IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-418

ANDREA JOHNSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

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

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

The decision below, *Johnson v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2008), is being reviewed[1] based on a conflict with *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); and *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984) on the issue of implied waiver of credit for time served.

The Petitioner, Andrea Johnson, 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 on appeal.

---

[1] The decision on review was initially stayed pending the disposition of *Rivera v. State*, 954 So. 2d 1216 (Fla. 3d DCA 2007), review granted 968 So. 2d 557 (Fla. 2007). The *Rivera* decision was being reviewed based on a conflict between *Rivera* and the decisions in *Silverstein*; *Reed*; and *Van Ellis*; as well as *Henderson v. State*, 720 So. 2d 1121 (Fla. 4th DCA 1998); *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 (Fla. 2d DCA 1997).

Ultimately, this Court discharged jurisdiction and dismissed review in *Rivera*. *See Rivera v. State*, 3 So. 3d 1193 (Fla. 2009). This Court granted review in this case after the parties responded to this Court's order to show cause why its decision discharging jurisdiction and dismissing review of *Rivera* is not controlling in this case and thus why this Court should not decline to accept jurisdiction in this case. This Court also granted review in a companion case, *Joyner v. State*, 988 So. 2d 670 (Fla. 3d DCA 2008), review granted 17 So. 3d 705.

STATEMENT OF THE CASE AND FACTS

Mr. Johnson was charged by information, on October 15, 2002, with armed robbery with a firearm and possession of a firearm by a convicted felon. On November 5, 2002, the defendant entered a guilty plea. (SR. 2, 49). In accordance with the plea, the trial court sentenced him as a youthful offender to four years of probation with the special conditions of one day in jail and that he enter and successfully complete boot camp. (SR. 2, 15-19).

Almost three years later, on September 28, 2005, an affidavit of violation of probation was filed alleging that the defendant committed a new offense, that he failed to submit monthly probation reports, and that he failed to pay his cost of probation supervision. (SR. 29). On April 25, 2006, a hearing was held on the probation violation. At this hearing, Mr. Johnson accepted the state's plea offer of four years in prison, and he admitted to the technical violations of failing to submit monthly reports and failing to pay his costs of supervision. The state withdrew the allegation that he committed a new offense.

In accordance with the plea, the trial court sentenced Mr. Johnson to four years in prison with credit for time served from his last booking date, November 14, 2005. (SR. 29, 52-54). The fact that Mr. Johnson served additional time in boot camp and his entitlement and/or waiver to this credit was never discussed by any of the parties.

After the court pronounced sentence, the court's clerk asked if there was any way to get Mr. Johnson to sign a contract for "exactly which case that has credit time serve." (SR. 54). The written agreement states that Mr. Johnson admitted to a violation of probation and understood and agreed that he would receive credit for all time served from November 14, 2005 in this case, F02-2782. (SR. 33). The written agreement did not indicate that Mr. Johnson had served additional time in boot camp, and it did not indicate that he was waiving this additional credit for time served.

On April 11, 2007, Mr. Johnson filed a pro se Rule 3.800(a) motion alleging his entitlement to credit for time served in boot camp. On July 5, 2007, without a hearing, the trial court entered two orders on this motion. The first order "corrected" Mr. Johnson's sentence to provide for credit for time served from November 14, 2005. (SR. 43). A second order was also entered in which the trial court found that he was entitled to all credit for time served from November 14, 2005, but he was not entitled to any additional credit as he entered a plea agreeing to a four year sentence with credit for time served from November 14, 2005. (SR. 44-45).

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. The statutory right to credit for all time served may be waived. However, this waiver must be knowing, intentional, 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 their entitlement to additional credit for time served when he or she agrees in a plea to a stipulated amount of credit for time served when the record is silent with respect to any additional credit for time served.

In its decision below, the Third District disagreed with its sister courts, and modified the well-established waiver rule to include an implied waiver exception when a defendant agrees in a plea to a stipulated amount of credit for time served, even though the defendant's entitlement to and/or waiver of this credit is not discussed in the record. This 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. This Court should reverse the Third District's decision below and award Mr. Johnson credit for his time served in Boot Camp.

ARGUMENT

A DEFENDANT'S WAIVER OF CREDIT TIME SERVED WILL NOT BE PRESUMED; IT MUST BE KNOWING, INTENTIONAL, 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. (2006) (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). "When a criminal defendant is sentenced after being convicted of a crime and serves some portion of that sentence, he or she is entitled to receive credit for the actual service of that sentence, or any portion thereof, in a resentencing for the same crime." *State v. Rabedeau*, 2 So. 3d 191, 193 (Fla. 2009). In the context of probation revocations, this means that a defendant is entitled to credit for all time served on the original sentence and on any subsequent sentences. *See e.g. Ryan v. State*, 837 So. 2d 1075 (Fla. 3d DCA 2003).

The statutory right to credit for all time served may be waived by a 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). Any waiver, however, must be knowing and voluntary, and it must be clearly shown on the record. This Court has 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." *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (citation omitted) (emphasis added).

