IN THE

Supreme Court of Florida

THOMAS B. GIBSON, Petitioner, v. FLORIDA DEPARTMENT OF CORRECTIONS, Respondent.	Case No. SC02-2362

INITIAL BRIEF OF APPELLANT

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1. Statement of the Case and Course of Proceedings Below.

Thomas B. Gibson (hereinafter Appellant Gibson or Mr. Gibson) seeks review of the following question certified by the First District Court of Appeal as a matter of great public importance:

> DOES THE FORFEITURE PENALTY ENUNCIATED IN *ELDRIDGE v. MOORE*, 760 So. 2d 888 (Fla. 2000), APPLY WHERE A DEFENDANT RECEIVES A SENTENCE OF INCARCERATION FOR ONE OFFENSE FOLLOWED BY A SENTENCE OF PROBATION FOR ANOTHER OFFENSE, WHERE BOTH CRIMES WERE SCORED ON A SINGLE SCORESHEET AND THE TRIAL COURT AWARDS PRISON CREDIT PURSUANT TO *TRIPP v. STATE*, 622 So. 2d 941 (Fla. 1993), UPON VIOLATION OF PROBATION FOR THE SECOND OFFENSE?

Gibson v. Florida Department of Corrections, 27 Fla. L. Weekly D2193, D2194 (Fla. Oct. 9, 2002). The Department of Corrections (hereinafter DOC) concedes that if this question is answered in the negative, then Mr. Gibson is entitled to immediate release. (A3-12).[1]

The instant proceedings were initiated when Mr. Gibson filed a petition for a writ of mandamus seeking to require DOC to award proper credit against the sentence he is currently serving. *See Gibson*, 27 Fla. L. Weekly at D2193. The trial court

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[1] References to the appendix will be made by the designation "A" followed by the appendix number and page number of the document.

denied Mr. Gibson's petition and he therefore filed a petition for a writ of certiorari in the district court requesting the court to reverse the trial court's order. *See id*. The district court denied Mr. Gibson's petition but certified the question quoted above as a matter of great public importance.

The petition for writ of mandamus in the trial court and the petition for a writ of certiorari in the district court were both filed by Mr. Gibson *pro se*. After the district court issued its opinion, undersigned counsel was contacted to represent Mr. Gibson in the proceedings before the Supreme Court and the law firm appears *pro bono publico*.

2. Statement of the Facts.

On 27 January 1994, Mr. Gibson was sentenced in three separate cases by the circuit court in Hardee County. (A4).[2] The offenses were all third-degree felonies and Mr. Gibson allegedly committed all of the offenses between May and September of 1993. (A5-1-3); *See also Gibson*, 27 Fla. L. Weekly at D2194 (Benton, J., dissenting).

[2] Undersigned counsel was informed by the clerk of the district court below that there is not a record on appeal in this case because the case was an original proceeding in that court. Due to the expedited nature of this proceeding, undersigned counsel has been unable to obtain copies of original documents from Hardee County. Therefore, citations will be made to briefs and documents that were filed in the court below and will be attached as an appendix to this brief. Undersigned counsel will supplement the record with copies of the original documents if the Court so requests.

In case number 93-216 (uttering forged bills), the court sentenced Mr. Gibson to five years' imprisonment. (A5-1). In case number 93-297 (uttering a forged instrument), the court also sentenced Mr. Gibson to five years' imprisonment, to run consecutive to the five-year sentence in case number 93-216. (A5-1). In case number 93-360 (numerous counts of forgery and uttering a forged instrument),[3] the court sentenced Mr. Gibson to five years' probation, to run consecutive to the sentences of incarceration in case numbers 93-216 and 93-297. (A4). The sentences for case numbers 93-216, 93-297, and 93-360 were imposed using a single sentencing scoresheet. *See Gibson*, 27 Fla. L. Weekly at D2194. On 9 February 1994, Mr. Gibson began serving his sentences in case numbers 93-216 and 93-297. (A1-2).

