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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,182

DCA CASE NO. 92-373

ANTHONY ROBERTS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CITATIONS

	PAGES
<i>AYALA v. STATE</i>	
585 So. 2d 483 (Fla. 2d DCA 1991)	3
<i>DANIELS v. STATE</i>	
591 So. 2d 1103 (Fla. 5th DCA 1992)	1
<i>GRADY v. STATE</i>	
618 So. 2d 341 (Fla. 2d DCA 1993)	4
<i>GRAHAM v. STATE</i>	
559 So. 2d 343 (Fla. 4th DCA 1990)	2
<i>HARRIS v. STATE</i>	
574 So. 2d 1211 (Fla. 2d DCA), <u>cause dismissed</u> ,	
581 So. 2d 1310 (Fla. 1991)	2
<i>MANUEL v. STATE</i>	
582 So. 2d 823 (Fla. 2d DCA 1991)	2
<i>PITTMAN v. STATE</i>	
604 So. 2d 1263 (Fla. 4th DCA 1992)	3
<i>SCHERWITZ v. STATE</i>	
618 So. 2d 793 (Fla. 5th DCA 1993)	2
<i>SILLIKER v. STATE</i>	
598 So. 2d 133 (Fla. 5th DCA 1992)	1
<i>STATE v. TITO</i>	
616 So. 2d 39 (Fla. 1993)	1
<i>TITO v. STATE</i>	
593 So. 2d 284 (Fla. 2d DCA 1992), <u>quashed</u> ,	
616 So. 2d 39 (Fla. 1993)	3
 OTHER AUTHORITIES	
 FLORIDA RULES OF CRIMINAL PROCEDURE	
Rule 3.701(d) (14)	3, 4
Rule 3.988	2

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AFTER REVOCATION OF PROBATION BASED ON A GUIDELINES SCORESHEET WHICH INCLUDED PRIOR CONVICTIONS WHICH WERE NOT SCORED WHEN THE DEFENDANT WAS ORIGINALLY PLACED ON PROBATION.

This supplemental brief is filed pursuant to this Court's order of September 21, 1993, directing the parties to submit supplemental briefs in light of State v. Tito, 616 So. 2d 39 (Fla. 1993).

In State v. Tito, this Court held that "when probation violation cases are being sentenced in conjunction with new substantive offenses, multiple scoresheets are to be prepared to determine the most severe sanction. Once the scoresheet with the most severe sanction is determined, that is the scoresheet to be used." State v. Tito, 616 So. 2d at 40.

That holding does not affect the present case because, here, the new substantive offense was a misdemeanor and therefore was not pending for sentencing under the guidelines. See Silliker v. State, 598 So. 2d 133 (Fla. 5th DCA 1992).¹ Factors which affect guidelines sentencing--such as the existence, character, and number of prior convictions--do not restrict the trial court's discretion in sentencing for a misdemeanor, and misdemeanors cannot be scored

¹See also Daniels v. State, 591 So. 2d 1103 (Fla. 5th DCA 1992) (where defendant is sentenced as habitual offender for new substantive offense at the same time as sentencing upon revocation of probation, there is no need to prepare a new scoresheet because adjudication as a habitual offender on the new offense removes that offense from guideline consideration, and the original scoresheet should be used in sentencing the defendant on the offense for which probation was imposed).

as primary offenses under the guidelines, Silliker at 134; see Fla. R. Crim. P. 3.988. Accordingly, in this type of case--i.e., where resentencing upon revocation of probation occurs together with sentencing on a new substantive offense which is not subject to the guidelines--the procedure established in State v. Tito cannot be followed.

This type of case differs in no material respect from those cases, such as Graham v. State, 559 So. 2d 343 (Fla. 4th DCA 1990), Harris v. State, 574 So. 2d 1211 (Fla. 2d DCA), cause dismissed, 581 So. 2d 1310 (Fla. 1991), and Manuel v. State, 582 So. 2d 823 (Fla. 2d DCA 1991), which hold that when sentencing a defendant upon violation of probation, a trial court must use the original scoresheet, and cannot make additions to the category of prior convictions.

The only reason that previously-omitted prior convictions might have to be scored when a new substantive offense is pending for sentencing, is to avoid an inappropriate sentence on the new offense. That reason never applies when the new offense is a misdemeanor, any more than it does when the occasion for resentencing is a technical violation. Since there is no material difference in the two situations, if it is held that the state can correct its original mistake when probation is revoked based on a nonfelony offense which is also pending for sentencing, as in this case, then it will inevitably follow that the state can do so when the violation is merely technical. See Scherwitz v. State, 618 So. 2d 793 (Fla. 5th DCA 1993) (agreeing with approach of Third

District, and acknowledging conflict with Graham, in a case which does not appear to have involved a new substantive offense).

Accordingly, as the Third District Court of Appeal correctly concluded, its decision in this case is in direct conflict with Graham. (A. 2-3). And, as argued in the petitioner's original brief, that conflict should be resolved in favor of Graham because to do otherwise would be contrary to Rule 3.701(d)(14), and to the legitimate expectations of finality to which that rule gives rise. That the state was negligent at original sentencing is not in itself a sufficient reason to allow it to correct its mistake at the defendant's expense, see Ayala v. State, 585 So. 2d 483 (Fla. 2d DCA 1991), and revocation of probation, under the circumstances of this case, and of Graham, provides no better an excuse for such corrections than does resentencing after remand, see Pittman v. State, 604 So. 2d 1263 (Fla. 4th DCA 1992).

