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

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STATEMENT OF THE CASE AND FACTS

In May, 1987, Respondent was charged with second degree murder. (A 4). On November 25, 1987, he was sentenced to 17 years in the Department of Corrections followed by 20 years probation. (A 5-6). Respondent was released from prison on July 7, 1993 and began serving the probationary portion of his sentence which had been reduced to 10 years after service of 9 months community control. (R 11-14).

An affidavit of probation was filed in May 1994, alleging Respondent had violated the conditions of his probation by failing to pay the costs of his supervision, resisting arrest without violence, battering Sharon Brown, and stalking Sharon Brown. (R 1-2). On August 3, 1994, Respondent was tried and found guilty of violating his probation by resisting arrest without violence and battery. (T 1-69, R 24). On August 17, 1994, Respondent was sentenced to 30 years in the Department of Corrections. (T 70-77, R 17-21). In addition to credit for time served in county jail, the trial court ordered the Department of Corrections 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

(R 20).

On appeal, Respondent argued that his 30 year sentence was illegal because it exceeded the applicable guidelines range, and 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 Supplemental Briefs). The Fourth District found that Respondent's 30 year sentence, while within the then current permitted guidelines, exceeded the guidelines applicable at the time Respondent committed his crime and thus was illegal. (A 2); Lancaster v. State, 656 So. 2d 533 (Fla. 1995). The Fourth District also 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. (A 2); Id. At 534.

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 Section 944.278 Florida Statutes (1993), had a vested right to previously awarded administrative gain time and provisional credits. (A 2); 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. (A 2-3); Id. at 534-535.

SUMMARY OF THE ARGUMENT

This Court has repeatedly held that the retroactive cancellation of administrative gain time or provisional credits does not violate ex post facto prohibitions. Thus a defendant who is sentenced for violation of probation or community control has no vested interest in previously awarded early release credits, and those credits may be retroactively cancelled in probation revocation proccedings. The Fourth District's opinion in this case misinterprets, misapplies and confuses the holdings of this Court with respect to the differences between basic or incentive gain time and administrative or provisional gain time, and the circumstances under which they may be retroactively cancelled, as well as the issue of when a defendant's sentence has 'fully expired' so as to produce a result which is contrary to established precedent. Thus, the decision of the Fourth District in this case must be quashed.

ARGUMENT

RETROACTIVE CANCELLATION OF ADMINISTRATIVE GAIN TIME AND PROVISIONAL CREDITS WHEN SENTENCING FOR VIOLATION OF PROBATION DOES NOT VIOLATE A DEFENDANT'S *EX POST FACTO* RIGHTS.

The State submits that in the instant case the Fourth District misinterpreted this Court's decisions Orosz v. Singletary, 655 So. 2d 1112 (Fla. 1995), and Tripp v. State, 622 So. 2d 941 (Fla. 1993), and announced a rule of law which is contrary to this Court's decisions in Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994) and Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 886, 116 L. Ed. 2d 790 (1992). Thus, the opinion of the Fourth District must be quashed.

Below, the Fourth District found that Respondent's sentence upon revocation of probation exceeded the guidelines in effect at the time Respondent committed his crime, but that the trial court had properly awarded Respondent credit for unforfeited gain time and properly delegated to the Department of Corrections the authority to calculate the amount of unforfeited gain time which should be credited to Respondent. Had the district court's opinion stopped there, it would have been correct. However, the Fourth District went further and held that this Court's opinion

in Orosz modified this Court's prior rulings (that gain time which was to be credited to a defendant was limited to earned gain time and did not include provisional and administrative credits), and interpreted Orosz as holding that "a defendant who committed an offense prior to October 1, 1989 and completed his sentence prior to the enactment of Section 944.278, Florida Statutes (1993), has a vested right to previously awarded administrative gain time and provisional credits." (A 2); Lancaster at 534. Additionally the Fourth District held:

> 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.

Id. At 534-535. Apparently the Fourth District combined and confused several different concepts addressed by this Court's above-referenced decisions to produce an incorrect result. Clearly the language in the Fourth District's opinion in this case is contrary to well established precedent and must be quashed.

I. Misinterpretation of Orosz

In Orosz this Court held that § 944.278 Florida Statutes (1993) could not be retroactively applied to cancel the administrative gain time and provisional credits awarded to Orosz

on his 1975 sentence because that sentence had fully expired prior to the time § 944.278 took effect. This Court held that in circumstances like Orosz', where a defendant's sentence has fully expired, he has a vested interest in all types of gain time previously awarded, thus § 944.278 could not be applied so as to reactivate or resurrect a sentence which had been completed prior to enactment of the cancellation of gain time statute. However, this Court **affirmed** the retroactive cancellation of the administrative gain time and provisional credits awarded to Orosz on his 1979 sentence based on its decision in Griffin.