On 14 August 1998, through the accumulation of gain-time,[4] Mr. Gibson

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[3] Mr. Gibson was charged with twenty-six counts of forgery and twenty-six counts of uttering a forged instrument. (A5-2-3).

[4] At the time of Mr. Gibson's release, the overall ten-year term of incarceration as to case numbers 93-216 and 93-297 was comprised of the following:

1200 days	Basic gain time
21 days	Original county jail credit
1660 days	Time served in prison (½7/94 to 8/14/98)
979 days	Additional gain time
-210 days	gain-time days forfeited due to disciplinary action
3650 days	Ten years in days

(A4).

completed his sentences in case numbers 93-216 and 93-297 and began serving his probationary sentence in case number 93-360. (A5-1). Mr. Gibson subsequently violated the terms of his probation. (A5-2). On 23 November 1999, the court sentenced Mr. Gibson on his violation of probation (hereinafter VOP) in case number 93-360. (A5-2). On the forgery counts, the court sentenced Mr. Gibson to concurrent terms of three years' imprisonment. (A5-2). On the uttering a forged instrument counts, the court sentenced Mr. Gibson to concurrent terms of four years' imprisonment, to run consecutive to the three-year sentences on the forgery counts. (A5-2). Initially, the court did not grant Mr. Gibson credit for time served on case numbers 93-216 and 93-297. *See Gibson*, 27 Fla. L. Weekly at D2193. However, after Mr. Gibson filed a motion to correct his sentence, the sentencing court awarded credit for time served in case numbers 93-216 and 93-297, pursuant to *Tripp v. State*, 622 So. 2d 941 (Fla. 1993). *See id.*

On 15 June 2000, Mr. Gibson began serving his VOP sentence in case number 93-360. (A1-4). A seven-year sentence is the equivalent of 2555 days' imprisonment. (A5-4). In accordance with the sentencing court's order, DOC applied all jail credit and all prison credit, consisting of 237 days jail credit (145 days violation of probation jail credit and 92 days original jail credit) and 1660 days of time served in case numbers 93-216 and 93-297. (A5-4). Subtracting 1660 days and 237 days from Mr.

Gibson's sentence of 2555 days leaves a balance of 658 days. *See Gibson*, 27 Fla. L. Weekly at D2195 (Benton, J., dissenting). Mr. Gibson finished serving the final 658-day installment of the aggregate seven-year sentence on 11 September 2001. *See id*. However, DOC claimed that pursuant to *Eldridge v. Moore*, 760 So. 2d 888 (Fla. 2000), it had the authority to forfeit the gain time that Mr. Gibson accrued in case numbers 93-216 and 93-297. (A1; A2; A3). Mr. Gibson accrued 1969 days of gain time in case numbers 93-216 and 93-297. (A5-1). Therefore, DOC has applied a gain-time penalty in Mr. Gibson's case and added 1969 days to his sentence in case number 93-360. DOC contended that Mr. Gibson's scheduled release date is October of 2003.[5] (A1-5).

Mr. Gibson filed a petition for a writ of mandamus in the circuit court seeking to require DOC to award proper credit against his sentences. *See Gibson*, 27 Fla. L. Weekly at D2193. The trial court denied Mr. Gibson's petition and Mr. Gibson sought certiorari review in the First District Court of Appeal. *See id.* The district court denied Mr. Gibson's petition, reasoning that DOC had authority to forfeit his previously accrued gain time pursuant to *Eldridge*. The district court pointed out that the Court stated in *Eldridge* that its holding applies to cases involving either a true split

[5] Mr. Gibson continues to receive gain time while in prison. As of the date of this filing, DOC's website indicates that Mr. Gibson's current release date is 12 December 2002. *See* "http://www.dc.state.fl.us/".

