ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY LANCASTER,

Respondent.

CASE NO. 86,312

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Nineteenth Judicial Circuit in and for Indian River County and the Appellant in the Fourth District Court of Appeal and Petitioner was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida and Appellee in the Fourth District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

The symbol "PB" will denote Petitioner's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Respondent, Anthony Lancaster, relies on Petitioner-State's *Statement of the Case and Facts* as found in its Initial Brief on the Merits with the following additions and/or clarifications.

Respondent, Anthony Lancaster, was charged by Information filed in the Nineteenth Judicial Circuit in and for Indian River County with second degree murder. R 10-17. This offense was alleged to have occurred on May 3, 1987.

Respondent was sentenced to seventeen (17) years in prison to be followed by ten (10) years of probation. T 71, 72. Respondent was subsequently released from prison after completion of his sentence. He commenced serving the probationary portion of this split sentence on July 7, 1993. On August 3, 1994, Respondent was found to have violated his probation and said probation was revoked by the trial judge.

The trial judge sentenced Respondent to thirty (30) years in prison with "credit for all time [he] served previously in the Department of Corrections." T 76. The trial court indicated to the court clerk that it would be its' duty to "get with the jail and figure out what the credit time, he has some local County Jail." T 76. The written sentence order signed by Judge Wild indicates that Appellant was sentenced to thirty (30) years in prison with credit for 344 days "county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number/ 8700351 count number." R 20.

On appeal to the Fourth District, Respondent argued that the trial court erred in failing to award Respondent ***seventeen (17) years*** in prison time credit for time previously served on the instant thirty (30) year sentenced imposed upon Respondent on August 17, 1994. Respondent had originally been sentenced to seventeen (17) years in prison to be followed by a term of probation for this same offense. T 71.

The Fourth District in a written opinion, *Lancaster v. State*, 656 So. 2d 533 (Fla. 4th DCA 1995)[See Appendix] initially held that Respondent's thirty (30) year sentence which exceeded the applicable permitted guidelines range had to be reduced on remand to twenty seven (27) years in prison. *Id.* at 534.[1]

As to the proper credit to be awarded, the Fourth District on the authority of this Court's decision in *Orosz v. Singletary*, 655 So. 2d 1112 (Fla. 1995) ruled that "if upon remand it is determined that defendant completed his original sentence prior to 1993, when the legislature enacted section 944.278 and retroactively cancelled on awards of gain time and provisional credits defendant should properly be credited not only with earned gain time but with administrative gain time and provisional credits." *Id.* at 535.

[1] This sentencing issue is not before this Honorable Court. Petitioner conceded this issue in the Fourth District Court of Appeal. *Lancaster*, 656 So. 2d at 534.

SUMMARY OF THE ARGUMENT

Respondent was originally sentenced to seventeen (17) years in prison followed by a term of twenty years probation. The underlying offense was alleged to have occurred on May 3, 1987. After the incarceration portion of this split sentence was completed, he commenced serving the probation portion.

Upon revocation of probation, the trial judge sentenced Respondent to thirty (30) years in prison with credit for 334 days in the county jail credit. The trial judge also ordered the Department of Corrections to "complete and apply credit for time served and unforfeited gain-time awarded during prior service of case number [87-351]."

Respondent maintains as held by the Fourth District Court of Appeal in the instant cause, that Respondent was entitled to full credit for the entire seventeen (17) year term in prison on his original sentence in this cause after he was reincarcerated in the same case to thirty (30) years in prison for the violation of the probationary portion of his split sentence. Respondent is entitled to this full credit here only because his original offense occurred *prior* to October 1, 1989, the effective date of § 948.06(6), *Fla. Stat.* (1989) which authorizes the forfeiture of gain time for a violation of probation and completed his prison sentence *prior* to the enactment of § 944.278, *Fla. Stat.* (1993), effective June 16, 1993, which cancelled all administrative gain time and provisional credits for inmates in the custody of the Department. As the *Lancaster* court noted *if* Respondent establishes on remand that he meets this second criteria, i.e., completion of his prison sentence prior to June 16, 1993, then and only then would he have a vested right to previously awarded administrative gain time and provisional credits.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENT CREDIT FOR ALL TIME SERVED PLUS ALL AWARDED GAIN TIME ON HIS SPLIT SENTENCE AFTER HIS REVOCATION OF PROBATION.

