IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1489

BERNARD JOYNER,

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

Florida requires that when a court imposes a sentence, it shall allow a defendant credit for all time previously served. A sentence that does not mandate credit for time served is illegal, as a trial court has no discretion to impose a sentence without crediting a defendant with time served. Defendants may waive their right to credit for time served. However, any waiver must be knowing, intentional and voluntary. It must be clearly shown on the face of the record and it cannot be based on suppositions or presumptions. It is the state's burden to establish that a waiver has taken place.

In its decision below, the Third District disagreed with its sister courts; it modified the well-established waiver rule to include an "effective" waiver exception when a defendant agrees in a plea to a stipulated amount of credit for time served, even though the existence of, entitlement to, and waiver of this credit is not discussed in the record. This exception is contrary to well-established Florida law which requires all waivers to be knowing and voluntary. Mr. Joyner did not knowingly, intentionally and voluntarily waive his entitlement to additional credit for time served in county jail. Mr. Joyner should be awarded this additional credit as the state failed to prove that a valid waiver was clearly shown on the face of the record.

ARGUMENT

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

The state failed to prove that a knowing, intentional and voluntary waiver was clearly shown on the face of the record.

For the last 37 years, Florida has required that when a court imposes a sentence, it shall allow a defendant credit for all time previously served. *See* § 921.161(1), Fla. Stat. (2006); Laws of Florida, Chapter 73-71. This credit must be provided for in the sentence itself. "[A] sentence that does not mandate credit for time served [is] illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time served." *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998).

Defendants may waive their right to credit for time served. However, any waiver must be knowing, intentional and voluntary. It must also be clearly shown on the face of the record.[1] It is the state's burden to establish that a waiver has taken place. *See Briggs v. State*, 929 So. 2d 1151, 1153-1154 (Fla. 5th DCA 2006); *Silverstein v. State*, 654 So. 2d 1040, 1041 (Fla. 4th DCA 1995).

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[1] *See, e.g., Lahens v. State*, 35 Fla. L. Weekly D293 (Fla. 4th DCA Feb. 3, 2010); *Briggs v. State*, 929 So. 2d 1151, 1153-1154 (Fla. 5th DCA 2006); *Reed v. State*, 810 So. 2d 1025, 1027 (Fla. 2d DCA 2002); *Wells v. State*, 751 So. 2d 703, 704-705 (Fla. 1st DCA 2000); *Silverstein v. State*, 654 So. 2d 1040, 1041 (Fla. 4th DCA 1995).

As discussed in Petitioner's Initial Brief, the First, Second, Fourth, and Fifth District Courts of Appeal have repeatedly held that when a defendant whose probation is violated enters a plea to a sentence of a specific length with a specified amount of credit for time served (either for a specific number of days, from a date certain, or between two dates), the 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. (Initial Brief at 5-12, and cases cited therein.) These decisions are based on the fact that a waiver of credit for time served will not be presumed. When the record is silent with regard to additional credit to which a defendant may be entitled, this silence negates any possible waiver. A defendant must have knowledge of the right he or she is waiving.[2] *See Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (defining waiver "as the voluntary and intentional relinquishment of a

[2] Courts have found a knowing relinquishment when a defendant executes an express waiver clause. For example, in *Lahens v. State*, 35 Fla. L. Weekly D293 (Fla. 4th DCA Feb. 3, 2010), the defendant executed a written plea agreement that he would receive 182 days credit for time served. The agreement also included a statement that he "agrees to waive all other credit in this case (1 year)." *Id.* The Fourth District found this statement satisfied the requirement that a defendant knows of his entitlement to additional credit and that he voluntarily waives this right. *See also White v. State*, 995 So. 2d 1172 (Fla. 4th DCA 2008) (statement in bold capital letters that "**I AM WAIVING ALL OTHER CREDIT FOR TIME ALREADY SERVED**" is a knowing and voluntary waiver of additional credit for time served).

known right or conduct which implies the voluntary and intentional relinquishment of a **known** right.") (citation omitted) (emphasis added).

In its decision below, the Third District Court of Appeal disagreed with its sister courts' decisions and held, on the authority of its earlier decision in *Johnson v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2008), review granted 17 So. 3d 705, "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." *Joyner*, 988 So. 2d 670, 672 (Fla. 3d DCA 2008) quoting *Johnson v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2008) (emphasis added). The Third District's "effective" waiver[3] exception for credit for time served is in direct and express conflict with every other district court of appeal, and with this Court's definition of waiver.