sentence or a probationary split sentence. The district court held that Mr. Gibson's sentence was "a probationary split sentence within the meaning of *Eldridge*." *Gibson*, 27 Fla. L. Weekly at D2193. However, the district court noted that the sentencing scheme utilized by the court in Mr. Gibson's case "is not at all uncommon" and, therefore, the district court recognized that its decision "will affect a relatively large number of inmates in the state correctional system." *Id.* at D2194. Hence, the district court certified the following question as a matter of great public importance:

> DOES THE FORFEITURE PENALTY ENUNCIATED IN *ELDRIDGE v. MOORE*, 760 So. 2d 888 (Fla.2000), APPLY WHERE A DEFENDANT RECEIVES A SENTENCE OF INCARCERATION FOR ONE OFFENSE FOLLOWED BY A SENTENCE OF PROBATION FOR ANOTHER OFFENSE, WHERE BOTH CRIMES WERE SCORED ON A SINGLE SCORESHEET AND THE TRIAL COURT AWARDS PRISON CREDIT PURSUANT TO *TRIPP v. STATE*, 622 So. 2d 941 (Fla.1993), UPON VIOLATION OF PROBATION FOR THE SECOND OFFENSE?

Id.

The Honorable Robert T. Benton dissented from the majority's opinion in *Gibson*, reasoning that Mr. Gibson did not receive a probationary split sentence and therefore *Eldridge* was inapplicable to his case. Judge Benton concluded that DOC "had no authority to amalgamate the two sentences on which he was incarcerated with his other sentences to create a general sentence." *Id.* at D2195 (Benton, J., dissenting). According to Judge Benton's calculations, Mr. Gibson was entitled to immediate

release:

> In the present case, "time served for the primary offense[s]," *Tripp*, 622 So. 2d at 942, consisted of time in jail before the original sentencing, and 1,660 days Mr. Gibson spent in prison. Adding this time to the time he spent in jail after he was arrested for probation revocation prior to his post-revocation sentencing on November 23, 1999, yields a total of 1,897 days. Subtracting 1,897 from the aggregate seven years (2,555 days) imposed on November 23, 1999, leaves 658 days, the balance he should have been required to serve, assuming (contrary to fact) no gain-time. He finished serving the final 658-day installment of the aggregate seven years on September 11, 2001, and should have been released from custody no later than then. (In fact, DOC awarded gain-time after the resentencing that by August 14, 2001, amounted to 172 days, and should have led to a still earlier release .)

Id. (Benton, J., dissenting) (footnotes omitted).

On 30 October 2002, Mr. Gibson filed a timely notice to invoke the discretionary jurisdiction of the Supreme Court of Florida. On 5 November 2002, the Supreme Court issued an order postponing its decision on jurisdiction and setting a briefing schedule.

D. SUMMARY OF ARGUMENT.

The gain time forfeiture penalty enunciated in *Eldridge v. Moore*, 760 So. 2d 888 (Fla. 2000), does not apply where a defendant receives a sentence of incarceration for one offense followed by a sentence of probation for another offense, where both crimes were scored on a single scoresheet and the trial court awards prison credit pursuant to *Tripp v. State*, 622 So. 2d 941 (Fla. 1993), upon violation of probation for the second offense. The certified question should be answered in the negative. Mr. Gibson's sentence was not a true "probationary split sentence" subject to the holding in *Eldridge*. In applying the gain time forfeiture penalty, DOC improperly grouped Mr. Gibson's sentences together. In essence, DOC has transformed Mr. Gibson's separate sentences into one general sentence, in violation of section 775.021(4) and Florida Rule of Criminal Procedure 3.701(d)(12).

E. ARGUMENT AND CITATIONS OF AUTHORITY.

The gain time forfeiture penalty enunciated in *Eldridge v. Moore*, 760 So. 2d 888 (Fla. 2000), does not apply where a defendant receives a sentence of incarceration for one offense followed by a sentence of probation for another offense, where both crimes were scored on a single scoresheet and the trial court awards prison credit pursuant to *Tripp v. State*, 622 So. 2d 941 (Fla. 1993), upon violation of probation for the second offense. The certified question should be answered in the negative.

a. Standard of Review.

