IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-936

VICTOR RIVERA,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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

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SUMMARY OF ARGUMENT

In its answer brief, the state does not dispute that a defendant's waiver of credit for time served must be knowing and voluntary. Instead, the state asserts that the Third District Court of Appeals did not decide the case below on the basis of any waiver theory, but rather its decision was based on the absurd result reasoning of *Fulcher v. State*, 875 So. 2d 647 (Fla. 3d DCA 2004). In its opinion, however, the Third District specifically concludes that "although the word 'waiver' was not used, the terms of the plea agreement necessarily exclude the award of additional credit for time served." *Rivera v. State*, 954 So. 2d 1216, 1218 n.2 (Fla. 3d DCA 2007). Additionally, the Third District recently confirmed the implicit intent exception holding of *Rivera* in *Johnson v. State*, 33 Fla. L. Weekly D 488 (Fla. 3d DCA Feb. 13 2008) *decision on review* (SC08-418) *stayed pending Rivera v. State* (SC 07-936).

This implicit intent exception is contrary to the rule of law followed by all of the other District Courts of Appeals. Contrary to the state's argument—that none of these cases involve a situation where the awarding of the claimed additional credit for time served would negate the intent of the sentence—in at least one of these cases, *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995), the defendant's sentence would have been entirely negated by the awarding of the additional credit. This Court

should find that this implicit intent waiver exception is contrary to well-established Florida law which requires all waivers to be knowing and voluntary.

For the last 35 years, Florida law has clearly and unwaveringly required a trial court imposing sentence to provide a defendant all credit for time served in county jail before sentence. The state rather than the individual defendant is in the best position to ensure that the legislature's mandate is carried out, as such, it is reasonable and proper for this Court to allocate to the state the risk of any mistake regarding the amount of this credit. The allocation of this risk to the state will also assist in equalizing any vagaries of local record keeping systems and in ensuring the finality of convictions and sentences.

In its answer brief, the state does not address much less dispute that the court should allocate this risk to the state. Rather, the state only posits that Petitioner's second argument that the state acted in conscious ignorance is specious, as the defendant's failure to apprise the trial court of its failure to pronounce a waiver of credit amounted to a lack of good faith and fair dealing on defendant's part. But, Mr. Rivera, a layman unfamiliar with the intricacies of the law, did not violate the good faith and fair dealing standard, which is only violated when a party has a higher degree of fault than its mere failure to exercise due care.

Petitioner's remaining arguments are similarly unavailing. The state argues that the defendant is not entitled to relief as (1) it is not clear that a mutual mistake of fact was established by the parties; (2) that there was no clear erroneous belief regarding the amount of credit for time served the defendant would receive; and (3) that an evidentiary hearing is required to resolve this issue, but an evidentiary hearing is not permissible for the resolution of his habeas petition, which is properly treated as a motion to correct illegal sentence. The state's first argument is contrary to its earlier position in the trial court, in the Third District, and in its response brief on jurisdiction to this Court. The state's second argument is similarly unavailing as Mr. Rivera's mistake regarded the amount of credit for time served to which he was legally entitled, not the amount of credit actually awarded by the trial court. Finally, Mr. Rivera would be entitled to an evidentiary hearing as his petition was filed within two years of his final sentence.

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 should bear the risk of any material mistake.

ARGUMENT

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

In its answer brief, the state does not dispute that a defendant's waiver of credit for time served must be knowing and voluntary. Instead, the state asserts that the Third District Court of Appeals did not decide the case below on the basis of any waiver theory, but rather its decision was based on *Fulcher v. State*, 875 So. 2d 647 (Fla. 3d DCA 2004), which the court court found "dispositive and applicable in the absence of a waiver." *Rivera v. State*, 954 So. 2d 1216, 1218 n.2 (Fla. 3d DCA 2007).

In its opinion, however, the Third District specifically concludes that "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. This conclusion clearly describes the application of an "implicit intent" exception to the waiver rule. In fact, the Third District recently confirmed this implicit intent exception holding in *Johnson v. State*, 33 Fla. L. Weekly D 488 (Fla. 3d DCA Feb. 13 2008) *decision on review* (SC08-418) *stayed pending Rivera v. State* (SC 07-936).

