IN THE FLORIDA SUPREME COURT

MICHAEL ANTHONY DAVIS :

APPELLANT :

v. : Case No. 80,922

STATE OF FLORIDA, :

APPELLEE :

_____ :

PETITIONER'S BRIEF ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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	:	

PRELIMINARY STATEMENT

MICHAEL ANTHONY DAVIS will be referred to as the "Petitioner" in this brief and the STATE OF FLORIDA will be referred to as the "Respondent." Petitioner was the original appellant in the District Court and the State of Florida was the original appellee. The Record on Appeal before the District Court will be referred to by the symbol "R" followed by the appropriate page number.

[1] Second District Court of Appeal Case No. 91-2951.

STATEMENT OF THE CASE AND FACTS

Petitioner **Michael Anthony Davis** seeks review of a decision of the Second District Court of Appeal rendered November 25, 1992, in which the court certified the following question:

> **IF A TRIAL COURT IMPOSES A TERM OF PROBATION IN ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE?**

This Honorable Court has jurisdiction pursuant to Article V, §3(b)(4), Florida Constitution. This Court postponed its decision on jurisdiction and directed Petitioner to serve his brief on the merits on or before January 11, 1993.

The case arose in the Circuit Court for Hillsborough County, Florida, where Petitioner was sentenced by the Honorable Harry Lee Coe III, Circuit Judge, who conducted the instant violation-of-probation hearing on August 22, 1991. (R86) Petitioner was appointed as counsel Assistant Public Defender Martin Hernandez; the prosecution was represented by Assistant State Attorney Daniel Sleet. (R87-89) In due course Judge Coe sentenced Petitioner to four and one-half years prison "with credit for time actually served," followed by five years probation. (R92-94) Mr. Hernandez objected that Judge Coe should give full credit to Petitioner for an eighteen-month sentence previously imposed but Judge Coe denied the request. (R94)

SUMMARY OF ARGUMENT

State v. Tripp, 591 So. 2d 1055 (Fla. 2d DCA 1991)[2] conceded that its holding "allows trial courts to greatly exceed the incarceration contemplated by the guidelines and Lambert[3] upon a single violation of probation," and further, "may conflict with the spirit of the sentencing guidelines."

These concerns and those raised below are well taken.

To begin with, this Honorable Court has held that a probationer must be given full credit for any sentence "served," and that a sentencing judge may not limit credit to time "actually served." See Lambert, supra; see also State v. Green, 547 So. 2d 925 (Fla. 1989); Ree v. State, 565 So. 2d 1329 (Fla. 1990); and Williams v. State, 581 So. 2d 144 (Fla. 1991).

But Tripp *permits* the "retroactive forfeiture of gain-time" specifically proscribed in Green, supra. And, since such forfeiture won't be mandatory, some judges will follow Tripp while others will not. The resulting haphazard sentencings will "destroy uniformity by skewing" cases like the instant one. (See, e.g., Flowers v. State, 586 So. 2d 1058 (Fla. 1991)).

Second, Tripp construes vague or uncertain statutes *against* defendants, contrary to §775.021(1), Florida Statutes.

Finally, giving or withholding "gain-time" is purely a function of the Department of Corrections, subject to policy

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[2] In which the Second District certified the same question to this Honorable Court.

[3] Lambert v. State, 545 So. 2d 838 (Fla. 1989).

"guidelines" of the Legislature. Accordingly, the Second District has no interpretive authority to usurp this legislative prerogative or to permit "forfeiture" in such a way that a judge like the one below will have no limitation or guidance in granting or withholding such gain-time.

Accordingly, this Honorable Court should answer the certified question in the negative, in keeping with the spirit and intent of the "guidelines," and with the "separation of powers" doctrine.

ARGUMENT:

JUDGE COE ERRED IN DENYING STATUTORY GAIN-TIME.

This Court held years ago that if a probationer violates a probationary split sentence,[4] the sentencing judge may impose any sentence he or she might originally have imposed, "with credit for time served and subject to the guidelines recommendation." Poore v. State, 531 So. 2d 161, 164 (Fla. 1988).

But in Tripp, supra, the Second District ruled that a sentence like that below is *not* a "split sentence, as described in Poore," but rather "a separate sentence of probation that is legally consecutive to the sentence of incarceration." 591 So. 2d at 1056. In other words, Tripp held that there are not five "basic sentencing alternatives" as this Court held in Poore, but *six*, the most newly-discovered of which allows a judge sentencing a probationer to usurp the legislative function, and to ignore both the sentencing guidelines and the "rule of lenity."