Whether the Court's decision in *Eldridge* applies to Mr. Gibson's case is a pure question of law. Pure questions of law are subject to *de novo* review. *See Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002).

b. Argument.

In *Eldridge*, this Court considered whether DOC has the authority to forfeit previously accrued gain time upon a subsequent violation of probation. The Court held that "upon resentencing in *either a probationary split sentence or a true split sentence*, regardless of whether the trial court resentenced the inmate to a lesser sentence, the Department's authority to forfeit all gain time upon revocation of

probation should not be lessened." *Id.* at 892 (emphasis added).

In *Poore v. State*, 531 So. 2d 161, 164 (Fla. 1988), the Court defined a "probationary split sentence" as "a period of confinement, none of which is suspended, followed by a period of probation." Even though Mr. Gibson's 1994 sentences did not meet the definition of probationary split sentence articulated in *Poore*, the district court nevertheless held that Mr. Gibson's 1994 sentences amounted to a "probationary split sentence" subject to this Court's holding in *Eldridge*. *See Gibson*, 27 Fla. L. Weekly at D2193.

Contrary to the district court's conclusion, Mr. Gibson's 1994 sentences cannot be labeled a probationary split sentence. A probationary split sentence is offense-specific. This point was emphasized by the Fourth District Court of Appeal in *Maynard v. State*, 763 So. 2d 480, 481-82 (Fla. 4th DCA 2000):

> Appellant also claims that his sentence of thirty months imprisonment, followed by thirty-six months probation for separate offenses, is illegal because it exceeds the maximum 60 month sentence for a third degree felony authorized by law. We do not agree. An examination of the record shows Appellant pled guilty to four separate offenses, three of which were third degree felonies, each punishable by up to five years imprisonment. Unlike those cases where a defendant's combined sentence of imprisonment and probation for a singular offense exceeds the maximum sentence authorized by law, the trial court imposed separate sentences. *The trial court did not impose a probationary split sentence for any one offense. Rather, it imposed a sentence for each offense notwithstanding that the offenses are combined in one scoresheet.* The period of probation is limited only by the statutory maximum for the

> crime. Here, Appellant's separate sentences of thirty months imprisonment for count I to be followed by thirty-six months probation in counts II and III (the sentences for the latter counts running concurrently) do not exceed the statutory maximum sentences permitted for these offenses.

(Emphasis added) (citations omitted) (footnote omitted).

As pointed out by the court in *Maynard*, it is well-settled in Florida that a probationary split sentence cannot exceed the statutory maximum *for the offense*. *See Nase v. State*, 746 So. 2d 469, 470 (Fla. 2d DCA 1997) ("The State concedes that a probationary split sentence cannot exceed the statutory maximum for the offense."); *Kline v. State*, 642 So. 2d 1146, 1147 (Fla. 1st DCA 1994) ("Where a trial court imposes a probationary split sentence, the incarcerative portion of the sentence plus the probationary portion of the sentence may not exceed the maximum term of imprisonment which may be imposed as punishment for the crime."); *State v. Holmes*, 360 So. 2d 380, 383 (Fla. 1978). All of the crimes for which Mr. Gibson was sentenced were third-degree felonies, subject to a maximum sentence of five-years. Mr. Gibson was given three separate sentences, two sentences of five years' imprisonment and one sentence of five years' probation. If, as held by the district court, Mr. Gibson's sentence was, in fact, a probationary split sentence, then his sentence was illegal because it exceeded the five-year statutory maximum for a third-degree felony. Despite the district court's erroneous label, it is clear that Mr. Gibson

was not given a probationary split sentence. Mr. Gibson was given three separate sentences, none of which consisted of "a period of confinement . . . followed by a period of probation." *Poore*, 531 So. 2d at 164.

