IN THE

Supreme Court of Florida

THOMAS B. GIBSON, Petitioner, v. FLORIDA DEPARTMENT OF CORRECTIONS, Respondent.	Case No. SC02-2414

REPLY BRIEF OF PETITIONER

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A. TABLE OF CONTENTS

B. TABLE OF CITATIONS

1. Cases

2. Statutes

3. Other Authority

C. ARGUMENT IN RESPONSE AND REBUTTAL.

Petitioner Gibson agrees with the Respondent that the question in this case is whether a "combination of incarcerative sentences and probation . . . constitutes 'a probationary split sentence' within the meaning of *Eldridge* [*v. Moore*, 760 So. 2d 888 (Fla. 2000)]." Answer Brief at 5.[1] Petitioner Gibson respectfully requests the Court to answer the Respondent's question in the negative. A "probationary split sentence" must be offense-specific, at least for purposes of *Eldridge*. As explained below, any other conclusion would lead to unfair and/or absurd results and would defeat the spirit and intent of the Court's holding in *Tripp v. State*, 622 So. 2d 941 (Fla. 1993).

The Respondent asserts that the Court and other district courts have "either directly or indirectly concluded that a sentencing under the sentencing guidelines using a single guidelines scoresheet that includes both incarceration or community control or probation on a variety of counts or cases is a form of probationary split sentence." Answer Brief at 5. The first case cited by the Respondent is *Horner v. State*, 617 So. 2d 311 (Fla. 1993). In *Horner*, the defendant originally received three separate and concurrent probationary split sentences. The defendant subsequently violated

[1] The term "probationary split sentence" has been specifically defined by the Court as "a period of confinement, none of which is suspended, followed by a period of probation." *Poore v. State*, 531 So. 2d 161, 164 (Fla. 1988).

probation and was sentenced as follows: concurrent terms of three-and-one-half years' incarceration in the first two cases, followed by a one-year term of probation for the second case and a consecutive one-year probationary period for the first case, all to be followed by four consecutive five-year probationary terms for the third case. The issue before the Court was whether the issuance of a one-year probationary period for the first case consecutive to the one-year probationary period for the second case violated section 948.01(8), Florida Statutes, in that the probation for the second case arguably created an impermissible time gap between incarceration and probation for the first case. The Court rejected this argument, reasoning that the statute's preclusion of a time gap only barred a gap between release from incarceration on all counts and probation. *Horner*, 617 So. 2d at 313. The Court, at least in dicta, referred to the defendant's sentence as a "probationary split sentence." *Id.* Nevertheless, Petitioner Gibson maintains that the Court's characterization of Ms. Horner's three separate cases as a "a single split sentence" was limited to its analysis of the time gap prohibition of section 948.01(8) and does not extend to the certified question in the instant case.

With the exception of *Larimore v. State*, 823 So. 2d 287 (Fla. 1st DCA 2002),[2]

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[2] It is not surprising that the *Larimore* case supports the Respondent's position, as that case is out of the same district as the case below.

the remaining cases cited by the Respondent do not stand for the proposition that a single sentencing scoresheet that includes incarceration for one offense followed by probation for a separate offense constitutes a "probationary split sentence." *See Smith v. State*, 685 So. 2d 1362 (Fla. 2d DCA 1996); *Davis v. State*, 701 So. 2d 119 (Fla. 3d DCA 1997); *Johnson v. State*, 665 So. 2d 380 (Fla. 4th DCA 1996); *Cosgrave v. State*, 656 So. 2d 281 (Fla. 5th DCA 1995). As the Respondent concedes, the opinions in *Smith, Davis, Johnson,* and *Cosgrave* do not lend any support for either party's argument in this case as those opinions do not reveal whether the defendants were sentenced for more than one offense. Answer Brief at 5 n.1 ("Unfortunately, the fact patterns in *Smith, Davis, Johnson,* and *Cosgrave* cases, *supra*, are not really clear . . . .").

The Respondent also attempts, unsuccessfully, to distinguish Petitioner Gibson's case from *Maynard v. State*, 763 So. 2d 480 (Fla. 4th DCA 2000). Yet an examination of the two cases reveals that the facts are analogous. In *Maynard*, the defendant pled guilty to three separate third-degree felony counts. The court sentenced the defendant to thirty months' imprisonment on the first count followed by thirty-six months' probation on the second and third counts, to run concurrently. On appeal, the defendant claimed that his sentence was illegal because it exceeded the statutory maximum permitted by law for a third-degree felony (sixty months). The

court rejected this argument, reasoning:

> 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.

