, it must then be decided if a party to the agreement bears the risk of his mistake.[7] Any imbalances in the contract do not abrogate the allocation of risk. This

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[7] The application of the contract rules of mistake lead to a more equitable result than the case by case decisions of individual courts, regarding whether a particular situation

means that despite any imbalances in the contract the state is still not entitled to require the defendant to accept his initial bargain or to withdraw his plea, as the state bears the risk of any mistake relating to the entitlement of credit for time served.

CONCLUSION

Mr. Rivera did not knowingly and voluntarily waive his entitlement to additional credit for time served. Additionally, Mr. Rivera is entitled to receive this credit for additional time served as the state bore the risk of any material mistake of fact. Mr. Rivera respectfully requests that this court grant his writ of habeas corpus, credit him with all time served since his initial arrest, and order his immediate release from custody.

Respectfully submitted,
BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1963

By: ____________________________
Shannon P. McKenna
Assistant Public Defender

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rendered a plea bargain an absurd result. The case by case decisions can lead to arbitrary results. For example, in *Fulcher*, with application of his prison credit, the defendant was entitled to immediate release. The Third District determined this was an absurd result and denied the application of the prison credit. Yet, in *Tillman v. State*, 693 So.2d 626, 628, n.2 (Fla. 2d DCA 1997), the Second District ruled that the defendant was entitled to credit for the time previously served in prison even though this resulted in a determination that the defendant was entitled to immediate release.

Florida Bar Number 385158
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida this 10th day of December, 2007.

By: ____________________________
Shannon P. McKenna
Assistant Public Defender

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
Assistant Public Defender