Accordingly, since Mr. Gibson's 1994 sentences did not constitute "a probationary split sentence," *Eldridge* does not apply. The Court in *Eldridge* limited its holding to "probationary split sentence[s] or a true split sentence[s]." 760 So. 2d at 892. As explained below, it is impermissible to extend the holding in *Eldridge* to sentences that are neither probationary split sentences nor a true split sentences.

In Mr. Gibson's case, he was sentenced to five years' imprisonment on case number 93-216, followed by five years' imprisonment on case number 93-297. Neither of these sentences included probation. Neither of these sentences was suspended. Neither of the offenses for which he had been sentenced was one for which conditional release was authorized. *See* § 947.1405(2), Fla. Stat. (1993). On 14 August 1998, through the accumulation of gain-time, Mr. Gibson completed his sentences in case numbers 93-216 and 93-297 and began serving his probationary sentence in case number 93-360. When Mr. Gibson was released on 14 August 1998, he was not put on probation on case numbers 93-216 and 93-297.[6] The sentences in

[6] In DOC Bureau Chief Doyle W. Kemp's affidavit, he specifically states that Mr. Gibson was released "on August 14, 1998, to begin service of the term of probation imposed in case 93-360." (A5-1). This statement by Chief Kemp establishes that Mr.

these two cases were complete upon release. Upon release, Mr. Gibson could not be sentenced any further in either case. To do so would violate the principles of double jeopardy. Therefore, the gain time that Mr. Gibson accrued on these two cases became a nullity upon his release. In this sense, the gain time was also offense-specific. No future violation on a separate case could ever cause the gain time that Mr. Gibson earned on the sentences that he served in case numbers 93-216 and 93-297 to be forfeited. Yet, when Mr. Gibson violated probation in case number 93-360, DOC attempted to apply a forfeiture of gain time penalty from two previously completed sentences to Mr. Gibson's new VOP sentence. DOC is not permitted to apply this type of penalty.

This point is highlighted by comparing the facts and reasoning of *Eldridge* to Mr. Gibson's case. In *Eldridge*, the defendant originally received a true split sentence, defined as "a prison term of a number of years with part of that prison term suspended, contingent upon the completion on probation of the suspended sentence." *Eldridge*, 760 So. 2d at 889 n.1. As a result of the accumulation of 2573 days of gain time, Mr. Eldridge was released early from his incarcerative portion of his sentence and began to serve the probationary portion of his sentence. Mr. Eldridge violated

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Gibson's sentences for case numbers 93-216 and 93-297 were complete upon release, as Chief Kemp did not indicate that Mr. Gibson was subject to any type of supervision in either of those cases.

probation and was resentenced to a term of five years' imprisonment. DOC forfeited the 2573 days of gain time and informed Mr. Eldridge that he would be required to serve the 2573 days in addition to his new five-year sentence.

The Court in *Eldridge* offered the following explanation of the gain time forfeiture process:

> When an inmate is awarded gain time while in prison, the inmate's release date is advanced and he or she is released earlier than would have been the case had no gain time been awarded. *See* § 944.275(1), Fla. Stat. (1999). When an inmate is released due in part to the award of that gain time and placed on probation or community control, the Department records a release date, or expiration of sentence date, for that particular sentence. *See* § 944.275(3)(a), Fla. Stat. (1999). If the trial court finds that the inmate violated his or her probation or community control and that it should be revoked, the inmate is returned to prison. *See generally* § 948.06, Fla. Stat. (1999). The Department, however, continues to maintain the original expiration date of the previous sentence until a decision is made as to the previously awarded gain time. *See* § 944.275(3)(a), Fla. Stat. (1999). That is, the previous expiration date, which was determined in large part, by the gain time awarded, is still on the Department's records and, at least on paper, the inmate retains his or her previously awarded gain time.