Respondent was originally charged with second degree murder which was alleged to have occurred on May 3, 1987. On November 17, 1987, Respondent was sentenced to seventeen (17) years in prison to be followed by a term of probation. T 71, 72.

The trial court later revoked Respondent's probation for violating two (2) conditions of his probation. T 69, 70, R 24. The trial court then resentenced him to thirty (30) years in prison with "credit for all time [he] served previously in the Department of Corrections." T 76. The written sentence order signed by Judge Wild indicates that Respondent would receive credit for 344 days

> "county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number/ 87--351 count number."

R 20.

Petitioner-State of Florida seems to suggest in its Initial Brief that this is sufficient under Florida law. PB 5-6. However, as an initial matter, a critical fact in the instant cause is that Respondent was alleged to have committed his original offense on May 3, 1987. R 15. Pursuant to *State v. Green*, 547 So. 2d 925 (Fla. 1989), upon revocation of his probation, Respondent was entitled to credit for all time served, including gain time he was *awarded* prior to being placed on probation. As the offense at issue was committed before October 1, 1989.

In *State v. Green*, the defendant was sentenced to four and a half (4½) years in prison, to be followed by three (3) years probation. The defendant was also granted 287 days credit for time served in jail prior to his sentencing. While incarcerated in the Department of Correction, the defendant accumulated gain time and was released after serving only 518 days

of his 4½ year sentence. The defendant immediately commenced serving his term of probation, which was subsequently revoked. At sentencing on the revocation of probation, the trial judge sentenced the defendant to seven (7) years in prison. As to credit, "Green was given 805 days credit for time served (518 days in prison plus 287 days served before original sentencing), but was not given credit for gain-time earned while previously incarcerated." *Id.* at 926. This Honorable Court held "that Green is entitled to include earned gain-time when computing time served to credit against the sentence imposed after revocation of probation which is part of a probationary split sentence." *Id.* at 927. The premise of this Court's holding was that accrued gain-time is the "functional equivalent" of time actually spent in jail. This Court explained:

> Section 944.275(1), Florida Statutes (1987), authorizes the Department of Corrections (Department) to grant "gain-time in order to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services." ***A prisoner who is released early because of gain-time is considered to have completed his sentence in full.*** See also § 944.291, Fla. Stat. (1987). Receipt of gain-time is dependent on a prisoner's behavior while in prison, not on satisfactory behavior once the prisoner has been released from incarceration. Therefore, ***accrued gain-time is the functional equivalent of time spent in prison.***
>
> *Id.* at 926 [Emphasis Supplied].

Since the accrued gain-time was the functional equivalent of jail time, it follows that upon revocation of the probationary portion of a split sentence, the defendant was entitled to included this earned gain-time when calculating the time served credit against the sentence imposed upon revocation of his probation. This Court explained:

> Green earned gain-time due to his satisfactory behavior while in prison. Because of that accumulated gain-time, Green was released early, and ***the incarceration part of his split sentence was finished, although he was still required to serve the probation part of his split sentence.*** Upon resentencing, Green was clearly entitled to credit for the time served on the original sentence. *State v. Holmes*, 360 So. 2d 380 (Fla. 1978); *see also North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The trial court only counted the time Green

> actually spent in prison as time served. This denial of credit for gain-time already served was essentially a retroactive forfeiture of gain-time.

Id. at 926 [Emphasis Supplied].

This Court further noted in *Green* that revocation of probation was *not* one of the statutory circumstances that authorized the forfeiture of gain-time pursuant to Section 944.28, *Fla. Stat.* (1987).

This statutory deficiency was quickly addressed by the Florida Legislature in Chapter 89-531, Section 6, *Laws of Florida* (1989), effective October 1, 1989 which added revocation of probation to the statutory circumstances that allowed forfeiture of gain-time. See Section 944.28(1), *Fla. Stat.* (1989).[2]

In *Tripp v. State*, 622 So. 2d 941 (Fla. 1993), this Honorable Court held that if the sentencing court imposed a term of probation on one offense consecutive to a sentence of incarceration in another offense, credit for time served on the first offense had to be awarded on the sentence imposed after the revocation of probation on the second criminal offense to be consistent with the intent of the *Fla.R.Crim.P.* 3.701 sentencing guidelines. This Honorable Court also noted that the change to Section 944.28 was inapplicable to Tripp because his offense was committed before its effective date:

> We note that prior to the enactment of Chapter 89-531, *Laws of Florida*, "credit for time served included jail time actually served and gain time granted pursuant to Section 944.275, *Florida Statutes*, 1991. *State v. Green*, 547 So. 2d 925, 927 (1989). It does not include "provisional credit" or "administrative gain time" which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison. *See* § 944.277, *Fla. Stat.* (1991). By virtue of Chapter 89-531, the revocation of probation

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[2] **944.28 Forfeiture of gain-time and the right to earn gain-time in the future.-**
(1) If a prisoner is convicted of escape, or if the clemency, conditional release as described in chapter 947, probation or community control as described in s. 948.01, provisional release as described in s. 944.277, or parole granted to him is revoked, the department may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his release under such clemency, conditional release, probation, community control, provisional release, or parole.

> or community control now serves to forfeit any gain time previously earned. This change in the law is inapplicable to Tripp because ***his crimes were committed before October 1, 1989, the effective date of the act.***

Id. at 942 n. 2 [Emphasis Supplied].

Respondent concedes that this Honorable Court indicates in *Tripp* that credit for time served which is to be awarded upon resentencing for a violation of probation does *not* include provisional credits or administrative gain time. *Tripp*, 622 So. 2d at 942 n. 2.

The Fifth District in *Rice v. State*, 622 So. 2d 1129 (Fla. 5th DCA 1993) addressed the award of credit upon revocation of probation in light of this Court's decision in *Tripp* as follows:

> Accordingly, Rice is entitled to credit on the strong armed robbery sentence for the jail time he ***actually served*** for the armed robbery conviction. Because his crimes were committed ***before the October 1, 1989 effective date of chapter 89-531*** Laws of Florida, Rice is also ***entitled to credit for gain time granted*** pursuant to section 944.275, Florida Statutes (1985), ***but is not entitled to provisional credits or administrative gain time.*** See *Tripp*, 622 So. 2d at 942 n. 2. We recognize that the actual calculation of credit for time served must, by necessity, be performed by the Department of Corrections because the trial court lacks the necessary records.

Id. at 1130 [Footnote Omitted].

In *Webb v. State*, 630 So. 2d 674 (Fla. 4th DCA 1994), the Fourth District citing *Tripp* and *Rice* held that upon revocation of probation, a defendant is entitled to not only credit for all time previously served in county jail and prison but also gain time served if the original offense was committed prior to the effective date of Section 948.06(6), *Florida Statutes* (1989). However, the Fourth District agreed with the state that

> [A]ppellant is not entitled to credit under section 944.277, Florida Statutes, for administrative gain time attributable to prison overcrowding. *See Tripp v. State*, 622 So. 2d 941, 942, n. 2 (Fla. 1993) and *Rice v. State*, 622 So. 2d 1129 (Fla. 5th DCA 1993). The record before us does not indicate what portion of appellant's gain time is attributable to appellant's good behavior or to prison overcrowding.
>
> Accordingly, we reverse the trial court's order denying

> appellant's motion and remand with instructions to the trial court to order the Department of Corrections to determine the amount of appellant's previous gain time attributable to his good behavior under section 944.275, Florida Statutes, and apply such credit to his current sentence.

Id. at 676.

Recently, this Court is *Orosz v. Singletary*, 655 So. 2d 1112 (Fla. 1995) [Appendix 2] held that Section 944.278, *Florida Statutes* (1993)[3] (effective June 17, 1993) which cancelled all awards of administrative gain-time and provisional credits for all inmates "serving a sentence or combined sentences in the custody of the department" could ***not*** be retroactively applied to cancel the administrative gain-time and provisional credits to Orosz on his 1975 sentence because that sentence had fully expired ***prior*** to the time Section 944.278 took effect. "In 1993, while Orosz was serving this second sentence [1975 battery on correctional officer], the Legislature enacted section 944.278. This statute retroactively cancelled all awards of administrative gain time and provisional credits for prisoners serving "a sentence or combined sentence in the custody of the department." § 944.278, *Fla. Stat.* (1993)[Emphasis Supplied]. *Orosz*, 655 So. 2d at 1113. Pursuant to this statute, the Department of Corrections cancelled the administrative gain time and provisional credits awarded to Orosz on both his first and second sentences.