Accordingly, such judicial "hair-splitting" violates the intent of the guidelines, destroys any uniformity such sentences might have had under Lambert, Ree, and Williams (supra), construes vague penal statutes *against* defendants, and infringes on the legislative creation of "gain-time."[5] Put another way,

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[4] That is, "consisting of a period of confinement, none of which is suspended, followed by a period of probation." Id.

[5] The denial of such gain-time is the issue in this case, while in Tripp the state's argument was that the trial judge "improperly awarded *jail credit* to the defendant." 591 So. 2d at 1055, emphasis added. Thus there could be a factual distinction between the two cases even though the certified questions were identical. On the other hand the issue in Tripp dealt with "jail

the sentencing method approved by Tripp allows judges to deny credit for time served (in some cases) and to sentence without "guidelines" or any other limitation or standard.

If this Honorable Court approves Tripp the sentencing guidelines will be either substantially weakened, or the very term "guidelines" will have been rendered a nullity.

Any defendant charged in an Information with more than one count[6] *may* be sentenced to prison on one count, followed by a consecutive term of probation for each count following. And on each term of prison on "consecutive" violations-of-probation the sentencing judge *may* impose not only second, third or more "new" sentences in excess of the original guidelines, but also *may* deny the probationer any, some or all "time served." Thus not only the guidelines but also Poore, Green, Ree and Lambert, supra, will be rendered a nullity.

As this Honorable Court has held, accrued gain-time "is the functional equivalent of time spent in prison." State v. Green, 547 So. 2d 925 (Fla. 1989), supra, where the defendant, on revocation of probation, was sentenced and given credit only for time "actually served," not for gain-time earned. The First

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credit, including accumulated gain time." 591 So. 2d at 1056.
In either event, both cases involve probationers denied jail credit or gain time, without mandating denial in all such cases. As noted, such denial on a case-by-case basis should be permitted, if at all, subject to appropriate standards and in such a way as to serve considerations of "public policy," subjects wholly within the legislative sphere of power.

[6] A virtual certainty under the Legislature's amendment to §775.021(4)(a) and (b), Florida Statutes.

District reversed the denial of credit and this Honorable Court agreed, holding a prisoner "released early because of gain-time is considered to have completed his sentence in full." Id.

That in a nutshell is the limited issue here: Judge Coe's ordering that Petitioner get only "credit for time *actually* served,[7]" thus nullifying the Petitioner's credit for the "functional equivalent of time spent in prison," supra.

By affirming the Petitioner's sentence and presenting the same certified question as in Tripp, the Second District approved a sentencing scheme in which a judge may not only "greatly exceed the incarceration contemplated by the guidelines,"[8] but may also deny credit for jail-time and/or gain-time contrary to Green, supra. This Honorable Court should answer the certified question in the negative, thus holding that no judge may usurp the legislative function by giving *some* probationers credit only for time "actually served," while others may be given full or partial credit for gain-time pursuant to Green, supra.

Again, in Green this Honorable Court noted that the sentencing judge "only counted the time Green actually spent in prison," then held the trial judge's "denial of credit for gain-time already accrued [a] retroactive forfeiture of gain-time," for which he had no statutory authority. Id. In the same way the Second District had no *statutory* authority to approve the

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[7] (R94) Emphasis added.

[8] In "conflict with the spirit of the sentencing guidelines." Id.

"sentencing method" in Tripp and the instant case.

That "method" permits just such retroactive forfeiture of jail-time and/or gain-time, which in turn opens a "Pandora's box" of sentencing alternatives limited only by a judge's imagination or lack of subjective vindictiveness. And Tripp *recognized* "situations in which this sentencing method could be abused." 591 So. 2d at 1057: "one can easily imagine a multiple-count information, resulting in numerous consecutive terms of probation. This situation would allow for imprisonment far beyond the permitted guidelines range if a defendant violated each of his probations." Id, at footnote 3. Tripp concluded:

> It may be that there should be some limitation on a trial court's authority to impose a term of probation consecutive to a sentence of incarceration. We, however, are unaware of any such restriction and are not authorized to create one.

591 So. 2d, at 1057. That in sum is the Tripp's legal flaw: it interprets legislative policy in such a way as to violate the separation of powers and the "rule of lenity."