760 So. 2d at 890. In short, DOC kept a release date for Mr. Eldridge, which was advanced due to gain time. Upon being released from incarceration, Mr. Eldridge was given a new "expiration of sentence" date, which, in turn, was also advanced due to the previously accrued gain time *in the same case number and sentence*. Upon the violation of probation, DOC maintained the "expiration of sentence" date, which, in

the Court's words, "was determined in large part, by the gain time awarded." *Id.* The Court ultimately held that DOC had the authority to forfeit the previously awarded gain time, thereby extending the "expiration of sentence" date. The Court reasoned that "it was the Legislature that provided for the award of gain time in the first place and it made the retention of gain time conditional upon the satisfactory completion of the inmate's supervision." *Id.* at 892.

The *Eldridge* rationale does not apply to the type of sentences that Mr. Gibson received. Pursuant to the accrual of gain time, Mr. Gibson's release date was advanced in case numbers 93-216 and 93-297. However, contrary to the defendant in *Eldridge*, Mr. Gibson was not placed on probation in these cases; rather, his sentences were completed upon release. Thus, Mr. Gibson received an "expiration of sentence" in case numbers 93-216 and 93-297.[7] At that time, Mr. Gibson began serving a separate probationary sentence in case number 93-360. This sentence had a separate case number and involved separate offenses. Mr. Gibson was therefore given a new "expiration of sentence" date in case number 93-360. In contrast to

[7] The prison sentences in case numbers 93-216 and 93-297expired on the day Mr. Gibson reached the combined "maximum sentence expiration date." *See* § 944.275(2)(a), Fla. Stat. (1993) ("The department shall establish for each prisoner sentenced to a term of years a 'maximum sentence expiration date,' which shall be the date when the sentence or combined sentences imposed on a prisoner will expire. In establishing this date, the department shall reduce the total time to be served by any time lawfully credited.").

Eldridge, Mr. Gibson's new "expiration of sentence" date in case number 93-360 was *not* "determined in large part, by the gain time awarded." 760 So. 2d at 890. Moreover, because Mr. Gibson's probationary sentence was separate from his incarcerative sentence, the retention of gain time in case numbers 93-216 and 93-297 was *not* "conditional upon the satisfactory completion" of Mr. Gibson's probation. *Id.* at 892. Further, conditional release was not authorized for the offenses for which he had been sentenced in case numbers 93-216 and 93-297. *See* § 947.1405(2), Fla. Stat. (1993).

In the opinion below, the majority appears to have confused and intermingled this Court's opinions in *Eldridge* and *Tripp v. State*, 622 So. 2d 941 (Fla. 1993): "we conclude that in light of *Tripp*, [Mr. Gibson's] original sentence of incarceration as to two cases followed by a term of probation in the third constitutes a probationary split sentence within the meaning of *Eldridge*." *Gibson*, 27 Fla. L. Weekly at D2193.[8]

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[8] The district court added that "[i]n *Tripp*, the supreme court rejected the contention that convictions for two separate crimes result in two separate sentences when sentencing takes place simultaneously and is scored on a single scoresheet encompassing both cases." *Gibson*, 27 Fla. L. Weekly at D2193-94. The court further stated that "[i]n *Larimore v. State*, 27 Fla. L. Weekly D1830 (Fla. 1st DCA Aug. 12, 2002), this court interpreted *Tripp* to mean that separate crimes and sentences may constitute a split sentence where both crimes were scored on a single scoresheet." *Id.* at D2194. Based on this reasoning, the court concluded that Mr. Gibson's sentence was therefore a probationary split sentence. Judge Benton faulted this reasoning in his dissent, pointing out that no court has ever held that "prison sentences that have no probationary component can be revived once the prison sentences have expired." *Id.* at D2195 (Benton, J., dissenting).