In its Answer Brief, the state argues that "Joyner knowingly waived credit to any additional time by entering into an agreement which limited the amount of credit

[3] In his Initial Brief, Joyner stated that the Third District's decision below modified the well-established rule requiring a knowing, intentional, and voluntary waiver to include an "implied" waiver exception. The use of the term "implied" was meant to refer to the fact that a defendant's knowledge of the right to be waived may not be presumed. It was not meant to refer to the fact that a waiver may not be implied from conduct or acts. As Joyner noted in his Initial Brief, waivers may be express or they may be implied from conduct or acts that lead a party to believe a right has been waived. (Initial Brief at 6). In order to avoid any potential confusion, henceforth, Petitioner will use the term "effective" waiver, rather than "implied" waiver.

for time served that he would receive." (Answer Brief at 9). This fact does not establish a knowing waiver of credit for additional time Joyner served in county jail. The written agreement did not mention the existence of this additional credit. Neither did it reference Joyner's entitlement to and waiver of this credit. A valid waiver requires knowing relinquishment. This knowing relinquishment cannot be based on suppositions or presumptions. It must be clear from the face of the record.

The state notes that Joyner's credit for time served agreement contained four separate boxes (11-29-2006 to 2-15-2007, X days credit for time served, all credit for time served, no credit for time served). The state then argued that since only the box which gave him credit between two dates was checked, Joyner knew and was put on notice that he was not being awarded all credit for time served. (Answer Brief at 10, 12). The state is incorrect.

The presence of these other fields on the form does not indicate that the defendant was aware of his entitlement to additional credit and that he waived this additional credit. In fact, in Joyner's case, two of the four fields (from X date to X date; X days of credit for time served) definitely provide for the same information—a specific amount of credit for time served. The "all credit for time served" field could either apply all credit for time served, or as it did in *Johnson*, it could provide for all credit for time served from a specific date. This modified field also provides the same

information as the first two fields—a specific amount of credit for time served. These different fields just signify alternate ways of expressing the same end result. Additionally, none of these fields, nor the fourth field (no credit for time served) included a clause stating that the defendant is waiving any additional credit for time served. Contrary to the state's argument, the mere presence of the phrase "all credit for time served" on the agreement does not clearly show a knowing, voluntary and intentional waiver of additional credit for time served. As previously stated, this waiver cannot be presumed; it must be clear from the face of the record.

The state also argues that the Third District's holding "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[,]" is not in express or direct conflict with the other district courts of appeal. (Answer Brief at 13). In support of this argument, the state attempts to distinguish Joyner's case from two of the numerous decisions cited in Petitioner's Initial Brief, *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007) and *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995).

The state distinguishes *Davis* from this case on the basis that it "goes to a 'certain amount of credit'—e.g. a number of days, and the Third District's opinion speaks to a written plea agreement for time served between specific dates." (Answer

Brief at 13). The state distinguishes *Silverstein* on the similar basis that it "allowed a certain number of days of credit for time served –127 days—whereas the Third District's opinion allowed for credit for time from a date certain." (Answer Brief at 14).

The state's distinctions are immaterial. The state's distinctions are also confusing and illogical. According to the state, a valid waiver does not exist (as it did not in *Davis* and *Silverstein*) if the amount of credit for time served defendant receives is expressed as a number of days. But, a valid waiver does exist if the amount of credit for time served is expressed as an amount between two dates or from a date certain. Yet, all three of these expressions of amount of credit time served (number of days, between two dates, and from a date certain) determine the same amount of credit for time served that is to be awarded. It is inconsequential what terms are used to enumerate the specific amount of credit for time served.

The state next attempts to distinguish Joyner's case from the numerous contrary district court of appeal decisions by arguing that none of those cases "involve a written form, signed by a defendant, in which the court conspicuously did not check off the unqualified option for <u>all</u> credit for time served." (Answer Brief at 15). At least one

other case,[4] *Hinkel v. State*, 937 So. 2d 1201, 1202-1203 (Fla. 5th DCA 2006), however, involves a virtually identical credit for time served agreement.

In *Hinkel*, the defendant signed an agreement on credit for time served which included four fields similar to the four included on Joyner's agreement. Hinkel's agreement had reflected a checkmark next to the field which noted that he would receive 73 total days credit for time served. The Fifth District found that this document itself was inconclusive on the waiver issue as the field checked on the document did not address the defendant's entitlement to and waiver of additional jail credit. In so doing, the court noted that another field included a waiver clause, but since the checked field did not address waiver in a similar manner, the court could not presume that a waiver of any entitlement to additional jail credit occurred. *See id.*

The state then relies on the lone decision, *Hagan v. State*, 35 Fla. L. Weekly D83 (Fla. 1st DCA Dec. 31, 2009), in support of its position. The 2-1 decision in *Hagan* was issued after Petitioner's Initial Brief on the Merits was filed and it is contrary to numerous earlier decisions of the First District Court of Appeal. In *Hagan*,

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[4] Several additional cases involve defendants that entered into written agreements, but the presence or absence of different fields regarding possible credit for time served was not discussed within these cases. *See Giggetts v. State*, 5 So. 3d 756 (Fla. 1st DCA 2009); *Hill v. State*, 985 So. 2d 1216 (Fla. 5th DCA 2008); *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995).

the court found that the "inclusion of specific language indicating the specific date from which the defendant's credit for time served would count towards his current sentence" is a sufficient waiver of any credit that may have accrued prior to that date. *See Hagan*, 35 Fla. L. Weekly D83 citing *Johnson*, 974 So. 2d 1152 (Fla. 3d DCA 2008) and *Joyner v. State*, 988 So. 2d 670 (Fla. 3d DCA 2008).

