

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA NO. 3D08-1657

BERNARD JOYNER

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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INTRODUCTION

Petitioner, Bernard Joyner, seeks discretionary review of a decision of the Third District Court of Appeal, that affirmed the trial court's denial of Mr. Joyner's motion to correct, citing as controlling authority the Third District's decision in *Johnson v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2007), *decision on review stayed pending disposition of Rivera v. State*, 954 So. 2d 1216 (Fla. 3d DCA 2007),

review granted, 968 So. 2d 557 (Fla. 2007). The decision below also expressly conflicts with *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); and *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984) on the issue of waiver of credit for time served. The symbol “A.” refers to the opinion of the lower court, as set forth in the Appendix.

STATEMENT OF THE CASE AND FACTS

Petitioner, Bernard Joyner, appealed an order denying his Florida Rule of Criminal Procedure 3.800(a) motion for additional credit for time served. (A. 2). In 2004, Mr. Joyner entered into a plea agreement and was sentenced to five years probation for the offense of false imprisonment. (A. 2). He was incarcerated for 122 days prior to his release on probation. (A. 2). The defendant was taken into custody again in 2006 on a violation of probation. He entered a plea of admission to the violation and was sentenced to 2 years in prison with 78 days of jail credit. (A. 2).

The trial court denied Mr. Joyner’s motion to correct sentence and attached a copy of an agreement on credit for time served. (A. 2-3). On this signed agreement, Mr. Joyner acknowledged that he will receive credit for time served for the 78 days he served since his arrest on the probation violation. (A. 3). It is not

indicated on this agreement that the defendant is also waiving his entitlement to any additional credit for time served. (A. 3).

The Third District Court of Appeal affirmed the denial of relief on authority of *Johnson v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2007), *decision on review stayed pending disposition of Rivera v. State*, 954 So. 2d 1216 (Fla. 3d DCA 2007), *review granted*, 968 So. 2d 557 (Fla. 2007). (A. 4, 7). The Third District cited the *Johnson* court as holding: “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.” *Johnson*, 974 So. 2d at 1152. (A. 4).

SUMMARY OF ARGUMENT

The Third District’s decision cited, as controlling authority, its decision in *Johnson* for which this Court has stayed review pending the resolution of *Rivera* for which this Court has granted review. A citation to a decision which is pending in this Court is prima facie evidence of an express conflict of decisions. *See Jollie v. State*, 405 So. 2d 418 (Fla. 1981). The Third District’s decision also expressly conflicts with *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); and *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984) on the issue of waiver of credit for time served.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION CITED, AS CONTROLLING AUTHORITY, ITS DECISION IN *Johnson v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2007), *decision on review stayed pending disposition of Rivera v. State*, 954 So. 2d 1216 (Fla. 3d DCA 2007), *review granted*, 968 So. 2d 557 (Fla. 2007). THE THIRD DISTRICT'S DECISION ALSO EXPRESSLY CONFLICTS WITH *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); AND *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984) ON THE ISSUE OF WAIVER OF CREDIT FOR TIME SERVED.

The Third District's decision cited, as controlling authority, its decision in *Johnson* for which this Court has stayed review pending the resolution of *Rivera* for which this Court has granted review. A citation to a decision which is pending in this Court is prima facie evidence of an express conflict of decisions. *See Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

The decision below, as well as, the *Johnson* and *Rivera* decisions conflicts with the decisions of every other district court of appeal on the same issue in factually similar cases. *See Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); and *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA

1984). 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). As it did in *Rivera*, this Court should exercise its jurisdiction to resolve this conflict in the case below.

CONCLUSION

In light of the foregoing demonstration that the Third District Court of Appeal's decision expressly conflicts with decisions of the other district courts of appeal, Mr. Joyner 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 Nikole Hiciano, 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 August, 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
Assistant Public Defender