IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC03-1676
	)	DCA# 4D01-4197
GARY MATTHEWS,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. He will be referred to as respondent or by name in this brief. The record on appeal, hearing transcript and two supplemental records on appeal consist of 6 volumes. The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The hearing transcript is numbered independently of the record on appeal. All references to the hearing transcript will be by the symbol “T” followed by the appropriate page number in parenthesis.

The first supplemental record on appeal includes the pleadings relating to the first motion to correct sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) as well as a transcript of the motion hearing. All references to the pleadings will be by the symbol “SR” followed by the appropriate page number in parenthesis. All references to the hearing transcript will be by the symbol “ST” followed by the appropriate page number in parenthesis.

The second supplemental record pertaining to the second motion to correct sentence will not be referred to in this brief.

All emphasis has been added by Respondent unless otherwise

noted.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and the facts with the following additions and clarifications:

Subsequent to filing of the notice to appeal, Respondent filed 2 motions to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). The first challenged the sentence imposed in case no. 90-1156 CF, on the ground that respondent was entitled to 5 years credit for time served on counts I and II upon finding of violation of probation for count III pursuant to Tripp v. State, 622 So. 2d 941 (Fla. 1993) based upon the Fourth District Court of Appeal decision in Palmer v. State, 804 So. 2d 455 (Fla. 4th DCA 2001) (SR-1-3).

At the motion hearing, defense counsel explained to the circuit court that although the sentence in 1990 case had expired, failure to award the proper credit effected respondent's sentence in the 1994 case because it was ordered to run consecutive to the 1990 case. If respondent received proper credit on the 1990 case, he would have begun to serve his sentence on the 1994 case at a much earlier date (ST-6-8).

The motion was denied by written order on the ground that the 1990 sentence expired prior to filing of the motion (SR-15).

SUMMARY OF ARGUMENT

This Court has consistently held that where a defendant is sentenced to prison on one count followed by probation on another count, the original prison sentence must be credited against the prison sentence which is imposed upon revocation of probation. The rationale for this holding is that the sentences for offenses which are interrelated when originally pronounced, remain interrelated throughout the process. Based upon this rule of law, the Fourth District Court of Appeal properly determined that the where respondent was sentenced as an habitual felony offender to concurrent 5 year prison terms on counts I and II followed by probation on count III, the trial court was required to credit the 5 year prison sentence against the prison sentence imposed upon revocation of probation.

The issue was not moot at the time the motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) was filed where respondent was serving a consecutive prison sentence on a second case. Had he been awarded proper credit on the first case which was the subject of the motion, his sentence on the second case would have commenced to run at an earlier date. Thus, his sentence in the second case was directly effected by the failure to award proper credit in the first case.

Consequently, the Fourth District Court of Appeal properly

determined the issues and its opinion should be approved by this Court.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT TRIPP[1] CREDIT APPLIES TO HABITUAL OFFENDER SENTENCES

The Fourth District Court of Appeal correctly held that where a defendant was originally sentenced to incarceration as an habitual felony offender on two counts followed by probation on a third, upon violation and revocation of probation, the original prison term must be credited against the newly imposed term of incarceration. Matthews v. State, 854 So. 2d 238 (Fla. 4th DCA 2003). This holding recognizes that "offenses which are originally sentenced together should continue to be treated in relation to each other." Palmer v. State, 804 So. 2d 455, 456 (Fla. 4th DCA 2001) citing Tripp v. State, 622 So. 2d 941 (Fla. 1993). The opinion should be approved by this Court.

Since the sentencing error at issue is a pure question of law the standard of review is *de novo*. See, State v. Glatzmayer, 789 So. 2d 297 n. 7 (Fla. 2001).

While petitioner accurately highlights Tripp as a guidelines case insuring that the guidelines were not circumvented when sentence was imposed upon violation of probation, that was but part of the rationale for the decision. Not only was this Court concerned that failure to award credit for time spent in prison would result in a *de facto* departure from the guideline range

[1]Tripp v. State, 622 So. 2d 941 (Fla. 1993)

when sentence was imposed upon violation probation, this Court viewed sentencing on multiple counts or in multiple cases traveling together as an integrated process, not merely a slice of the pie. Tripp v. State. 622 So. 2d at 942

In the paragraph preceding the holding 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," this Court wrote:

> 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. See Lambert, 545 So.2d at 838, 841; Fullwood v. State, 558 So.2d 168, 170 (Fla. 5th DCA 1990).

622 So. 2d at 942.

Later cases from this Court interpreting Tripp emphasize that sentencing for multiple counts or multiple cases is an interrelated process. Therefore, Tripp credit must be awarded even though the sentence, without the credit, was within the guideline range. Cook v. State, 645 So. 2d 436, 437-438 (Fla.

1994); Hodgdon v. State, 789 So. 2d 958 n.5 (Fla. 2001); State v. Witherspoon, 810 So. 2d 871 (Fla. 2002).

