IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,312

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY LANCASTER,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA TERENZIO
Bureau Chief
Assistant Attorney General
Florida Bar No. 656879

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Petitioner

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PRELIMINARY STATEMENT

Respondent was the Defendant 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. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

In May, 1987, Respondent was charged with second degree murder (Exhibit A). On November 25, 1987, he was sentenced to 17 years in the Department of Corrections followed by 20 years probation (Exhibit B). Respondent was released from prison on January 14, 1991 and began serving the 20 year probationary portion of his sentence (Exhibit C). Apparently after a violation of probation (See Exhibit C), Respondent was resentenced in July 1993, to probation for 10 years after service of 9 months community control (Exhibit D). In August 1994, Respondent's probation was again revoked (Exhibit E)(R 24), and he was sentenced to 30 years imprisonment with credit for 334 days time served in county jail prior to sentencing, and the Department of Corrections was ordered to "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." (Exhibit F) (R 17-23).

On appeal, Respondent argued that the trial court erred in failing to give him credit for all the time he previously served on the 17 year portion of his original sentence, including incentive gain time, i.e. Respondent argued he should be credited with the entire 17 years. See: (Appellant's Initial and Reply Briefs). The Fourth District found that the trial court correctly ordered that Respondent be awarded unforfeited gain

time and delegated to the Department of Corrections the task of determining the amount of gain time to be awarded (Exhibit G). Lancaster v. State, 656 So. 2d 533, 534 (Fla. 4th DCA 1995).

As to Respondent's claim that he was entitled to credit for his entire 17 year sentence the Fourth District interpreted this Court's decision in Orosz v. Singletary, 655 So. 2d 1112 (Fla. 1995), as providing that defendants who had committed offenses prior to October 1, 1989, and who had completed their sentences prior to the enactment of § 944.278 Florida Statutes (1993), had a vested right to previously awarded administrative gain time and provisional credits (Exhibit G). Lancaster at 534. The Fourth District further held that to retroactively cancel administrative gain time and provisional credits would violate a defendant's rights against *ex post facto* laws and bills of attainder, thus if on remand it was determined that Respondent had completed his sentence prior to 1993 when §944.278 was enacted, he was entitled to credit, not only for gain time awarded, but also to administrative gain time and provisional credits (Exhibit G). Lancaster at 534-535.

Petitioner obtained discretionary review of the Fourth District's decision this Court. Finding that the Fourth District had misinterpreted the holding in Orosz, this Court quashed the decision of the Fourth District to the extent it held that all inmates who committed their offenses prior to October 1, 1989,

and who completed their sentences prior to the 1993 enactment of § 944.278 have a vested right in previously awarded administrative gain time and provisional credits, and remanded for further consideration (Exhibit H). State v. Lancaster, 687 So. 2d 1299 (Fla. 1997).

Less than one month after this Court's decision in this case, the United States Supreme Court decided Lynce v. Mathis, 519 U.S. ___, 117 S.Ct. 891, 137 L.Ed. 2d 63 (1997). In Lynce, the Court held that the 1992 statute canceling provisional credits violated the *Ex Post Facto* Clause (Exhibit I). Lynce.

Respondent filed a petition for writ on certiorari in the United States Supreme Court which was granted, and this case was remanded to this Court for further consideration in light of the Lynce decision (Exhibit J).

SUMMARY OF THE ARGUMENT

The failure to re-award overcrowding credits to Respondent upon his reincarceration after violating his probation, does not violate *ex post facto* considerations. Respondent's reincarceration occurred for different reasons than the petitioner in Lynch, who did nothing and was reincarcerated when his overcrowding credits were canceled upon enactment of the statute authorizing cancellation. Respondent's overcrowding credits were never canceled; he remained on probation even after enactment of the statute authorizing cancellation. It was only when Respondent's probation was revoked after he committed a new offense, that the overcrowding credits were not re-awarded to him. As Respondent had 'used these credits up' when he was released, the failure to re-award the credits does not constitute an *ex post facto* violation. Thus, the decision of the Fourth District in this case must be quashed.