In his mandamus petition to this court, Orosz argued that the retroactive cancellation of his administrative gain time and provisional credit previously applied on both his first and second sentences violated his constitutional protections against *ex post facto* laws and bills of

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[3] **944.278 Cancellation of administrative gain-time and provisional credits**
All awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are hereby cancelled for all inmates ***serving a sentence*** or combined sentence in the custody of the department, or serving a state sentence in the custody of another jurisdiction. Release dates of all inmates with 1 or more days of such awards shall be extended by the length of time equal to the number of days of administrative gain-time and provisional credits which were canceled. Inmates who are out of custody due to an escape or a release on bond, or whose post release supervision is revoked on or after the effective date of this act, shall have all administrative gain-time and provisional credits cancelled when the inmates release date is reestablished upon return to custody. [Emphasis Supplied].

attainder. This court rejected this argument as applied to Orosz's second sentence which he was serving in 1993 when the Legislature enacted section 944.278. However, as to Orosz's first sentence, which had been completed *prior* to 1993, this Court found merit in Orosz's contention that the Department's cancellation of his *administrative and provisional credits* previously awarded on Orosz's first sentence was improper. This Honorable Court held:

> that this prisoner, ***who has fully completed a sentence because of gain time awarded under a proper interpretation of the statutes applicable to his sentences, has a vested right in that gain time.***
>
> In the instant case, the statute that retroactively cancelled the administrative gain time and provisional credits awarded to Orosz on his first sentence ***was not enacted until 1993, well after Orosz had completed his first sentence.*** As reflected in the Department's records and undisputed by the parties, the Department properly calculated Orosz's gain time pursuant to the applicable statutes then in effect.
>
> The Department disputes Orosz's assertion that he had "completed" his first sentence. According to the Department, it has the statutory authority to combine multiple sentences into one overall term for the purpose of calculating the award or forfeiture of gain time. Under this analysis, Orosz was not serving two distinct sentences but one combined sentence of forty-five years for his first and second offenses. And, because he never completed this combined sentence, his right to gain time never became vested.
>
> To support this contention, the Department points to a seventy-five year history of cases, statutes and Department policy. ....In light of the express language in the statute during the period of 1978 to 1983, we are not persuaded that the historical practices of the Department may allow it to combine Orosz's first and second sentences.
>
> We grant partial relief on Orosz's petition for a writ of mandamus. While the Department may cancel administrative gain time and provisional credits awarded to Orosz on his second sentence, it cannot do so for the first sentence, and, consequently, ***the first sentence must be deemed completed.*** We also order the Department to restore the gain time Orosz had earned on the second sentenced except the administrative gain time and provisional credits, which we find were properly cancelled.

Id. at 1114 [Emphasis Supplied, Footnotes Omitted].

It follows at bar that if Respondent ***completed*** his prison sentence before the effective date of Section 944.278 which cancelled administrative gain time and provisional credits [June 17, 1993],[4] then like the defendant in *Orosz*, he has "fully completed a sentence" and "has a vested right in that gain time." As this Court explained: "While the Department may cancel administrative gain time and provisional credits awarded to Orosz on his second sentence, it cannot do so for the first sentence and consequently, the first sentence must be deemed completed." *Id.* at 1114. As the Fourth District held in the instant case: "to retroactively cancel administrative gain time and provisional credits would unconstitutionally violate a defendant's constitutional rights against ex post facto laws and bills of attainder." *Lancaster*, 656 So. 2d at 534.

Based on the argument contained herein, if upon remand to the trial court it is determined that Respondent had in fact completed his original sentence prior to June 17, 1993, when the Legislature enacted Section 944.278, Respondent should be credited not only with the time he actually served in jail plus earned gain time but also administrative gain time and provisional credits.

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[4] This factual issue must be resolved on remand. *Lancaster*, 656 So. 2d at 535.

CONCLUSION

Respondent requests that this Court *approve* the decision of the Fourth District Court of Appeal in *Lancaster v. State*, 656 So. 2d 533 (Fla. 4th DCA 1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sarah Mayer, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 28th day of February, 1996.

Attorney for Anthony Lancaster