As pointed out by the dissent, this decision is a departure from the First District's case law: "We have consistently—and recently—held that a defendant's stipulation even to a specific number of days' jail credit does not preclude the award of additional credit, in the absence of evidence that the defendant knew of his entitlement to additional credit and voluntarily relinquished that right." *Hagan*, 35 Fla. Law. Weekly D83 (Benton, J. dissenting) (citing *Velasquez v. State*, 11 So. 3d 979, 980 (Fla. 1st DCA 2009); *Gigetts v. State*, 5 So. 3d 756, 757 (Fla. 1st DCA 2009)). *See also Williams v. State*, 12 So. 3d 896 (Fla. 1st DCA 2009); *Cary v. State*, 997 So. 2d 423 (Fla. 1st DCA 2008); *Wells v. State*, 751 So. 2d 703 (Fla. 1st DCA 2000), and *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984).

Mr. Joyner entered a plea to a sentence of a specified length (2 years) with a specified amount of credit for time served (from November 29, 2006 to February 15, 2007). (A. 5). His credit for time served agreement was silent regarding the existence of any additional credit, his entitlement to this credit and his waiver of this credit. (A.

5). A valid waiver requires knowing relinquishment. Nothing in the record below indicates that Joyner knowingly relinquished this additional credit for time served.[5] Joyner's knowledge cannot be on suppositions or presumptions. It must be clearly shown on the face of the record.

This Court should reverse the Third District's finding below that Mr. Joyner "effectively" waived any claim to additional credit for time served. This "effective" waiver exception is contrary to well-established Florida law which requires that a defendant's waiver of credit for time served will not be presumed; it must be knowing, voluntary and intentional. In the absence of proof that a valid waiver was clearly shown on the face of the record, Mr. Joyner is entitled to this additional credit for time served.

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[5] In its Answer Brief, the state asserts that Petitioner did not preserve his argument that his waiver was not knowing and voluntary, and that a defendant cannot waive a right that he does not know about. (Answer Brief at 10-11). The state argues that in his Rule 3.800 motion, Petitioner only alleged his entitlement to additional credit. This is all that Petitioner was required to allege. It is the state's burden to establish that a waiver has taken place and that this waiver is clearly shown on the face of the record. *See Briggs*, 929 So. 2d at 1153-1154; *Silverstein*, 654 So. 2d at 1041. The argument that when a defendant is not aware of his entitlement to additional credit there cannot be a knowing, intentional and voluntary waiver is simply a response to the state's allegation that Joyner is not entitled to this credit as he waived this credit.

Contrary to the state's further allegations, neither does this argument require an exploration of the defendant's actual state of mind. In order to prove the existence of a valid waiver, the defendant's knowledge (awareness) or lack thereof must be clearly shown on the face of the record.

The state suggests that Joyner is not entitled to have this additional credit for time served awarded, and that the proper remedy is to have Joyner seek to withdraw his plea in its entirety. The state is incorrect. Both the state and Joyner entered into the plea with the understanding that unless a valid waiver was clearly shown on the record, in accordance with Section 921.161, Florida Statutes, Joyner would be entitled to receive credit for all time he spent in the county jail. It is the state's duty to make certain that the issue of credit for time served is fully addressed by either crediting to the defendant or ensuring that that a proper waiver was entered. As this Court found in *McCoy v. State*, 599 So. 2d 645, 649 (Fla. 1992), "when entering into a plea agreement, the State must make sure that the specific terms of the agreement are made a part of the plea agreement and the record."

Finally, the state suggests that if "this Court disagrees with the Third District Court of Appeal, the proper remedy is to remand the matter back to the trial court for further proceedings or for the trial court to attach documents that refute the defendant's claims." (Answer Brief at 16). In support of this argument, the state supposes that the plea colloquy (which was not appended to the lower court's order)[6] "could very well have gone beyond the written waiver form, as it is conceivable that the lower court

[6] As stated in Petitioner's Initial Brief, undersigned counsel's attempts to procure a transcript of the February 15, 2007 plea colloquy were unsuccessful.

expressly advised the defendant that as part of the plea, credit for prior time served was being waived." (Answer Brief at 16). A remand for additional proceedings is not the proper remedy. A defendant is entitled to receive all credit for time served, unless the state proves that a knowing, intentional, and voluntary waiver was clearly shown on the face of the record. The state did not meet this burden and Mr. Joyner is entitled to this additional credit.

CONCLUSION

This Court should reverse the Third District's finding below that Mr. Joyner "effectively" waived any claim to additional credit for time served. In accordance with Florida law, a waiver must be knowing, voluntary and intentional; it may not be based on suppositions or presumptions. In the absence of proof that a valid waiver was clearly shown on the face of the record, Mr. Joyner is entitled to this additional credit for time served.

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 ____ day of March, 2010.

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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