In *Tripp*, this Court held that when separate crimes are sentenced together on the same scoresheet, "if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served on the first offense must be awarded on the sentence imposed after revocation of probation on the second offense." 622 So. 2d at 942. The Court gave two reasons for its holding. First, if a defendant was not given credit for time served in prison on the first offense, trial courts could easily circumvent the sentencing guidelines by sentencing at the top of the guidelines on the primary offense and ordering probation on the remaining counts. If the defendant violated probation, the court could again impose a sentence at the top of the guidelines for the remaining counts and the total sentence would exceed the range contemplated by the guidelines. Second, the Court recognized "both offenses were factors that were weighed in the original sentencing through the use of a single scoresheet and must continue to be treated in relation to each other, even after a portion of the sentence has been violated." *Id.* For this reason, *Tripp* applies even if an award of credit is not necessary to ensure the total prison time does not exceed the guidelines. *See State v. Witherspoon*, 810 So. 2d 871 (Fla. 2002).

Tripp was correctly applied by the sentencing court to Mr. Gibson's case because Mr. Gibson was sentenced to "a term of probation on one offense consecutive to a sentence of incarceration on another offense." 622 So. 2d at 942.

Therefore, when Mr. Gibson violated probation in case number 93-360, he was entitled to an award of credit for time served in case numbers 93-216 and 93-297. However, the district court seemed to reason that the application of *Tripp* to his case somehow converts his separate sentences into one probationary split sentence subject to the forfeiture penalty announced in *Eldridge*. There is no basis to support such a conclusion. *Tripp* concerns credit for time served when a defendant is given at least two separate sentences in a single scoresheet, where one of the sentences consists of incarceration and another sentences consists of probation. In contrast, *Eldridge* concerns the forfeiture of gain time in cases where a defendant has received either a probationary split sentence or a true split sentence. The two cases involve separate and distinct concepts. Pursuant to *Tripp*, Mr. Gibson is entitled to *credit for time served* in case number 93-360. He is not entitled to, nor is he now seeking, any *unforfeited gain time* in case number 93-360.[9] As explained above, gain time is

[9] In the district court's opinion, the majority states that the sentencing court "entered an order awarding credit for time served and unforfeited gain-time accrued on the initial prison sentences." *Gibson*, 27 Fla. L. Weekly at D2193. There appears to be some confusion in the courts of this state regarding gain time awards. In cases involving violations of probation pursuant to true split sentences or probationary split sentences, it seems that there are two types of "awards" of gain time that a trial court can give. First, a court can award gain time "against an extension of incarceration imposed because of a violation of the probationary portion of a sentence." *Singletary v. Whitaker*, 739 So. 2d 1183, 1183 (Fla. 5th DCA 1999). In other words, the court can reduce the length of the "resentence" by the amount of gain time days accrued on the initial sentence. Second, a trial court can order that gain time accrued on the initial sentence be retained upon

offense-specific. The gain time that he received in case numbers 93-216 and 93-297 became a nullity upon his completion of those sentences. He cannot claim that gain time on separate offenses or sentences, nor can that gain time be forfeited and assessed against him as a penalty in separate sentences. Due to its improper combining of *Tripp* and *Eldridge* in Mr. Gibson's case, the district court ultimately

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resentencing. In other words, the trial court can decline to forfeit the accrued gain time, meaning that the defendant will not receive a forfeiture penalty, thereby extending the "resentence" by the amount of days of forfeited gain time.

The first type of gain time award truly is an award, because if it is given, the defendant's "resentence" will be reduced by the amount of gain time previously accrued. However, in *Whitaker*, the district court held that the first type of gain time award is inappropriate for offenses committed on or after 1 October 1989. Pursuant to *State v. Green*, 547 So. 2d 925 (Fla. 1989), gain time was treated as time served for offenses committed prior to 1 October 1989. However, subsequent statutory amendments have now given DOC the right to forfeit gain time for all offenses committed on or after 1 October 1989. Therefore, for offenses committed on or after 1 October 1989, a court should not award gain time "against an extension of incarceration imposed because of a violation of the probationary portion of a sentence." *Whitaker*, 739 So. 2d at 1184.