ARGUMENT

FAILURE TO RE-AWARD CREDIT FOR ADMINISTRATIVE GAIN TIME AND PROVISIONAL CREDITS WHEN SENTENCING FOR VIOLATION OF PROBATION DOES NOT VIOLATE A DEFENDANT'S *EX POST FACTO* RIGHTS.

At issue in this case is a defendant's entitlement to the award of overcrowding credits as the "functional equivalent of time served" upon revocation of a subsequent supervision. In is governed by the Florida Supreme Court's decision in State v. Lancaster, 687 So. 2d 1299 (Fla. 1997), this Court reversed the decision of the Fourth District, concluding that "because Lancaster has no vested interest in any previously awarded administrative gain time or provisional credits, we conclude that Lancaster is not entitled to credit for any such time awarded during the incarcerative portion of his initial sentence." Id. Because Lancaster was decided some 20 days prior to the decision in Lynce v. Mathis, 519 U.S. ___, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997), this Court did not have the opportunity to consider the impact of the Lynce decision in this particular set of circumstances. While some of the *ex post facto* analysis contained in this Court's prior decision in this case is superseded by the principles contained in Lynce, this alone does not mean that the overcrowding credits must be reapplied upon revocation of supervision. As noted in the argument below, such credit may not be entitled to reinstatement based upon its nature and purpose which do account for whether such credit should be

considered the "functional equivalent of time served". Lynce addressed only the retroactive cancellation of overcrowding credits which had been awarded but which had not resulted in the release of the offenders who had received the overcrowding credits[1]. There is merit to the argument that overcrowding release credits, which are not earned and which were designed to alleviate prison overcrowding, are essentially "used up" upon release from incarceration. See Bowles v. Singletary, 698 So. 2d 1201 (Fla. 1997).

In Lynce the United States Supreme Court held that the cancellation of provisional overcrowding credits which had been awarded to the petitioner, constituted a violation of the *ex post facto* clause. There, the petitioner, who had been released from incarceration due in part to the award of these provisional credits, was rearrested and reincarcerated. In the instant case, no such retroactive cancellation occurred. Here, Respondent Lancaster was awarded the overcrowding credits and released to

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1. While Lynce himself had been released, he had been erroneously released based upon the Department of Corrections's misapplication of amendments to section 944.277 effective July 6, 1992. Had DOC applied the statute in accordance with the interpretation noted by the Attorney General in 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992), Lynce would have had his overcrowding release credits canceled on July 6, 1992, and would not have been subsequently released in October 1992. Upon issuance of the Attorney General's opinion, Lynce was returned to custody to complete satisfaction of his sentence. Thus, Lynce was not in the same posture as Respondent Lancaster, who actually achieved his release from incarceration on the previous sentence as a result of the application of overcrowding credits.

commence the probationary portion of his split sentence in 1991. When the statute at issue in Lynce was enacted in 1992, Lancaster's provisional credits were **not** canceled, notwithstanding that he, like Lynce, had been convicted of a murder offense. Lancaster, unlike the petitioner in Lynce, was neither rearrested nor reincarcerated. Rather, Lancaster remained at liberty, serving the probationary portion of his sentence. It was not until Lancaster committed a new substantive offense and was given a new sentence upon revocation of his probation, that consistent with the law in place at that time, the sentencing court did not award credit for overcrowding credits, but directed only credit for time served and unforfeited gain-time. See Tripp v. State, 622 So. 2d 941 (Fla. 1993). Thus there were no overcrowding credits to cancel under § 944.278. These credits were simply not awarded by the sentencing court or reinstated by DOC. Unlike the petitioner in Lynce, who did nothing to lose these overcrowding credits, Lancaster retained the benefits of these credits until he violated the law, as well as the terms of his probation. Obviously, Lancaster is in a very different posture from the petitioner in Lynce.