On the latter, it is not the judicial function either to create restrictions on police power or to *fail* to restrict "creative" sentencings which interpret vague law to permit some probationers to be punished more harshly than others, without guidance or limitation to advance "public policy." Rather, the judicial function is to interpret vague or uncertain penal statutes to *favor* the accused. §775.021(1), Florida Statutes.

See also State v. Buchanan, 191 So. 2d 33 (Fla. 1966): criminal statutes must be strictly construed; in interpreting penal statutes the due process standard of "definiteness" is of

special import; and if criminal statutes omit certain necessary and essential provisions which impress the acts as being wrongful and criminal, *courts* are not at liberty to supply deficiencies or undertake to make the statutes more definite and certain.

Contrary to Buchanan and due-process "definiteness," Tripp construed such statutes *liberally*, thus purporting to supply perceived deficiencies in sentencing and gain-time statutes, and so attempting to make those statutes more "definite and certain" than before. Quite simply, according to settled law including Buchanan and §775.021, supra, if the Legislature did not give judges *express* power "to impose a term of probation consecutive to a sentence of incarceration" so as to deny credit for jail- or gain-time on a case-by-case basis, that power does not exist.

Furthermore, Tripp would cause judicial chaos by allowing some judges to grant one probationer full credit while denying jail- or gain-time to another probationer with the same background and circumstances. Or some judges might routinely give full credit in *all* cases, while others could as routinely deny full credit in all cases. Yet other judges might feel each granting-of-credit must be done on a case-by-case basis, scaled according to the magnitude of the probationer's misconduct, his perceived "remorse," or a host of other subjective variables.

That of course is what the "guidelines" were to eliminate: "The purpose of the sentencing guidelines is to establish a uniform set of standards [and] to eliminate unwarranted variation in the sentencing process" by reducing judicial subjectivity.

Rule 3.701(b), Fla. R. Crim. Pr. Compare this with Tripp's granting judges virtual *carte blanche* in cases like this one: "It may be that there should be some limitation on a trial court's authority to impose a term of probation consecutive to a sentence of incarceration. We, however, are unaware of any such restriction and are not authorized to create one." 591 So. 2d at 1057.

That's also why the Legislature, if it *did* delegate power to grant or deny gain-time, couldn't do so without giving the very guidelines and "limitations" that Tripp concedes do not exist: "It *may* be that there should be some limitation on a trial court's authority to impose a term of probation consecutive to a sentence of incarceration." Tripp, supra, emphasis added. Again, by law, if the Legislature didn't set "limitations" in the same statute that "delegated" this judicial power to deny gain-time, that delegation is by definition invalid.

See Hialeah, Inc. v. Gulfstream Park, 428 So. 2d 312 (Fla. 4th DCA 1983): statutes enacted under the state's police power may not constitutionally delegate legislative authority in the absence of any standards. Unbridled discretion cannot be delegated by the legislature; standards must exist in the "delegating" statute. See Flesch v. Metropolitan Dade County, 240 So. 2d 504 (Fla. 1970). See also, Delta Truck Brokers, Inc. v. King, 142 So. 2d 273 (Fla. 1962):

> It is essential that the act which delegates the power likewise defines with reasonable certainty the standards which shall guide the agency in the exercise of that power.

Under the doctrine of non-delegation of legislative power, primary policy decisions must be made by legislators who are elected for that purpose. Askew v. Cross-Key Waterways, 372 So. 2d 913 (Fla. 1978). Further, the power to define what acts constitute a criminal offense and *what penalties shall be inflicted* is purely a legislative power. Watson v. State, 190 So. 2d 161 (Fla. 1966). And no division of the government -- executive, legislative or judicial -- may usurp the power of either of the other arms. Fla. National Bank of Jacksonville v. Simpson, 59 So. 2d 751 (Fla. 1952).

Unless the Legislature gave judges *express* authority to grant, withhold or partially credit jail or gain-time in the manner prescribed by Tripp, that power simply does not exist, especially since it would override the sentencing guidelines, prior decisions of this Court, and the rule of lenity.