763 So. 2d at 481 (citations omitted) (footnote omitted). In reaching this conclusion, the court cited to the Fifth District Court of Appeal's decision in *Weiner v. State* for the principle that a "court is under a duty to impose a sentence for each offense notwithstanding that the offenses are combined in one scoresheet." 562 So. 2d 392, 393 (Fla. 5th DCA 1990). *See also Tripp*, 622 So. 2d at 942 ("A sentence must be imposed for each separate offense . . . ."). The holdings in *Maynard* and *Weiner* support Petitioner Gibson's position.

Next, the Respondent states that the Court in *Eldridge* "acknowledged that it was the Legislature's prerogative to condition the retention of any previously earned gain-time upon satisfactory completion of any supervision *related to the sentence*." Answer Brief at 16 (emphasis added). The Respondent adds "[d]ue to the interrelatedness of the sentences scored on a single scoresheet under the guidelines, it makes sense that the Legislature would intend that forfeiture penalty to be applied upon revocation of *a related probation*." Answer Brief at 16-17 (emphasis added).

The Respondent uses the word "related" loosely. The Court in *Eldridge* actually stated:

> [I]t was the Legislature that provided for the award of gain time in the first place and it made the retention of that gain time conditional upon the satisfactory completion of the inmate's supervision. *See* § 944.28(1), Fla. Stat. (1989-1999). Therefore, when an inmate fails to satisfactorily complete his or her supervision and it is revoked, the Department, as part of the executive branch, merely executes or fulfills the legislative mandate that the previously awarded gain time be forfeited; thus the inmate must serve out his or her prior incarceration as a penalty for the revocation of supervision.

760 So. 2d at 892. The Court added that gain-time "is merely an incentive device used by the Department for purposes of encouraging good behavior both in prison and on supervision." *Id.* at 891. *See also* § 944.275(1), Fla. Stat. (1993) ("The department is authorized to grant deductions from sentences in the form of gain-time in order to encourage satisfactory prison behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services."). In other words, gain-time has two possible purposes: (1) it encourages good behavior while in prison and (2) it encourages good behavior while on probation, community control, or conditional release. However, the latter purpose only applies to those prisoners that either receive a split sentence for a single offense or are subject to conditional release pursuant to section 947.1405(2), Florida Statutes

(1993).[3] For prisoners that fall into this second category, the retention of gain-time is conditioned upon the successful completion of probation, community control, or conditional release.[4]

Petitioner Gibson does not fall into this second category (i.e., gain-time that is

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[3] Section 947.1405(2), Florida Statutes (1993), provides in relevant part that "[a]ny inmate who is convicted of a crime committed on or after October 1, 1988, which crime is contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure, and who has served at least one prior felony commitment at a state or federal correctional institution or is sentenced as a habitual or violent habitual offender pursuant to s. 775.084 shall, upon reaching the tentative release date or provisional release date, whichever is earlier, as established by the Department of Corrections, be released under supervision subject to specified terms and conditions, including payment of the cost of supervision pursuant to s. 948.09."

[4] The defendant in *Eldridge* fell into this second category. Mr. Eldridge received a "true split sentence," defined as "a prison term of a number of years with part of that prison term suspended, *contingent upon completion on probation of the suspended term of years*." *Eldridge*, 760 So. 2d at 889 n.1 (emphasis added). When Mr. Eldridge violated his probation, the Court stated the following regarding Mr. Eldridge's previously accrued gain-time: "[t]here is nothing in the statute that requires that the trial court must award the gain time before the Department is permitted to forfeit it, and as discussed above, *the inmate retains the previously awarded gain time until it is forfeited*." *Id.* at 890. This language sets forth the distinction between (1) the type of sentences that Petitioner Gibson received and (2) "probationary split sentences and true split sentences" (the only two types of sentences referred to in the *Eldridge* opinion). Unlike Mr. Eldridge, when Petitioner Gibson violated his probation in case number 93-360, he did not retain previously awarded gain-time because he did not have any previously awarded gain-time in case number 93-360; his previously awarded gain-time was obtained in case numbers 93-216 and 93-297. It follows that since he did not retain the previously awarded gain-time, such gain-time cannot be forfeited or applied as a penalty.