Petitioner submits that there is no need for a statutory provision which addresses the forfeiture or cancellation of overcrowding credits upon revocation of probation because, in the first instance these credits are not earned based upon work or

performance in prison. As such, these credits are not the functional equivalent of time served. See Tripp v. State, at n.2. Further, Lancaster entitlement to overcrowding credit was based on the statutes in effect at the time he committed his offense in May, 1987. At that time, the provisional credits statute (§ 944.277), was the primary overcrowding control mechanism in effect. His entitlement to any subsequently allocated provisional credits is based upon the version of the emergency gain-time statute in effect on the date of his offense, May 3, 1987, i.e. § 944.276 Fla. Stats. (1987). No provision in either § 944.276 or in § 944.277 speaks to entitlement to reapplication of overcrowding credits (previously used to gain release) to a subsequent new sentence imposed upon revocation of probation. Consequently, the provisional credits which Lancaster seeks to have awarded as the functional equivalent of time served are not authorized to be credited upon revocation of probation under Florida law.

Moreover, there is no federal constitutional right to credit for time served prior to sentence, and absent a state statute granting such credit, credit for time served is within the discretion of the sentencing judge. See Gremillion v. Henderson, 425 F.2d 1293 (5th Cir. 1970); Palmer v. Dugger, 833 F.2d 253 (11th Cir. 1987). While this principle has been focused primarily on time which may have been served in county jail

pending trial or disposition of charges, it would seem equally applicable when a sentencing court imposes a wholly new sentence upon the revocation of probation. In Florida, § 921.161, Florida Statutes, mandates that the sentencing court grant credit for time served in county jail prior to sentence. Florida law also provides for the sentencing court to direct credit for actual time served from any prior incarceration related to the new sentence, either as a probationary split sentence or sentences which are related as a result of the application of sentencing guidelines in accordance with Tripp. In State v. Green, 547 So. 2d 925 (Fla. 1989), this Court extended the credit requirement to gain-time which had been earned while in prison. In concluding that gain-time earned should be treated in a similar fashion to actual time served, that court reasoned:[2]

> Receipt of gain-time is dependent on a prisoner's behavior while he is 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.

However, this Court has never extended the same status to

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2. The Supreme Court's analysis is no doubt drawn from this Court's decision in North Carolina v. Pearce, 395 U.S. 711, 898 S.Ct. 2072, 23 L.Ed.2d 656 (1969), in which this Court concluded that double jeopardy principles would be violated if upon a conviction after retrial, the time credited did not include both actual time served and time credited for good behavior during service of the original sentence.

overcrowding credits. Overcrowding credits are simply not the functional equivalent of time served -- the *ex post facto* clause does not compel a second and third allocation of these credits once they have been used to effectuate the early release of the original sentence. None of the statutes authorizing overcrowding credits extends such an entitlement to the offender. Petitioner submits that the decision in Lynce does not compel Florida courts to convert time not served as a result of overcrowding into actual time served when a new sentence is imposed upon revocation of probation. There is no forfeiture which occurs as a result, because Lancaster has essentially 'used up' the credits he was awarded when he was released from custody as a result of overcrowding. The Supreme Court in Lynce did not alter the nature of overcrowding credits -- it simply concluded that the purpose and subjective intent of the legislature in retroactively canceling such credits prior to an offender's release is irrelevant to the *ex post facto* analysis, since the effect of the credits is to reduce the length of time to be served on the sentence as a result of overcrowding. Lancaster is not similarly situated to the petitioner in Lynce. Respondent Lancaster had full benefit of his overcrowding credits, and he 'used up' his credits when he was released on probation. Unlike the petitioner in Lynce, Lancaster's own affirmative actions in violating his probation prompted his return to custody with a **new** sentence.