On the other hand, if the power *has* been delegated the statute delegating it is invalid unless it contains "sufficient standards or guidelines." See Department of Insurance v. Southeast Volusia Hospital Dist., 438 So. 2d 815 (Fla. 1983): the crucial test on whether a statute unlawfully delegates legislative power is whether the statute itself contains standards or guidelines so the courts can determine whether the legislative intent is being carried out. See also Lewis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1977): statutes delegating power must so clearly define that power as to preclude action through whim, favoritism or unbridled discretion.

Thus since no statute "guides" judges in giving or withholding gain-time to probationers, that authority doesn't exist. See 14 Fla. Jur., "Criminal Law," §13, page 78:

> The courts may not imagine an intent and bend the letter of the act to define that intent, and they cannot strike out or remodel a statute with the view of making it express an intent which the statute does not evidence.

Further, statutes "prescribing punishments and penalties should not be extended further than their terms reasonably justify." Id, at §14, page 79. That seems to be what Tripp did.

Under Tripp any judge, on Informations with two or more counts, can sentence a defendant to the maximum permissible guidelines prison-term on Count One.[9] The judge may then impose on each following count "a separate sentence of probation that is legally consecutive to the sentence of incarceration."[10]

If and when the probationer commits even a single technical "violation," the judge may then both ignore the guidelines and deny the probationer any or all jail and gain-time previously served. Yet with another probationer, under the same circumstances, the same judge could grant full "credit" for reasons amounting to nothing more than "whim, favoritism or

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[9] See the concurrence in Tripp (Campbell, A.C.J.), in which Judge Campbell posed a longer and more detailed certified question. 591 So. 2d at 1057-8.

[10] 591 So. 2d at 1056. As noted, such a sentence would be a *sixth* "basic sentencing alternative," thus appending Poore, supra, which recognized only five. 531 So. 2d at 164. On the other hand, this "separate sentence" seems indistinguishable from Poore's third alternative: "a 'probationary split sentence' consisting of a period of confinement, none of which is suspended, followed by a period of probation." Id.

unbridled discretion." Lewis v. Bank of Pasco County, supra.

Accordingly, through Tripp the power to give or withhold all jail and gain-time to probationers will be removed from the legislative sphere and made a matter of pure judicial discretion, with no consideration of "public policy" or other relevant factors.[11] Clearly, Tripp "extends" the possible punishment for the vast proportion of probationers much farther than statutory terms reasonably justify.[12] It also "imagines" a legislative intent that does not exist, and bends the letter of the relevant sentencing and gain-time statutes in order to "remodel" them[13] to permit a sentencing method recognized neither by the legislature nor by this Honorable Court in Poore, supra.

In short, not only would Tripp gut the guidelines, override "lenity," and ignore prior authority from this Honorable Court, it would allow judges to usurp legislative power by determining which probationer is to be given full credit for gain-time and which one is not. Put another way, Tripp would leave the giving or withholding of credit for jail and gain-time to individual judges with neither guidance nor limitation. But, contrary to Tripp, if any governmental "body" is to institute such far-reaching policy changes, it must be the Legislature.

Furthermore, Tripp's reasoning is flawed. For one thing,

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[11] Tripp would also ignore the fact that, as recognized in Green, supra, the Department of Corrections would *also* have the "ability to award, forfeit, or restore gain-time."

[12] 14 Am. Jur., "Criminal Law," supra.

[13] Id.

rather than producing a "separate sentence of probation that is legally consecutive to the sentence of incarceration,"[14] both the Petitioner's and the defendant Tripp's "original" sentence appeared to be simply one of the five "basic sentencing alternatives" recognized in Green: that is, a "'probationary split sentence' consisting of a period of confinement, none of which is suspended, followed by a period of probation." 531 So. 2d at 164. And as both Poore and Green make clear, no district court has authority either to usurp legislative policy-making power or to approve a sentencing method that conflicts with the spirit and intent of the sentencing guidelines.

For one thing, this Court in Green clearly recognized the legislative prerogative over gain-time: "Section 944.275(1), Florida Statutes (1987), authorizes the Department of Corrections (department) to grant 'gain-time.'" 547 So. 2d, at 926. And the reasons for awarding gain-time -- primarily as an incentive to good behavior[15] -- are clearly matters of sound public policy, which are in turn solely legislative functions.

In Green this Honorable Court went on to say:

> Section 944.28, Florida Statutes (1987), governs the forfeiture of gain-time. This section lists circumstances that justify the forfeiture of gain-time, including a conviction for escape or the revocation of parole. There is no statutory authority, however, for forfeiture of gain-time upon revocation of *probation*. It is a well-recognized rule of statutory construction that the mention of one thing implies the exclusion of another. [Citation omitted.] Therefore, the revocation of probation is not a circumstance

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[14] Tripp, 591 So. 2d at 1056.