In *Johnson*, the defendant claimed entitlement to additional credit for time previously served in boot camp in his sentence for a probation violation. In his plea agreement, it was specifically stated that the defendant would be sentenced to four years with credit for time served from a specific date (after his time served in boot camp). Citing to its decision in *Rivera*, the Third District held: "Following *Hines v. State*, 906 So. 2d 1137 (Fla. 3d DCA 2005), we again hold that a provision in a plea agreement that the defendant is to be awarded credit for time served from a specific date effectively waives any claim to credit for time served before that date." The Third District then noted that its holding was contrary to the Fifth District's decision in *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007).

Based on its *Johnson* holding, and on its language in the *Rivera* decision below, it is clear that the Third District is applying an implicit intent exception to the waiver rule. This exception is contrary to 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—followed by all of the other District Courts of Appeals. *See Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Reed v. State* 810 So. 2d 1025 (Fla. 2d DCA 2002); *Wells v. State*, 751 So. 2d 703 (Fla. 1st DCA 2000); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995).

The state attempts to distinguish these other cases by stating: "Significantly, unlike the instant case, the facts of these other cases do not reveal situations in which the sentence imposed on revocation would become meaningless or absurd since the prior credits would negate the new sentence and thereby undermine its obvious intent." The state is incorrect.[1] In at least one of these plea agreement cases, *Silverstein*, the defendant's entire sentence would have been negated by the awarding of the additional claimed credit for time served. In *Silverstein*, the defendant was originally sentenced to a split sentence of 30 months followed by 2 years of probation. Upon violation of his probation, the defendant was sentenced to 364 days with credit for only the 127 days served since he was arrested on the probation violation. The defendant claimed that he was entitled to receive credit for the approximately 30 months he served on the original split sentence. The awarding of this additional credit

[1] The implicit intent of the plea bargain is seemingly unimportant to the First, Second, Fourth and Fifth District Courts of Appeal, as none of the cases cited in Petitioner's initial brief even discuss the intent of the plea bargain in their decisions holding that a waiver for credit time served must be knowing and voluntary. *See Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006); *Briggs v. State*, 929 So. 2d 1151 (Fla. 5th DCA 2006); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Wells v. State*, 751 So. 2d 703 (Fla. 1st DCA 2000); *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998); *Williams v. State*, 711 So. 2d 1369 (Fla. 4th DCA 1998); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984); *Lawrence v. State*, 306 So. 2d 561 (Fla. 4th DCA 1975).

would have completely negated the defendant's sentence of 364 days and he would have been entitled to immediate release upon his sentencing.

The Second District, in *Tillman v. State*, 693 So. 2d 626 (Fla. 2d DCA 1997),[2] was similarly unconcerned that the intent of the sentence would have been negated by the application of the claimed credit for time served. In *Tillman*, the Second District awarded the defendant credit for time served in prison even though the amount of credit awarded exceeded the sentences against which it applied—a fact which clearly negates the sentence and undermined its obvious intent. Yet, the Second District held that the defendant was still entitled to receive the additional credit for time served.

The Third District's application of an implicit intent waiver exception in the case below is in direct and express conflict with every other district court of appeal. This Court should find that this implicit intent waiver exception is contrary to well-established Florida law which requires all waivers to be knowing and voluntary.

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[2] In *Tillman*, the defendant appealed the trial court's imposition of sentence upon his probation violation; it did not involve a negotiated plea agreement for a specific sentence.

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.

For the last 35 years, Florida law has clearly and unwaveringly required a trial court imposing sentence to provide a defendant all credit for time served in county jail before sentence. *See* § 921.161(1), Fla. Stat. (2005); Laws of Florida, Chapter 73-71. "This credit must be for a specified period of time and shall be provided for in the sentence." § 921.161(1), Fla. Stat. (2005). The state rather than the individual defendant is in the best position to ensure that the legislature's mandate is carried out as the determination of the amount of credit for time served is mainly a ministerial/clerical function carried out by other departments of the county and state, which does not involve any factual disputes. As the state is in the best position to ensure that a defendant receives all credit to which he is entitled, it is reasonable and proper for this Court to allocate to the state the risk of any mistake regarding the amount of this credit. *See* Restatement (Second) of Contracts § 154, cmt. d (in dealing with risk allocation issues "the court will consider the purposes of the parties. . . .")