If a defendant does not know about a right, then he or she cannot waive that right. *See Cochron v. State*, 117 So. 2d 544 (Fla. 3d DCA 1960). In *Lawrence v. State*, 306 So. 2d 561 (Fla. 4th DCA 1975), the Fourth District examined the situation where a record was silent regarding some, but not all, of a defendant's credit for time served. 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. Silence on a matter negates any waiver, as a defendant must be aware of the right which he or she is waiving.

In conformity with this law requiring a knowing, intentional and voluntary waiver, all of the District Courts of Appeal, except for the Third District, which

permits an **implied** waiver of credit for time served,[2] 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. *See generally Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995); *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007); *Reed v. State*, 810 So. 2d 1025 (Fla. 2d DCA 2002); *Van Ellis v. State*, 455 So. 2d 1065 (Fla. 1st DCA 1984).

In *Silverstein v. State*, 654 So. 2d 1040 (Fla. 4th DCA 1995), the trial court 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 trial court found that the defendant waived any right to additional credit for time served because the plea did not specifically provide for any additional credit for time served. The **Fourth District** found that the defendant did not waive his entitlement to this additional credit and held: "Where a defendant's waiver of credit for time served on the incarcerative portion of a

---

[2] Contrary to its sister courts, the Third District holds: "[T]hat 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 1152-1153 (citations omitted).

split sentence is not clearly shown on the record, it will not be presumed." 654 So. 2d at 1041 (citation omitted). The Fourth District reversed and remanded the case to the trial court to award the defendant credit for time served previously in custody. *See also 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 the written plea agreement which stated that the defendant will receive credit for 3 years which he served in jail, was not clear and specific waiver of additional time which he served in prison); *Williams v. State*, 711 So. 2d 1369 (Fla. 4th DCA 1998) (in *dicta* court commented that plea agreement which provided for 35 months with 115 days of credit did not constitute waiver of additional credit for time served).

Recently, in *Hines v. State*, 4 So. 3d 726 (Fla. 4th DCA 2009), the **Fourth District** confirmed its continued agreement with its earlier *Silverstein* decision. In *Hines*, the defendant stipulated to an amount of credit for time served in his plea. After he was sentenced, he claimed entitlement to an additional 193 days of credit for time served. The state argued that by stipulating to a specific amount of credit for time served the defendant waived his right to any additional credit for time served. The Fourth District again specifically rejected this argument finding "that the record does not show a specific voluntary waiver of this jail credit." *Hines*, 4 So. 3d at 727 (citing *Davis, Reed, Silverstein*, as well as *Tribble v. State*, 948 So. 2d 52, 54 (Fla. 4th DCA

2007) and *Murphy v. State*, 930 So. 2d 794 (Fla. 1st DCA 2006). *Compare White v. State*, 995 So. 2d 1172 (Fla. 4th DCA 2008) (defendant apparently waived credit for additional time served in plea agreement which called for specific sentence with a specific amount of credit from a particular date where the written plea agreement in bold capital letters included the following statement: "**I AM WAIVING ALL OTHER CREDIT FOR TIME ALREADY SERVED**.") (emphasis in original).

Similar to *Silverstein* and *Hines*, in *Davis v. State*, 968 So. 2d 1051 (Fla. 5th DCA 2007), the **Fifth District** held that a written plea agreement, which stated: "[c]redit for time served as of 7/31/2006 is 1,531 days[,]" was insufficient evidence that the defendant knowingly and voluntarily waived credit for additional time served. In *Davis*, the state specifically argued that the Second District's decision in *Reed* (discussed *supra*) "stands for the proposition that a stipulation to a specific amount of jail credit contained within a written plea agreement is tantamount to a waiver of any amount above the stipulated sum." *Davis*, 968 So. 2d at 1052. The Fifth District disagreed with the state's analysis and pointed out the decision in *Reed* was solely affirmed due to insufficient allegations, and that the defendant was permitted to re-file a facially sufficient motion. The court emphasized: "We do not interpret this dicta to mean that a waiver can be shown merely by a defendant's stipulation to a certain amount of credit, absent evidence that the defendant knew of his entitlement to

additional jail credit and voluntarily relinquished that right." *Davis*, 968 So. 2d at 1053. The court then 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 Canada v. State*, 1 So. 3d 338 (Fla. 5th DCA 2009) (defendant's agreement to waive prison credit did not waive his entitlement to jail credit for time served while awaiting disposition on community supervision violations, where record was silent regarding jail credit, as waiver must be knowing and affirmatively appear as condition of plea) (citing *Hill v. State,* 985 So. 2d 1216 (Fla. 5th DCA 2008)); *Hinkel v. State*, 937 So. 2d 1201 (Fla. 5th DCA 2006) (in *dicta* the court noted that 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, and suggested that if the written acknowledgement had added words such as "entitlement to additional jail credit has been waived" this would have been sufficient waiver); *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).

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. *See also 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).