[15] See, Id.

that may be used to justify the forfeiture of statutory gain-time.

547 So. 2d, at 926, emphasis in original. This citation gives yet another reason for answering the certified question in the negative: given the Department of Correction's *express* authority to "award, forfeit, or restore gain-time,"[16] no similar authority to award, forfeit, or restore gain-time can be wrought by judicial interpretation, Tripp notwithstanding.

Under Tripp a vast new pool of gain-time forfeitures would be tapped. Since it is a matter of common knowledge that most of this state's judges and prosecutors feel unduly constrained by the sentencing guidelines, they would as a matter of course use Tripp's "alternative" whenever possible. Since it is also a matter of common knowledge that this state's prison system verges on gridlock, it is reasonably foreseeable that Tripp will simply add to that system's problems.[17] Thus, not only would Tripp

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[16] Green, 547 So. 2d at 926-7.

[17] See for example, "Chiles' 'safe streets,'" St. Petersburg Times, Page 10-A (Editorial), January 11, 1993:

"With his call for reform of Florida's criminal justice system, Gov. Lawton Chiles is putting law enforcers and prosecutors on the spot. Do they want to keep holding press conferences to decry the release of child killers, or do they want to fix the system that is causing it?

"... the greatest obstacle to reform in recent years has been law enforcement itself."

"Under the current system, prosecutors and judges can pretend they are sending a child killer such as Douglas McDougall away for 31 years, but they know better...

"Unfortunately, the state's prosecutors, who are looking to protect their plea bargaining leverage, have argued against honest sentencing reform[, and w]hose attitudes are irresponsible and obstructionist..."

"In raw political terms, when a Douglas McDougall is released from prison after serving less than a third of his

supersede the guidelines and ignore basic tenets of judicial interpretation, it would add immeasurably to this state's over-populated prison system, all of which would occur without due deliberation by the Legislature.

For these and other reasons Tripp must be reversed. Since forfeiture of gain-time is governed by statute -- i.e., the legislature -- other means by which gain-time may be forfeited may not be created through judicial interpretation. Buchanan, §775.021(1), supra. See also, Flowers v. State, 586 So. 2d 1058, 1059 (Fla. 1991): the rule of lenity contained in §775.021(1)

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court-ordered sentence, prosecutors are not held accountable; the governor is."

See also, "A prison system nobody points to with pride," St. Petersburg Times "Perspective" section, pp. 1 and 5-D, January 10, 1993:

"This is a criminal justice system nobody points to with pride, a system its prison chief recently criticized in terms a newspaper wouldn't print.

"It is a patently unfair system.

"In Florida prisons, there are men being imprisoned longer for shoplifting meat and clothing than others were for murder...

"It is also a patently dysfunctional system.

"Today, Florida's state prison system has the highest admissions rate and quickest exit rate of any in the country[;] it is nearing gridlock."

"Florida's latest prison crisis is driven by three factors.

"First, its prisons are full again, despite a crash construction program that doubled state prison beds in the late 1980s. Second, more than 90 percent of the prisoners left in the system last year were either in the class excluded from release or deemed 'high-risk' by the Parole Commission. Third, the Legislature's new mandatory-prison crimes are being abused by prosecutors and judges who are incarcerating thousands of mostly black defendants as habitual offenders..."

In other words Tripp would give prosecutors and sentencing judges -- already abusing habitual offender statutes -- *another* tool for avoiding sentencing guidelines, and create yet another class of prisoners who may be "excluded from release," supra, thus making the system even more "dysfunctional."

applies to the sentencing guidelines, and further:

> nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered included within its very terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.[18]

In view of Tripp there are two possible interpretations of the statutes by which probationers may be given or denied credit for jail or gain-time. *One* construction conflicts with the sentencing guidelines, usurps the legislative function, and permits judges to withhold or grant gain-time to probationers without guidance or limitation. The *other* respects the rule of lenity, promotes uniform sentencing without subjective "variations," and also gives full effect to prior case-law from this Honorable Court. Since the latter construction "operates in favor of liberty," *it* should be given effect.