The allocation of this risk to the state will also assist in equalizing any vagaries of local record keeping systems and will assist in ensuring statewide uniformity in the

granting of credit for time served. Additionally, the allocation of this risk to the state will help to ensure the finality of convictions and sentences as the proper amount of credit for time served will be awarded at sentencing, not during a post-conviction proceeding. Finally, it makes sense to allocate this risk to the state as the state can easily avoid any mistakes by simply ensuring that the credit for time served calculations are accurate and that any waiver by the defendant is knowing and voluntary.

In its answer brief, the state does not address much less dispute that the court should allocate this risk to the state. Rather, the state only addresses Petitioner's second argument—that the state should also bear the risk of 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. In response to this argument, the state posits that Petitioner's argument that the state acted in conscious ignorance is specious, as the defendant's failure to apprise the trial court of its failure to pronounce a waiver of credit amounted to a lack of good faith and fair dealing on defendant's part.

However, the defendant's failure to know that as a matter of law he was entitled to receive credit for all the time which he served does not amount to a lack of good

faith and fair dealing. Mr. Rivera is not an attorney who is familiar with the intricacies of the law and his entitlement to receive credit for all the time he served on his case. Nor should Mr. Rivera be bound by his own attorney's failure to properly advise him regarding his entitlement to credit for all time served. Additionally, Mr. Rivera never misrepresented the amount of time which he previously served in relation to his case. At no point during the plea colloquy did anyone ask Mr. Rivera if he had served any time in relation to his case previous to his arrest on his probation violation. Finally, and importantly, the good faith and fair dealing standard is not violated by a party's mere failure to exercise due care instead the standard requires a higher degree of fault. *See* Restatement (Second) of Contracts § 157, cmt. a.

The state's remaining responses to Petitioner's argument—that the state should bear the risk of mistake—revolve around the nature of the mistake. The state argues that the defendant is not entitled to relief as (1) it is not clear that a mutual mistake of fact was established by the parties; (2) that there was no clear erroneous belief regarding the amount of credit for time served the defendant would receive; and (3) that an evidentiary hearing is required to resolve this issue, but an evidentiary hearing is not permissible for the resolution of his habeas petition, which is properly treated as a motion to correct illegal sentence.

The state's first argument is contrary to its earlier position in the trial court, in the Third District, and in its response brief on jurisdiction to this Court. In the trial court, the state repeatedly asserted that there was a mutual mistake of fact and the defendant, pursuant to *Fulcher*, should be allowed the opportunity to withdraw his plea and proceed to trial on the merits of his violation. (SR. 35, 37, 38). In its answer brief in the Third District, the state requested affirmance of the trial court's order which granted defendant the option to withdraw his plea based upon a mutual mistake of fact. (Respondent's Answer Brief in the Third District at 9). Finally, in its response brief on jurisdiction to this Court, the state specifically stated that this case involves a mutual mistake of fact. (Respondent's Brief on Jurisdiction in this Court at 8).

The state's second argument—that there was no clear erroneous belief regarding the amount of credit for time served the defendant would receive—is similarly unavailing. Mr. Rivera's mistake regarded the amount of credit for time served to which he was legally entitled, not the amount of credit actually awarded by the trial court. Under the Restatement, a mistake takes place when a party makes an assumption about a fact without being aware of any alternatives and/or when a party has an erroneous belief with respect to the law. *See* Restatement (Second) of

Contracts §151, cmts. a & b. It is clear in this case that Mr. Rivera made a mistake regarding the amount of credit for time served to which he was legally entitled.

The state's third additional argument is also unavailing. The state argues that an evidentiary hearing is required to resolve the issue of whether there was a mistake, but an evidentiary hearing is not permissible for the resolution of Mr. Rivera's habeas petition, which is properly treated as a motion to correct illegal sentence. However, as the defendant's habeas petition was filed within two years of his sentence, an evidentiary hearing would be allowable under Florida Rule of Criminal Procedure 3.850.

In the case below, there was a mutual mistake regarding the amount of credit time served to which Mr. Rivera was entitled. The state should bear the risk of this mistake as it is reasonable for the court to allocate this burden to the state, and the state acted in conscious ignorance. By bearing the risk of this mistake, the state 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. This remedy is equitable as Mr. Rivera cannot be returned to his/her original position as he has already served time on his sentence and surrendered basic constitutional rights by entering his plea agreement.

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 should bear the risk of any material mistake. 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,
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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 31st day of March, 2008.

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
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