Thus it is clear that **contrary** to the Fourth District's interpretation of Orosz, this Court **did not recede** from its holding in Griffin that administrative gain time and provisional credits awarded to a defendant may be retroactively canceled. Orosz merely held the decision in Griffin does not apply to defendants whose sentences have expired.

Moreover, **nowhere** in the Orosz decision does this Court ever mention a class of defendants whose crimes were committed prior to October 1, 1989[1] or make any suggestions as to how they should

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[1] October 1, 1989 is the effective date of the amendment to Section 944.28 Florida Statutes which provides that when a defendant violates the terms of his probation or community control he may forfeit **all** gain time previously earned. *See:* II

be treated, thus the Fourth District's citation of this date as a factor is also incorrect. As noted by this Court in Footnote 1. of Orosz, that decision is limited to the unique facts of that case (none of which are present in the instant case) and to a narrow class of cases fitting that specific fact pattern. Orosz, at 1112, n. 1. Indeed, the date is wholly irrelevant to the issue of whether a defendant's administrative gain time and provisional credits may be retroactively canceled. Thus, the language of the Fourth District in Lancaster implying that the decision in Orosz made the date October 1, 1989 a factor with respect to the issue of retroactive cancellation of administrative gain time and provisional credits is incorrect and must be quashed.

Further, the decision in Lancaster appears to hold that a defendant who has completed the **incarcerative** portion of his split sentence has a vested interest in previously awarded administrative gain time and provisional credits. (A 2-3); Id. at 534-535. **Nowhere** in the Orosz decision does this Court suggest that a defendant who has been released from prison, due in part to early release credits, is entitled to credit for those early

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infra.

release credits when being sentenced for violation of the probationary or community control portion of his sentence. The decision in Orosz is expressly limited to those defendants whose sentences had **fully expired** prior to the 1993 enactment of § 944.278 which retroactively cancelled awards of administrative gain time and provisional credits for prisoners serving a sentence or combined sentences in the custody of the department. Orosz, at 1112, n. 1.

Contrary to the Fourth District's determination that a defendant, who has completed the **incarcerative** portion of his split sentence, has a vested interest in previously awarded early release credits, this Court has repeatedly held that the retroactive cancellation of this type of credit does not violate ex post facto prohibitions in circumstances where a defendant who committed his crime prior to enactment of the statute authorizing cancellation of early release credits is still serving his sentence when the statute authorizing cancellation of early release credits is enacted. Griffin; Rodrick; Blakenship v. Dugger, 521 So. 2d 1097 (Fla. 1988); *See also* Waite v. Singletary, 632 So. 2d 192 (Fla. 3rd DCA 1994), *rev. denied*, 640 So. 2d 1109 (Fla. 1994) (where a defendant was taken back into custody after being released due to the award of early release

credits because the statute authorizing the cancellation of early release credits was enacted prior to the expiration of his sentence). This Court has also held that a defendant is not entitled to credit for previously awarded early release credits when being sentenced after violating his probation or community control. Tripp. Clearly in Orosz, this Court did not recede from its decisions in Griffin, Rodrick and Blakenship, thus, the Fourth District's opinion that defendants have a vested interest in previously awarded administrative gain time and provisional credits when being sentenced for violation of probation or community control is incorrect and must be quashed.

II. Misinterpretation of Tripp

Likewise in Tripp, this Court held that 'credit for time served' which is to be awarded by a court under authority of State v. Green, 547 So. 2d 925 (Fla. 1989), upon resentencing for violation of probation, does not include provisional credits or administrative gain time. Tripp at 942, n.2. Yet, in Lancaster, the Fourth District determined a defendant has a vested right to the award of these credits if he satisfied the incarcerative portion of a split sentence before enactment of § 944.278 Florida Statutes. Despite this Court's express determination in Tripp that "credit for time served" does **not** include "overcrowding"

credits, the Fourth District in Lancaster held that these credits must be awarded when the incarcerative portion of the sentence was satisfied before the enactment of § 944.278. Thus the decision in Lancaster directly conflicts with this Court's holding in Tripp and must be quashed.