The **First District** confirmed its holding in *Wells* in several more recent cases. *See Williams v. State*, 12 So. 3d 896 (Fla. 1st DCA 2009); *Velasquez v. State*, 11 So. 3d 979 (Fla. 1st DCA 2009); and *Giggets v. State*, 5 So. 3d 756 (Fla. 1st DCA 2009). In *Williams*, based on his plea agreement the defendant was sentenced to three years imprisonment with credit for time served from his most recent arrest. The plea colloquy and the written agreement were silent regarding his entitlement to prison credit. The First District concluded that there was no indication of a waiver of this prison credit in the record. In *Velasquez*, the defendant's plea agreement specifically called for him to receive 100 days of credit for time served. The First District held:

> [A] written notation in the plea agreement as to the amount of credit a defendant will receive is not sufficient to demonstrate that a defendant 'knowingly and voluntarily waived jail credit to which he would otherwise be legally entitled.' [citation omitted] A stipulation to a specific amount of credit in a written plea agreement is not sufficient in the absence of evidence 'that the defendant knew of his entitlement to additional credit and voluntarily relinquished that right.' [citation omitted].

Velasquez, 11 So. 3d at 980, quoting *Davis*, 968 So. 2d at 1052, 1053. Similarly, in *Giggets*, the defendant entered a guilty plea and stipulated to 698 days of credit for time served, but after sentencing filed a motion alleging his entitlement to 910 days of credit for time served. Yet again, the First District held: "[T]he plea agreement and plea transcripts do not establish that, as part of his plea, he knowingly waived any additional credit which he may have been due. A waiver of jail credit cannot be shown merely by a defendant's stipulation to a certain amount of credit in the absence of evidence that the defendant knew of his entitlement to additional credit and voluntarily relinquished that right." *Giggets*, 5 So. 3d at 757 (citations omitted).

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

These decisions of the First, Second, Fourth and Fifth District Courts of Appeal are in line with the legal definition of waiver. When a defendant is not aware of his entitlement to additional credit for time served, there cannot be a knowing, intentional and voluntary waiver of this additional credit for time served. Similar to the defendants in these decisions, Mr. Johnson entered a plea to a sentence of a specified length (4 years) with a specified amount of credit for time served (from November 14, 2005—the date of his arrest on the probation violations). (SR. 29, 33, 52-54). Also similar to these defendants, Mr. Johnson's plea agreement was silent regarding his entitlement and/or waiver to additional credit for time served in Boot Camp. (SR. 29, 33, 52-54). In accord with these decisions, Mr. Johnson should be granted credit for time served in Boot Camp as he did not knowingly, intentionally and voluntarily waive his statutory right to this credit for time served.

In its decision below, however, the Third District Court of Appeal disagreed. Rather than granting Mr. Johnson's credit for time served, it modified the well-

established rule which requires a knowing, intentional, and voluntary waiver to include an implied waiver exception. Specifically, 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." *Johnson*, 974 So. 2d at 1152 (citations omitted) (emphasis added). This implied waiver 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.

This Court should find that this implied waiver exception is contrary to well-established Florida law which requires all waivers to be knowing, intentional, and voluntary. This Court should then apply the credit due to Mr. Johnson for his time spent in Boot Camp. The application of the additional credit for time served is not a difficult task. It is mainly a ministerial/clerical function, and it does not usually involve any factual disputes.

It is reasonable to apply this credit as both parties entered the agreement knowing that absent a valid waiver the defendant is entitled at all credit for time served. Additionally, it is the state's duty to make certain that the issue of credit for time served is fully addressed by either crediting it to the defendant and/or ensuring that the defendant properly waived the credit. 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." Further, there is 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) which holds that a claim of credit for jail time was cognizable under Florida Rule of Criminal Procedure 3.800(b). *See Hildago v. State* 729 So. 2d 984, 986 (Fla. 3d DCA 1999).

Requiring the state, at the time of the plea, to make certain that the issue of credit for time served is fully addressed by either crediting it to the defendant and/or ensuring that the defendant properly waived the credit will help to guarantee that all defendants will uniformly receive the credit for time served to which they are entitled. It may also help to equalize any vagaries of local record keeping systems. *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); *Mancino*, 714 So. 2d at 433 ("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."); *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).

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. As this Court noted in *Mancino*, "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)). This early handling of any dispute regarding credit for time served ensures the finality of a defendant's sentence.

Furthermore, it is equitable to apply this credit to the defendant's sentence. In the situation of a plea bargain, if the defendant were forced to withdraw his or her plea in order to receive the credit for time served to which he or she is entitled, it is likely impossible to return the defendant to his or her original position. By the time the error is detected, defendants have already surrendered basic constitutional rights by entering

the plea agreement. Also, before the error is detected most of the defendants have already served time on their sentence, and many may have already completed a majority of their sentence.

CONCLUSION

Mr. Johnson did not knowingly, intentionally and voluntarily waive his entitlement to additional credit for time served in Boot Camp. Mr. Johnson is entitled to have this additional credit applied to his sentence and he respectfully requests that this Court reverse the Third District's decision below and award him credit for his time served in Boot Camp.

Respectfully submitted,
CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

By: _____
Shannon P. McKenna
Assistant Public Defender
Florida Bar Number 385158
Counsel for Petitioner

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 December, 2009.

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