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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,312

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY LANCASTER,

Respondent.

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

STATEMENT OF THE CASE AND FACTS

Petitioner adopts and realleges the statement of the case and facts as set forth in its initial brief.

SUMMARY OF THE ARGUMENT

This Court has repeatedly held that the retroactive cancellation of administrative gain time or provisional credits, i.e. overcrowding 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.

Respondent argues that because he "completed" his sentence prior to the effective date of section 944.278,[1] [2] then he, like the defendant in Orosz, has the right to retain the administrative gaintime and provisional credits awarded to effect his release from prison. Respondent misreads Orosz and misapplies section 944.278.

In Tripp v. State, 622 So. 2d 941 (Fla. 1993), this Court noted the distinction between basic and incentive gaintime earned by a prisoner, and provisional credits and administrative gaintime

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[1] Section 944.278 became effective on June 17, 1993.

[2] The Petitioner has been apprised by the Department of Corrections that there is a factual "mistake" in both the initial and answer briefs. The briefs state that Lancaster was released from prison on 7/7/93, but Lancaster was actually released from prison on 1/14/91 to probation supervision. He was later placed on community control on 7/7/93. Obviously, the 7/7/93 release date originally relied upon by the state could not be correct as the provisions of section 944.278, effective June 17, 1993, would have been applied to Lancaster prior to his release from prison, and Lancaster would have actually served out the time related to the previously allocated credits. By separate motion, the Petitioner is requesting permission to supplement the record from the circuit court below to provide the proper date of release from prison.

allocated solely to alleviate prison overcrowding:

> 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 (Fla. 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 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., 622 So. at 942 n.2. Through this footnote, this Court was merely pointing out that because provisional credits and administrative gaintime were not "earned" through good prison behavior, but were solely allocated to alleviate prison overcrowding, this credit could not be considered the "functional equivalent of time served in prison". Thus, under State v. Green, 547 So. 2d 925 (Fla. 1989), a defendant is not entitled to have time which has been awarded due to allocation of provisional or administrative credits applied as a credit for time served upon violation of probation or community control. The discussion of the forfeiture provisions enacted through Chapter 89-531, Laws of Florida, related solely to when a defendant was allowed to receive

credit for basic and incentive gaintime as credit.[3]

The dicta contained in note 2 of the Tripp opinion was not altered by Orosz v. Singletary, 655 So. 2d 1112 (Fla. 1995). Orosz is a decision of very limited application. The decision is founded upon the special manner in which the department was required to treat consecutive sentences for offenses committed between July 1, 1978 and June 16, 1983[4] based upon the version of section 944.275 in effect during this time period. For that 5-year period, the department was not allowed to cumulate consecutive sentences into one overall term. Thus, as each consecutive

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[3] These forfeiture provisions, which were effective for offenses committed on or after October 1, 1989, gave dual authority to the sentencing courts and the Department of Corrections to forfeit basic and incentive gaintime upon revocation of probation or community control. See § 944.28(1), Fla. Stat. (1989); § 948.06(6), Fla. Stat. (1989). SPECIAL NOTE: At page 11, paragraph 2, of the answer brief, the Petitioner erroneously states that the October 1, 1989, effective date relates to section 944.278 and is inclusive of both basic and incentive gaintime forfeitures and provisional credit and administrative gaintime forfeitures. Clearly, the October 1, 1989 forfeiture date only applies to the 1989 amendments to sections 944.28(1) and 948.06(6). The effective date for section 944.278 is June 17, 1993.

[4] The State has been advised by the Department of Corrections that a second motion for rehearing or clarification is pending before this Court with regard to the actual effective dates for section 944.275 discussed in Orosz. The department's position is that the effective dates extend only through June 14, 1983.

sentence reached its interim tentative release date, that individual sentence was considered fully expired. In Orosz, the petitioner was in custody to serve two sentences that were structured consecutively. The first sentence was for 35 years for an offense committed in 1975 and the second was for 10 years for an offense committed in 1979. Under statutes in effect after 1978, the department was not permitted to change these sentences into an overall 45-year term, but was required to treat each sentence separate. Orosz received early release credits for prison overcrowding while in service of both his first and second sentences. The first 35-year sentence reached its end point and was considered expired as a result of the application of these credits on January 18, 1991, and Orosz began service of the 10-year sentence on that date. Thus, on June 17, 1993, the date that section 944.278 became effective, Orosz was not in service of the first sentence and, under statutes in effect between July 1, 1978 and June 14, 1983, that sentence was considered fully expired. However, the Orosz court clearly noted that as to Orosz's second sentence, the department could retroactively cancel overcrowding credits previously allocated:

> In his mandamus petition, 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 constitutioal rights, including the constitutional protection against ex post facto laws and bills of attainder. We have previously upheld the statute against such attacks, see, Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994), and we reaffirm that decision today to the extent that it applies to Orosz's second sentence. However, with regard to the first sentence, which had been completed according to the Department's records, we find merit in Orosz's contention that the Department's cancellation of administrative gain time and provisional credits previously awarded on Orosz's first sentence was improper. We hold 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. (emphasis supplied)

Orosz, 655 So. 2d at 113-114. Thus, it should be clear that this Court in Orosz did not disturb its prior ruling in Griffin, supra, with regard to the questions of ex post facto law and bills of attainder. The decision turned upon "a proper interpretation of the statutes applicable to [Orosz's] sentences . . . ." Id.

Contrary to his contentions, Respondent's position is not even remotely like the petitioner's in Orosz. Respondent was in service of a probationary split sentence comprised of 17 years in prison to be followed by 20 years of probation. Respondent was released from prison through a combination of awards of gain time authorized under section 944.275 and early release credits under sections 944.276 and 944.277 allocated to alleviate prison

overcrowding. Respondent correctly notes, as does the Fourth District, that upon resentencing for revocation of probation Respondent was entitled to receive credit for all unforfeited gaintime under section 944.275 because his offense predates the October 1, 1989 effective date for the forfeiture provisions in sections 948.06(6) and 944.28(1) enacted under Chapter 89-531, Laws of Florida. However, the overcrowding credits are not the "functional equivalent of time served" and therefore Respondent is not entitled to application of that credit as such. Unlike the petitioner in Orosz, Respondent's sentence was never fully satisfied because he still had to successfully complete the probationary term of his sentence. Moreover, whether overcrowding credits should be included as "credit for time served" does not generate from section 944.278. As noted in Tripp, because overcrowding credits were not earned for good behavior in prison and because these credits were allocated solely to alleviate prison overcrowding, these credits cannot be treated as the "functional equivalent of time served"; they are distinctly different from gaintime awarded under section 944.275. See Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991).

The provisions of section 944.278, which became effective on June 17, 1993, require the cancellation of overcrowding credits

for the following groups of prisoners:

1) For offenders in custody serving a sentence or combined sentences, cancellation of credits occurred on the effective date of the law

2) For offenders out of custody because of escape or release on bond, cancellation of credits occurs upon return to custody and reestablishment of the release date, on or after the effective date of the law

3) For offenders out of custody because of release to supervision, cancellation of credits occurs upon return to custody after revocation of the post release supervision, on or after the effective date of the law

Lancaster falls within the third group of offenders targeted by the cancellation statute. This Court on several occasions has indicated that overcrowding credits are not to be directed as additional credit upon revocation of probation or community control because these credits are not the "functional equivalent of time served." However, because the sentencing courts continued to award this credit in spite of this directive, the Legislature included this third category to assure that offenders returning from post-release supervision would be required to serve that previously unserved time.

Contrary to the holding of the Fourth District in this case, Respondent is not entitled to credit for the administrative gaintime and provisional credits awarded prior to his release.

Unlike the petitioner in Orosz, Respondent had not fully completed his sentence when he was released from prison because he was required to successfully complete a period of probation supervision as part of the sentence imposed upon conviction. Therefore, the overcrowding credits allocated to Lancaster to prompt his release from prison did not vest to him. Moreover, while Lancaster's basic and incentive gaintime are not subject to forfeiture because his offenses were committed prior to the effective date of section 944.28(1) and 948.06(6), this Court's decision in Tripp precludes the sentencing court from awarding such overcrowding credits as additional credit for "time served", and the legislative pronoucements in section 944.278 prevent Lancaster from retaining any overcrowding credits.

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 26th day of March, 1996.

Of Counsel