The second type of gain time award was discussed by the Court in *Eldridge*. This type is more accurately labeled a retention of gain time. As explained by the Court in *Eldridge*, a sentencing court has the option to check a box on the sentencing documents produced during the revocation proceedings indicating that gain time should be retained. If the court does not retain the gain time, then the time is forfeited. Even if the court does retain the gain time, DOC still has the authority to forfeit the gain time. "There is nothing in the statute that requires that the trial court must award the gain time before the Department is permitted to forfeit it." *Eldridge*, 760 So. 2d at 891.

In Mr. Gibson's case, both types of gain time awards are irrelevant. Mr. Gibson accrued gain time in case numbers 93-216 and 93-297. He violated probation in case number 93-360. DOC did not have the authority to forfeit the gain time accrued in case numbers 93-216 and 93-297 and apply the forfeiture penalty to case number 93-360.

converted the *Tripp* credit into a *Tripp* penalty.[10]

Finally, Mr. Gibson adopts the reasoning from Judge Benton's dissenting opinion in the case below. Judge Benton persuasively reasoned that under Florida law, a court must impose a separate sentence for every crime, sentencing guidelines notwithstanding. *See Gibson*, 27 Fla. L. Weekly at D2195 (Benton, J., dissenting). Section 775.021(4), Florida Statutes (1993), provides:

> (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, *shall be sentenced separately for each criminal offense*; and the sentencing judge may order the sentences to be served concurrently or consecutively....
>
> (b) The intent of the Legislature is *to convict and sentence for each criminal offense committed* in the course of one criminal episode or transaction . . . .

(Emphasis supplied.) *See also* Fla. R. Crim. P. 3.701(d)(12) ("A sentence must be imposed for each offense."). By applying a forfeiture penalty in case number 93-360 based on gain time accrued in case numbers 93-216 and 93-297, DOC has, in essence, treated Mr. Gibson's separate sentences as one general sentence, in violation of section 775.021(4) and Florida Rule of Criminal Procedure 3.701(d)(12). The

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[10] Mr. Gibson spent 1660 days in prison in case numbers 93-216 and 93-297. He accrued 1969 gain time days. The net result of the district court's decision is that Mr. Gibson is now required to serve an additional 309 days. Instead of receiving a credit for time served, the district court has construed *Tripp* in a way that penalizes Mr. Gibson. No other court has construed *Tripp* in this manner.

imposition of a general sentence for multiple offenses is fundamental error. *See Parks v. State*, 765 So. 2d 35, 35-36 (Fla. 2000).

In order to avoid running afoul of Florida's prohibition against the imposition of general sentences, gain time forfeiture penalties must be limited to probationary split sentences and a true split sentences. This limitation was recognized by the Court in *Eldridge*. *See* 760 So. 2d at 892. Accordingly, the district court's certified question should be answered in the negative: the forfeiture penalty enunciated in *Eldridge* should *not* apply where a defendant receives a sentence of incarceration for one offense followed by a sentence of probation for another offense, where both crimes were scored on a single scoresheet and the trial court awards prison credit pursuant to *Tripp* upon violation of probation for the second offense.

The district court erred in holding that Mr. Gibson's sentence was a probationary split sentence. None of Mr. Gibson's sentences consisted of "a period of confinement . . . followed by a period of probation." *Poore*, 531 So. 2d at 164. Therefore, *Eldridge* does not apply to Mr. Gibson's case and DOC had no authority to increase Mr. Gibson's sentence in case number 93-360 by adding a gain time forfeiture penalty from case numbers 93-216 and 93-297. DOC has conceded that absent the forfeiture penalty, Mr. Gibson is entitled to immediate release. (A3-12). Accordingly, Mr. Gibson hereby requests that he be immediately released from

incarceration.

F. CONCLUSION

The certified question should be answered in the negative. The appropriate remedy in this case is to remand the proceeding with directions that Mr. Gibson be immediately released from incarceration.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Susan A. Maher
Assistant General Counsel
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

by hand/mail delivery this _____ day of November, 2002.

Respectfully submitted,

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xc: Thomas B. Gibson

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that the Initial Brief of Appellant complies with the type-font limitation.