As this Honorable Court held in Green, supra:

> [A]warding of statutory gain-time is solely a function of the [Department of Corrections], and the trial court is without authority to prevent such award or order its waiver. [Citation omitted.] The statute places in the hands of the department the ability to award, forfeit, or restore gain-time. There is no statutory authority for the court to initiate the forfeiture of gain-time by denying credit for accrued gain-time at resentencing.

547 So. 2d at 926-7. And in Poore, supra, this Court "stressed" that cumulative prison-time imposed after a violation-of-probation "always will be subject to any limitations imposed by the sentencing guidelines recommendation." 531 So. 2d at 165.

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[18] Brackets in original.

But under Tripp the ability to award, forfeit, or restore gain-time would *also* be given judges who sentence probationers, though without limitation from either legislature or sentencing guidelines. In Poore this Honorable Court characterized a similar sentencing as one which would "permit trial judges to disregard the guidelines," and would further "not only defeat the purpose of the sentencing guidelines, but would destroy them altogether. Obviously, this result never was intended when the guidelines permitted the probationary portion to exceed the recommended range." Id, 531 So. 2d at 165.

Finally, Daniels v. State, 491 So. 2d 544 (Fla. 1986)[19], also recognized the purely legislative function of granting or withholding gain-time:

> Formerly, the determination as to whether the defendant should be allowed credit for all or part of the time spent in county jail before sentencing was left to the sole discretion of the sentencing court. In 1973, however, the legislature amended section 921.161(1) to provide that the court *must* allow a defendant credit for *all of the time* spent in county jail before sentencing.

Emphasis in original. Since the Legislature thus clearly has sole power to create or extinguish authority over gain-time forfeitures, *only* the Legislature has the power to determine under which circumstances a probationer may be granted, denied or given partial credit for jail or gain-time in the manner prescribed by Tripp. Accordingly, this Honorable Court should answer the certified question in the negative.

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[19] Cited by the Second District in Tripp as supporting its holding. See 591 So. 2d, at 1056-7.

Further, in Daniels, supra, this Court also recognized that approving the construction proposed by two district courts would "render meaningless the legislative directive that a defendant receive credit for all the time served." 491 So. 2d, at 545. Thus, far from supporting Tripp's sentencing "alternative," Daniels, supra, supports the opposing contention that that scheme improperly permits judges to usurp a legislative function without guidance, limitation or "standard."

As noted, this Court should answer the certified question in the negative. Judge Coe committed reversible error and exceeded his authority by limiting the Petitioner's "credit" to only that prison-time actually served, and not including gain-time for good behavior for which the Petitioner was released early from prison. On remand the Petitioner must be given full credit for the prior eighteen-month sentence. And finally, since he will have served the entire four and one-half years unlawfully imposed, the interests of justice[20] demand that any excess time the Petitioner has spent in prison be deducted from the five-year term of probation which is to follow that prison term.

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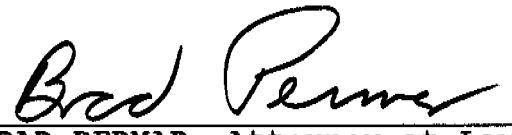
[20] This Honorable Court has the authority to grant such relief under Rule 9.140(f), F.R.App.Pr.: "In the interests of justice, the court may grant any relief to which any party is entitled." See also Tibbs, *supra*, 397 So.2d at 1126: "The latter has long been, and still remains, a viable and independent ground for appellate reversal[;] This rule, or one of its predecessors, has often been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings. . ."

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Petitioner respectfully requests that this Honorable Court accept jurisdiction over the certified question, answer it in the negative, and reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail Dale E. Tarpley, Assistant Attorney General, Seventh Floor, Westwood Center, 2002 North Lois Avenue, Tampa, Florida 33607, and to Petitioner Michael Anthony Davis, 1711 Beach Street, Tampa, FL 33607 this 11th day of January, 1993.



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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING - MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL ANTHONY DAVIS, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 91-02951

Opinion filed November 25, 1992.

Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge.

James Marion Moorman, Public Defender, Bartow, and Brad Permar, Assistant Public Defender, Clearwater, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See State v. Tripp, 591 So. 2d 1055 (Fla. 2d DCA 1991). As in the cited case we certify the following question to the supreme court:

IF A TRIAL COURT IMPOSES A TERM OF PROBATION ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE?

DANAHY, A.C.J., and CAMPBELL and THREADGILL, JJ., Concur.