Resolving the conflict by approving Graham would not be inconsistent with State v. Tito. The holding of State v. Tito, requiring preparation of multiple scoresheets and use of the scoresheet which recommends the most severe sanction, does not apply to this type of case, that is, where only the original, underlying offense is subject to guidelines sentencing.

Moreover, by approving Judge Parker's dissenting opinion in Tito v. State, 593 So. 2d 284, 286-87 (Fla. 2d DCA 1992), see State v. Tito, 616 So. 2d at 40, this Court has already implicitly approved the line of cases represented by Graham, Manuel, and Harris. Judge Parker's dissent recognized that when no new

criminal charges are pending for sentencing, "the trial judge must utilize the original scoresheet," as required by Manuel and Harris, but argued that reliance on those cases is misplaced where such charges are pending. Tito v. State, 593 So. 2d at 287 (Parker, J., dissenting). Whatever Judge Parker's reasoning might imply with respect to the scoring of previously-omitted convictions when a new felony offense is also pending for sentencing², it certainly means that Graham, Manuel, and Harris should be followed in other cases. This is one of those other cases.

There is no reason not to follow the plain meaning of Rule 3.701(d)(14), where, as here, doing so can have no effect on the sentence imposed for the new substantive offense, or where, as in Graham, no new substantive offense is involved. This Court should approve Graham and quash the decision below.

²Tito did not involve unscored priors, and this Court's holding in State v. Tito may not be inconsistent with the rule that the original scoresheet should be used in sentencing upon the original offense, even when a new substantive offense is pending for sentencing. See Grady v. State, 618 So. 2d 341, 344-45 (Fla. 2d DCA 1993).

Merely because all prior convictions should be scored when determining the maximum guidelines sentence for the new offense, it does not necessarily follow that the original scoresheet cannot be used to determine an upper limit for the sentence on the original offense.

As discussed in Grady, 618 So. 2d at 344-45, which, like Tito, did not involve unscored priors, the procedure set forth in State v. Tito is consistent with the rule which requires use of the original scoresheet when sentencing on a violation of probation. The scoresheet recommending the most severe sanction must be used to determine the total guidelines sentence allowed, and the sentences imposed must fall within that total range; however, the sentence imposed for the original offense for which probation is revoked "will be the recommended sentence as taken from the original scoresheet on the underlying substantive offense, plus the allowed one-cell bump for each violation of probation." Grady at 344.

CONCLUSION

Based on the foregoing argument and authorities, and on the argument made in petitioner's original brief, the petitioner requests this Court to quash the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to Barbara Arlene Fink, Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 this 30th day of September, 1993.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

A P P E N D I X

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1992

ANTHONY ROBERTS,
Appellant,

**

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vs.

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CASE NO. 92-373

THE STATE OF FLORIDA,
Appellee.

**

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Opinion filed December 29, 1992.

An Appeal from the Circuit Court for Monroe County, Richard Payne, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Barbara Arlene Fink, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and NESBITT and GODERICH, JJ.

NESBITT, J.

Anthony Roberts appeals the sentence imposed following a violation of probation. We affirm.

Originally, after a jury trial, the defendant was convicted of selling cocaine, and sentenced to four years in prison followed by

six years probation under a scoresheet which mistakenly omitted a number of prior convictions. After appeal, this court affirmed the judgment and sentence. Roberts v. State, 565 So.2d 1359 (Fla. 3d DCA 1990).

Thereafter, the defendant violated his probation and, after a hearing, the court sentenced him to nine years in prison. Because the subsequent scoresheet contained the correct number of prior convictions, the sentence imposed upon the defendant was bumped up three cells. The defendant argues that both the Florida Rules of Criminal Procedure as well as the Florida Supreme Court allow for a maximum one-cell increase in a defendant's sentence upon a violation of probation. Fla. R. Crim. P. 3.701(d)(14); see also State v. Pentaude, 500 So.2d 526 (Fla. 1987). Thus, according to the defendant, the court's failure to use the original scoresheet resulted in a sentence which exceeded the maximum allowed one-cell upward increase.

The defendant cites to Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990) for the proposition that a trial court is without power to consider a new scoresheet, over objection, containing prior convictions completely omitted from the original. The contention then is that the defendant be sentenced under a scoresheet that is simply not based upon the truth. Consequently, we do not agree with Graham because to follow it literally, the defendant receives the benefit of being sentenced under a scoresheet which mistakenly omits prior convictions. Neither the rules nor the substantive law justifies a defendant receiving the largesse of a judicial error. Since only one guidelines

scoresheet may be used for each defendant covering all offenses pending before the court at sentencing, Fla. R. Crim. P.

3.701(d)(1); accord Lambert v. State, 545 So.2d 838, 841 (Fla. 1989), following the defendant's argument permits him to escape the punishment meted out by the law.

Furthermore, since the defendant's violation of probation triggered the resentencing, the defendant is not being sentenced for "precisely the same conduct," and double jeopardy concerns do not come into play. State v. Payne, 404 So.2d 1055, 1058 (Fla. 1981)(citing Williams v. Wainwright, 493 F.Supp. 153, 155-56 (S.D. Fla. 1980).

In the instant case, using the original scoresheet, the court could have imposed a maximum sentence of two and one-half to five and one-half years incarceration after the probation violation. Had the defendant originally been sentenced under a correct scoresheet, however, the trial court could have incarcerated him for a maximum of twelve years after his probation violation. Allowing the inaccurate scoresheet to stand unjustly benefits the defendant by allowing his prior convictions to pass unnoticed merely because they were mistakenly omitted the first time.

We certify to the supreme court the apparent conflict between our decision and that of Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990).

Accordingly, the sentence under review is affirmed.