conditioned upon compliance with the terms of release). Neither of his sentences in case numbers 93-216 and 93-297 contained a period of probation or community control; nor were the offenses ones for which conditional release was authorized pursuant to section 947.1405(2).[5] Hence, Petitioner Gibson's receipt of gain-time was conditioned only upon maintaining satisfactory behavior *while in prison*, *see* § 944.275(4)(a), Fla. Stat. (1993), or upon participating in productive activities or performing outstanding deeds or services *while in prison*. *See* § 944.275(4)(b), (c), & (d), Fla. Stat. (1993). The gain-time that Petitioner Gibson accrued in case numbers 93-216 and 93-297 was not conditioned upon the successful completion of his probationary sentence in case number 93-360 and the Respondent has failed to cite to any statute, case, or departmental rule that provides otherwise. Therefore, when Petitioner Gibson was released from prison in case numbers 93-216 and 93-297, the gain-time he accrued in those cases became a nullity and could not subsequently be forfeited or imposed as a penalty.

Throughout the Answer Brief, the Respondent refers to the fact that the trial court "awarded unforfeited gain-time." *See* Answer Brief at 1, 14, 17. This argument is a red herring, as the Respondent seems to imply that the trial court's "award" and

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[5] The offenses that Petitioner Gibson was convicted of are not contained in category 1, category 2, category 3, or category 4 of rule 3.701 or rule 3.988.

the Department's "forfeiture" cancel each other out – resulting in no gain or loss for Petitioner Gibson. Were this the case, then Petitioner Gibson would have no complaint. However, as conceded by the Respondent in footnote 8 of its Answer Brief,[6] the trial court's actions in this regard are irrelevant, as the Department can forfeit gain-time whether or not a trial court "awards" gain-time.[7] The trial court's

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[6] In its Answer Brief, the Respondent states:

> If the sentencing court does not award gain-time, the gain-time is deemed forfeited by the court and the defendant must serve the forfeiture penalty. If the sentencing court does award the gain-time, then the department may still (and mandatorily does by rule) forfeit the gain-time and requires the defendant to serve out the forfeiture penalty.

Answer Brief at 14 n.8. In light of this concession, it is difficult to understand why the Respondent repeatedly refers to the trial court's "award" of gain-time in Petitioner Gibson's case.

[7] In Petitioner Gibson's Initial Brief, a distinction was made between an "award" of gain-time and the "retention" of gain-time. *See* Initial Brief at 18 n.9. The word "award" indicates a benefit, or in this context, a credit. However, an award of gain-time only applies to offenses committed before 01 October 1989, as prior to that date, gain-time was treated as credit for time served and a violation of probation ("VOP") sentence was reduced by the amount of previously accrued gain-time. For offenses committed on or after 01 October 1989, gain-time is no longer considered the equivalent of credit for time served and a VOP sentence is not reduced by the amount of previously accrued gain-time. Hence, the Respondent's repeated references to the trial court's "award" of gain-time in Petitioner Gibson's case are misleading, as Petitioner Gibson's VOP sentence was *not* reduced by the previously accrued gain-time. In reality, the trial court in Petitioner Gibson's case retained the previously accrued gain-time, meaning that gain-time would not be forfeited, or added on, to increase the new VOP sentence. *See Eldridge*, 760 So. 2d at 890 ("[Gain-time] may be taken if the trial court does not check the box on the sentencing documents produced during the revocation proceedings indicating that gain time should be

actions notwithstanding, the Department imposed a forfeiture penalty upon Petitioner Gibson, which resulted in a 1969-day increase in his sentence.