Petitioner submits that no federal constitutional protection is extended to the amount of credit Lancaster may receive upon a new sentence from any prior incarceration unless the failure to give such credit would result in Lancaster's serving a term beyond the statutory maximum for the offense, thereby running afoul of the double jeopardy clause. Because overcrowding credits are neither actual time served, nor the functional equivalent of time served, and because Lancaster will not be subject to serving beyond the statutory maximum of the new sentence imposed, he cannot invoke any federal constitutional protection to command that the State again allocate these credits as time served upon a **new** sentence.

Finally, even if it can be argued that the sentencing court did direct DOC to apply the provisional credits from the previous incarceration, Petitioner submits that DOC could invoke § 944.278 to cancel the credits without implicating the *ex post facto* clause. The Sixth Circuit Court of Appeals has recognized the critical distinction between laws which change the penalty imposed for the original offense as opposed to laws which change penalties for new behavior which results in the revocation of post-release supervision. U.S. V. Reese, 71 F.3d 582 (6th Cir. 1995); but see U.S. v. Parriett, 974 F.2d 523 (4th Cir. 1992)[3];

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3. Although the Fourth Circuit reached a different conclusion, the court noted:

> A better argument against a finding that the statutory revision is retrospective is that

U.S. v. Paskow, 11 F.3d 873 (9th Cir. 1993); U.S. v. Meeks, 25 F.3d 1117 (2d Cir. 1994); U.S. v. Beals, 87 F.3d 854 (7th Cir. 1996); U.S. v. St. John, 92 F.3d 854 (8th Cir. 1996). In Reese, the defendant was convicted and sentenced to a term of incarceration, followed by a term of supervised release. After Reese committed his crime, a new statute was enacted which required a trial judge, upon revocation of supervised release, to impose a term of not less than one-third of the term of supervised release, whereas under the prior statute the trial

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> the revocation of Parriett's supervised release was not ordered as punishment for his initial crimes, but instead, as punishment for his possession of drugs during the term of his supervised release. Under this interpretation, there could be no claim that the statute operated retrospectively because Parriett engaged in the drug possession long after the effective date of the revision of the statute. The Supreme Court has stated that a law raises *ex post facto* concerns only "if it changes the legal consequences of acts completed before its effective date." (citation omitted) Clearly, the revision to the supervised release statute most directly altered the "legal consequences" of Parriett's drug possession. Only in a more tenuous sense can it be said that revision of the supervised release statute changed the legal consequences of Parriett's original crime, making the punishment for that crime more severe by constraining the district court's discretion to overlook any ensuing controlled substance violations committed by the defendant while on supervised release.

Parriett, 974 F.2d at 526. However, because of the Fourth Circuit's earlier precedent in Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989), the court felt compelled to hold that the revision nonetheless violated the *ex post facto* clause.

judge had discretion to impose any sentence up to three years. In finding that application of the new statute to Reese did not violate the *ex post facto* clause, that court found that the punishment for Reese's original offense was **not** being changed or increased. Noting that a person identically situated to Reese, who did not violate the terms of his supervised release would suffer no consequences from the new statute, the court stated that "it can hardly be logically argued that the punishment is being imposed 'because of' the earlier conduct." Id. at 590. Here, as in Reese, no *ex post facto* violation occurred as a result of the application of § 944.278, because the consequences suffered by Lancaster were the result of conduct committed **after** the enactment of § 944.278 Fla. Stat. (1993).

As the circumstances in the instant case are distinguishable from those in Lynch, aand as Respondent has not suffered any retroactive cancellation of overcrowding credits, Petitioner submits this Court should again reject Respondent's argument that he is entitled to re-application of the overcrowding credits, as no *ex post facto* violation occurred in this case.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to QUASH in part, the decision of the Fourth District Court of Appeals in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief
Florida Bar No. 656879

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by Courier to: ANTHONY CALVELLO, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 16th day of January, 1998.

Of Counsel