It appears that the Fourth District's reference in Lancaster to October 1, 1989 may have come from this Court's citation of that date in footnote 2 of its decision in Tripp. October 1, 1989 is the effective date of the amendment to § 944.278 which provides that when a defendant violates the terms of his probation or community control he forfeits **any and all** types of gain time previously earned, i.e. basic and incentive gain time in **addition** to provisional or administrative gain time credits. In the footnote, this Court merely noted that the amendment did not apply to Tripp because he committed his crimes prior to the October 1, 1989, the effective date of the amendment.

Apparently the Fourth District failed to recognize the difference between basic/incentive gain time and provisional/administrative gain time, i.e. earned versus "overcrowding" credits. The District Court erroneously combined these two distinct varieties of gain time in holding that Lancaster was entitled to credit for **both** types because his crime

was committed before October 1, 1989. Clearly this Court in Tripp in no way stated or even suggested that the cancellation of provisional or administrative gain time credits was affected by the amendment to § 944.28. Indeed, the express language of that footnote states that defendants are **not** entitled to provisional or administrative gain time credits as part of "credit for time served" when being sentenced after violations of probation or community control. Nonetheless, the Fourth District's opinion states that a defendant who has committed an offense prior to October 1, 1989 "has a vested right to previously awarded administrative gain time and provisional credits." (A 2); Lancaster at 534.

This holding is directly contrary to this Court's decision in Tripp, as well as this Court's decisions in Orosz, Griffin and Rodrick, and must be quashed.

III. Rule of Law Contrary to Griffin and Rodrick

This Court has expressly and repeatedly held that the award of provisional or administrative gain time credits is procedural rather than substantive, thus the retroactive cancellation of provisional or administrative credits **does not** violate a defendant's right against ex post facto laws. Griffin, at 501; Rodrick, at 4; Blankenship. In Griffin, at 501, this Court held

that due to the nature of provisional credits and administrative gain time, the cancellation of these overcrowding credits could not violate the ex post facto clauses of the constitution. In addressing § 944.278, this Court held:

> the ex post facto clauses of both the federal and state Constitutions do not prohibit the legislature from passing, nor DOC from enforcing, legislation that limits or eliminates the availability of this particular species of credit or gain time, whatever name it is given.

Id. at 501. Contrary to this Court's holding in Griffin, the Fourth District in Lancaster has expressly held that the cancellation of overcrowding credits violates ex post facto laws.

In Orosz, this Court reaffirmed that the retroactive cancellation of overcrowding credits under § 944.278 is not subject to ex post facto prohibitions:

> Orosz asserts that the retroactive cancellation of administrative gain time and provisional credits previously applied on both his first and second sentences is a violation of his constitutional protection against ex post facto law and bills of attainder. We have previously upheld the statute against such attacks, *see Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994),...

Id. at 1113. Indeed, even in Orosz, this Court **affirmed** the retroactive cancellation of administrative gain time and provisional credits awarded Orosz on the sentence Orosz is

currently serving. Id. at 1114. The portion of the decision in Lancaster, which holds that retroactive cancellation of early release credits violates ex post facto laws, expressly and directly conflicts with the above-quoted portion of this Court's decision in Orosz, as well as with this Court's decision in Griffin, and must be quashed.

IV. Application of Orosz, Griffin and Tripp to the Instant Case

In the instant case, in November 1987, Respondent was originally sentenced to 17 years incarceration followed by 20 years probation. (A 5-6). He was released from prison in 1993 and began serving a 10 year probationary sentence. (R 11-14). In 1994, Respondent was found guilty of violating his probation; he was sentenced to 30 years incarceration, with credit for the time he served in county jail, as well as credit for time served in state prison, plus all unforfeited gain time awarded during his prior incarceration. (R 17-20). With the exception of the length of the term of incarceration, this sentence was correct.

Contrary to the holding of the Fourth District in this case, Respondent **is not** entitled to credit for the administrative gain time and provisional credits awarded prior to his release. Unlike Orosz, Respondent had not fully completed his sentence, and the statute which authorizes the cancellation of Respondent's

early release credits was enacted before Respondent's sentence had fully expired. As stated by this Court in Griffin, Rodrick and Blankenship, because the cancellation of early release credits is procedural, rather than substantive, there is no ex post facto restriction against the retroactive cancellation of this type of credit. Respondent has no vested right to these early release credits, and to the extent the Fourth District's opinion so holds, it must be quashed.

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,

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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 14th ~~day~~ of February, 1996.

Of Counsel