IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-418

ANDREA JOHNSON,

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. Johnson did not knowingly, intentionally and voluntarily waive his entitlement to additional credit for time served in boot camp. Mr. Johnson 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 "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 v. State*, 974 So. 2d 1152 (Fla. 3d DCA 2008) (citations omitted) (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 Johnson's waiver was clear from the face of the record because during the plea colloquy and in the written agreement on credit for time served, it was noted that Johnson would only be receiving credit for time served from a date certain. This fact does not establish a knowing waiver of

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[3] In his Initial Brief, Johnson 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 Johnson noted in his Initial Brief, and as the state correctly recites in its Answer 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 7; Answer Brief at 10-11). In order to avoid any potential confusion, henceforth, Petitioner will use the term "effective" waiver, rather than "implied" waiver.

credit for time Johnson had served in boot camp. The written agreement did not mention the existence of this additional credit. Neither did it reference Johnson'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 also argues that Johnson's knowledge that he spent time in boot camp is sufficient to show that he was "actually and constructively aware of his entitlement to this credit." (Answer Brief at 11). However, knowing that he spent time in boot camp, without more, is insufficient. A defendant's knowledge that he previously served time is simply not the same as knowing that he or she is also entitled to receive credit for this time served. This is especially true in Johnson's case as he may not have been aware that attending boot camp is the equivalent of serving time in a county jail. 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 next attempts to distinguish Johnson's case from the numerous contrary district court of appeal decisions by arguing that none of those decisions "have a written plea agreement which specifies the time from which the credit runs while including other options regarding the credits, which options are not being

checked off." (Answer Brief at 15). At least one other case,[4] *Hinkel v. State*, 937 So. 2d 1201, 1202-1203 (Fla. 5th DCA 2006), does involve a virtually identical situation.

In *Hinkel*, the defendant signed an agreement on credit for time served which included four fields similar to the four included on Johnson's agreement. Hinkel's agreement 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's distinction that Johnson's case involved a written agreement which specifies the time from which the credit runs while including other options regarding the credits, which options are not being checked off, is a distinction without a

[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).

difference. 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 Johnson's case, three of the four fields (from X date to X date, X days of credit for time served, and all credit for time served from a date certain) all provide for a specific amount of credit for time served. These different fields just signify a different way 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.

The state argues that in signing this agreement Johnson "was put on notice that he was not being awarded **all** credit for time served." (Answer Brief at 12) (emphasis in original). 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.

Finally, and importantly, this credit for time served agreement, was entered only at the clerk's direction, after the trial court's oral pronouncement of sentence. (SR. 54). An after-the-fact written agreement cannot serve as valid waiver of a person's rights.

Other than the Third District's decision below, the state 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*, 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*, 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. 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). (SR. 29, 33, 52-54). Nothing in the record below indicates that Johnson knew of his entitlement to additional credit for time served.[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 valid waiver requires knowing relinquishment. This knowledge cannot rest on suppositions or presumptions. The state failed to prove that a knowing, intentional, and voluntary waiver was clearly shown on the face of the record.

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[5] In its Answer Brief, the state asserts that Petitioner did not preserve his argument: "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." (Answer Brief at 15-16). 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 Johnson 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.

This Court should reverse the Third District's finding below that Mr. Johnson "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. Johnson is entitled to this additional credit for time served.

This court should retain jurisdiction to hear this case.

In its motion to dismiss as moot, the state suggests that this Court should dismiss this case as Mr. Johnson's sentence has been fully served and he has been released. If this case is deemed moot, it is well settled that mootness does not destroy an appellate court's jurisdiction. *See Holly v. Auld*, 450 So. 2d 217, 218 & n.1 (Fla. 1984). An appellate court may decide an otherwise moot case "when the questions raised are of great public importance or are likely to recur." *Id.* (citations omitted). An appellate court may also decide an otherwise moot case that is capable of repetition but likely to evade review. *See N.W. v. State*, 767 So. 2d 446, 447 & n.2 (Fla. 2000). *See also Sims v. State*, 998 So. 2d 494, 503 & n.8 (Fla. 2008).

In *State v. Matthews*, 891 So. 2d 479 (Fla. 2004), this Court considered the applicability of credit for time served under *Tripp v. State*, 622 So. 2d 941 (Fla. 1993) to habitual felony offender sentences. Even though the defendant had been released from prison prior to its decision, this Court exercised its discretion to retain jurisdiction to address the conflict and to resolve uncertainty. *See Matthews*, 891 So. 2d at 483. This Court noted that jurisdiction was not destroyed as the issue was of great public importance, likely to recur, and capable of repetition yet evading review. *See id* at 483-484.

Similar to *Matthews*, the credit for time served issue presented in this case is of great public importance, likely to recur, and capable of repetition yet evading review. This Court should retain jurisdiction to address the conflict and to resolve the uncertainty between the district courts of appeal on the issue of whether a defendant's waiver of credit of time served must be knowing, intentional, and voluntary, or whether it may be presumed.

The state suggests that this Court should dismiss this case as the same issue is before this court in *Joyner v. State*, 988 So. 2d 670 (Fla. 3d DCA 2008), review granted 17 So. 3d 705. In *Joyner*, the Third District affirmed the denial of relief on the authority of its decision in this case. *See Joyner*, 988 So. 2d at 672. Rather than

dismissing this case as moot, Petitioner respectfully suggests that this Court consolidate these cases for all future purposes.

CONCLUSION

This Court should reverse the Third District's finding below that Mr. Johnson "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. Johnson 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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