In order to be crystal clear, the following day-for-day explanation is provided. When Petitioner Gibson violated his probation in case number 93-360 (the only sentence that Mr. Gibson was serving at the time of the violation of probation ("VOP")), the trial court sentenced him to 2555 days' imprisonment. Pursuant to *Tripp*, the trial court awarded credit for time served in case numbers 93-216 and 93-297 plus credit for time spent in jail after he was arrested for the probation revocation prior to his post-revocation sentencing, for a total of 1897 days. *See Gibson v. Florida Department of Corrections*, 828 So. 2d 422, 426 (Fla. 1st DCA 2002) (Benton, J., dissenting). The trial court also retained the 1969 days of gain-time that Petitioner Gibson accrued in case numbers 93-216 and 93-297 (sentences that had been completed at the time of the VOP). Thereafter, the Department forfeited the 1969

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retained."). "If the trial court does check the box indicating that gain time is to be retained, the trial court has essentially indicated that it is not forfeiting gain time." *Id.* If the trial court does not check the box, then the gain-time is forfeited and the defendant's sentence is increased. Even if the trial court retains gain-time, the Department still has the authority to forfeit gain-time and impose a penalty, which results in the defendant's VOP sentence being increased by the amount of forfeited gain-time. In light of the Respondent's concession in footnote 8 of its Answer Brief that the Department forfeits gain-time in every case regardless of the trial court's action, it seems that the trial court's role in the gain-time retention process has become irrelevant.

days of gain-time that Petitioner Gibson had previously accrued in case numbers 93-216 and 93-297. At the end of the day, Petitioner Gibson's 2555-day sentence for case number 93-360 turned into a 2627-day sentence (2555 minus 1897 = 658 plus 1969 = 2627).[8] *Eldridge* allows the Department to apply such a penalty when the split sentence is for a single offense (i.e., the gain-time penalty stems from gain-time accrued on the same offense as the VOP). But *Eldridge* does not allow the Department to resurrect expired sentences (and the gain-time previously accrued on those expired sentences) in order to impose a forfeiture penalty on separate and unrelated offenses.

The fallacy in the Respondent's argument is highlighted by the following hypothetical. The underlying offenses in case number 93-360 consisted of several counts of forgery and uttering. Upon violating his probation in case number 93-360, Petitioner Gibson was sentenced to consecutive sentences of three years' imprisonment for the forgery counts and four years' imprisonment for the uttering counts. For purposes of the hypothetical, suppose Mr. Gibson had only been

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[8] The Respondent's position results in a "*Tripp* penalty" rather than a "*Tripp* credit." *See Weigle v. State*, 789 So. 2d 1217, 1217 n.1 (Fla. 5th DCA 2001); *Hough v. State*, 671 So. 2d 839, 840 (Fla. 2d DCA 1996). *See also Gibson v. Florida Department of Corrections*, 828 So. 2d 422, 428 (Fla. 1st DCA 2002) (Benton, J., dissenting) ("No case before the present case converts the *Tripp* credit into a '*Tripp* penalty' . . . .").

charged with two counts in case number 93-360 (one count of forgery and one count of uttering), both third-degree felonies. Suppose further that upon violating probation, Mr. Gibson was given the statutory maximum for both counts: five years' imprisonment to run consecutively. If the "*Tripp* penalty" argued by the Respondent was applied to this hypothetical, then the sentences would be illegal as they would exceed the statutory maximum (the sentences would be ten years' imprisonment plus the 72-day loss imposed by the Department after subtracting the 1897-day credit and adding the 1969-day forfeiture penalty). This example illustrates the problem with using the gain-time accrued in one case and applying a forfeiture penalty of that gain-time to a separate, unrelated case.

Finally, the Respondent states that "[i]f Gibson is dissatisfied with the effect of the forfeiture penalty, he must convince this Court to overrule *Tripp* and its progeny." Answer Brief at 18. Contrary to this assertion, it is the Respondent, not Petitioner Gibson, that needs the Court to overrule *Tripp* in order to be successful. The Respondent repeatedly asserts that *Eldridge* applies to Petitioner Gibson's case because of *Tripp*. In essence, the Respondent argues that if a prisoner requests a *Tripp* credit, then the holding in *Tripp* converts separate sentences for separate offenses into "one interrelated unit," Answer Brief at 9, thereby allowing the Department to apply a forfeiture penalty for gain-time accrued in a previously expired

sentence. However, the holding in *Tripp* directly contradicts the Respondent's argument. In *Tripp*, the defendant entered a guilty plea to burglary and grand theft, both third-degree felonies. Pursuant to the sentencing guidelines, the trial court sentenced Mr. Tripp to four years' imprisonment for the burglary charge and four years' probation for the grand theft. The probation was to be served consecutive to the imprisonment and was to begin upon Mr. Tripp's release from prison. Due to the accumulation of gain-time, Mr. Tripp served his four-year prison sentence on the burglary charge in less than ten months and was released on probation. He subsequently violated his probation, and upon resentencing, the trial court sentenced Mr. Tripp to four and one-half years' incarceration on the grand theft charge. The question in the case was whether Mr. Tripp was entitled to credit for time served on the burglary offense. The Court answered this question in the affirmative:

> The purpose of the sentencing guidelines is "to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process" so as to eliminate unwarranted variation in sentencing. Fla. R. Crim. P. 3.701(b). One guidelines scoresheet must be utilized for all offenses pending before the court for sentencing. Fla. R. Crim. P. 3.701(d)(1). A sentence must be imposed for each separate offense, but the total sentence cannot exceed the permitted range of the applicable guidelines scoresheet unless a written reason is given. Fla. R. Crim. P. 3.701(d)(12). Sentences imposed after revocation of probation must be within the recommended guidelines range and a one-cell bump. Fla. R. Crim. P. 3.701(d)(14).
>
> When Tripp was originally sentenced, the maximum jail time he could have received within the permitted range of the sentencing

> guidelines was four and one-half years. Under ordinary circumstances, when he violated his probation, his sentence could not exceed the five-and-one-half-year maximum of the next highest permitted range (limited by the fact that the maximum sentence for a third-degree felony is five years), less credit for time served. The problem arises because Tripp committed two crimes. Unless he is given credit for time served on the one against the sentence imposed for the other upon the probation violation, his total sentence for the two crimes will be eight and one-half years, which is three years beyond the permitted range of a one-cell bump.
>
> Thus, it appears that the sentencing method sanctioned by the district court of appeal is inconsistent with the intent of the sentencing guidelines. Under this method, trial judges can easily circumvent the guidelines by imposing the maximum incarcerative sentence for the primary offense and probation on the other counts. Then, upon violation of probation, the judge can impose a sentence which again meets the maximum incarcerative period. Without an award of credit for time served for the primary offense, the incarcerative period will exceed the range contemplated by the guidelines.
>
> The State argues that Tripp was convicted of two separate crimes and received two separate sentences. Thus, Tripp is not entitled to credit for time served on his first conviction after revocation of probation on his second conviction. The State, however, ignores the fact that 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.
>
> We hold that 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 (citations omitted) (footnote omitted).

The key distinction between *Tripp* and the case below is that Mr. Tripp committed his offenses prior to 01 October 1989 and therefore his credit for time

served for the burglary charge included not only actual time spent in prison but also the previously earned gain-time. *See id*. at 942 n.2. Hence, not only could the Department not apply a forfeiture penalty for Mr. Tripp's three-plus years of gain-time (i.e., add three-plus years onto his new sentence), the Department was required to reduce the new sentence by the three-plus years of gain-time. Because Petitioner Gibson's offenses were committed after 01 October 1989, his new sentence was not reduced by the previously earned gain-time and the Department applied a forfeiture penalty (i.e., his new sentence was increased by the number of days of forfeited gain-time).

But suppose that Mr. Tripp's offenses were committed after 01 October 1989. Then, if the Department had taken the same action in Mr. Tripp's case as it took in Petitioner Gibson's case, Mr. Tripp's new sentence of four and one-half years' imprisonment on the grand theft charge would have only been reduced by *10 months, the time actually served by Mr. Tripp in prison on the burglary offense*. More importantly, the four and one-half years VOP sentence would have been increased by the three-plus years of previously accrued gain-time (a gain-time forfeiture penalty). At the end of the day, Mr. Tripp would have been required to serve more than six years for the grand theft offense, a sentence "*beyond the permitted range of a one-cell bump*." *Tripp*, 622 So. 2d at 942 (emphasis added). Since the Court was

concerned with making sure that Mr. Tripp's sentence did "not exceed the range contemplated by the guidelines," *id.*, it is presumable that the Court would not have permitted the Department to apply a gain-time forfeiture penalty in Mr. Tripp's case. Likewise, a gain-time forfeiture penalty should not have been permitted in Petitioner Gibson's case.

D. CONCLUSION

The certified question should be answered in the negative.

E. CERTIFICATE OF SERVICE

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

Susan A. Maher
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2601 Blair Stone Road
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by hand/mail delivery this _____ day of February, 2003.

Respectfully submitted,

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H. CERTIFICATE OF COMPLIANCE

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