When a defendant with multiple cases or multiple counts appears before a Judge for sentencing, the Judge has an overall sentencing plan in mind which is pronounced count by count. The structure creates a nexus between the charges and their sentences which remains in tact throughout the proceedings. An interrelated unit approach to sentencing requires approval of Matthews v. State, 854 So. 2d at 238 and comports with legislative intent in the realm of habitual offender sentencing.[2]

In 1993, the legislature formally rejected contemporaneous convictions as a predicate for the enhanced sentence and required prior sequential convictions. See, Ch. 93-406, Laws of Fla. The habitual offender statute thus, views prior convictions as a unit when they are entered on the same day and not simply as individual convictions. Awarding Tripp credit upon violation of probation in a multiple count habitual offender case is consistent with the legislature's approach to prior record as a predicate for habitual offender sentencing.

In Duncan v. State, 686 So. 2d 701 (Fla. 2d DCA 1996), the Second District Court of Appeal found that Tripp credit did not apply to a sentence as an habitual offender imposed upon

[2]It bears noting at this juncture that this Court decided Tripp in 1993 and Cook in 1994. In the ensuing decade, the legislature has not acted to abrogate these holdings.

revocation of probation. Like petitioner, the Second District, reasoned that Tripp credit was awarded only to avoid a potential departure sentence. Duncan, however, was decided in 1996 before this Court's 2001 decision in Hodgdon v. State, 789 So. 2d at 958 and its 2002 decision in State v. Witherspoon, 810 So. 2d at 871. Post Hodgdon and Witherspoon, and without discussing Duncan, the Second District reached a conclusion contrary to Duncan in Sylvester v. State, 842 So. 2d 977 (Fla. 2d DCA 2003).

In Sylvester, the defendant pled to 3 separate cases. In the first, he received a net sentence as an **habitual felony** offender of 4 years in prison followed by 4 years of probation. In the second and third, he was placed on concurrent terms of probation which ran concurrent with the probationary term of the first case. He was found to have violated the concurrent terms of probation in each of the 3 cases and was sentenced to prison as an habitual felony offender. The Second District Court of Appeal held that the defendant should have received credit for the time spent in prison as an habitual felony offender in the first case on the other two cases as well.

As evidenced by Sylvester, it is very plausible that Duncan would have been decided differently today particularly in light of Hodgdon and Witherspoon. Accord, Thomas v. State, 805 So. 2d 850 (Fla. 2d DCA 2001)(Tripp applies to defendant's sentence under the Criminal Punishment Code); Contra, Moore v. State, 859

So. 2d 613 (Fla. 1st DCA 2003) order on jurisdiction, SCO3-2136 (Fla. Dec. 15, 2003) (Tripp credit does not apply to sentence under the Criminal Punishment Code); but see, James v. State, 845 So. 2d 238, 240 (Fla. 1st DCA 2003) (in context of resentencing First District acknowledged "[w]hen a defendant is sentenced for multiple crimes arising from a single criminal episode, nothing prevents a trial judge from weighing all the crimes in determining the appropriate sentence; hence, the sentence for each count should not be viewed in isolation, but as part of a purposeful plan.")

Here, respondent was charged in a single information with 6 offenses occurring in 1990 (R-13-14). He pled no contest to counts I, II and III while the remaining counts were nolle prossed by the state (R-7-8). As to counts I and II, he was sentenced to serve concurrent terms of 5 years in prison as an habitual felony offender with credit for 134 days time served (R-9-12; R-267-268) A consecutive term of 5 years probation was imposed as to count III (R-13-15, 16-17, 264-267). Ultimately, probation was revoked and respondent was sentenced to serve 4 1/2 years in prison with credit for only 355 days (R-24-26, 304). Respondent was not designated an habitual felony offender as to count III. Based upon this Court's line of case law, the Fourth District Court correctly held that credit for the time spent in prison on counts I and II should have been awarded

against the sentence imposed in count III since the sentences for each count were interrelated from the onset. Matthews v. State, 854 So. 2d at 238. The opinion should be approved by this Court. Tripp; Cook; Hodgdon; Witherspoon.

Although the state sought discretionary jurisdiction in this court and opposed respondent's suggestion of mootness based upon expiration of the sentence imposed in the 1994 case before the award of Tripp credit, petitioner now argues, ironically, that "any attack on the sentence in 90-1156 was moot because Respondent had already served his time." (Petitioner's Initial Brief at 5). This claim was fully reviewed by the Fourth District Court of Appeal and rejected in its written opinion. Matthews v. State, 854 So. 2d at 239-240. It is outside the parameters of the certified conflict and the merits need not be reached. See, Ross v. State, 601 So. 2d 1190, 1193 (Fla. 1992)("The remaining issues lie beyond the scope of the issue for which jurisdiction lies, and we see no need to exercise our prerogative to reach them."); Salters v. State, 758 So. 2d 667, 669 n.5 (Fla. 2000) ("These additional claims are clearly outside the scope of the certified conflict issue, and we decline to address them."); Welsh v. State, 850 So. 2d 467, 471 n.6 (Fla. 2003) ("We decline to address the other issues raised by Welsh that are not the basis of our jurisdiction."); Wood v. State, 750 So. 2d 592, 595 n. 3 (Fla. 1999) (declining to address issues beyond

the scope of the certified conflict); Raford v. State, 828 So. 2d 1012, 1021 n.12 (Fla. 2002) ("We decline to address the other issues raised by petitioner because they are beyond the scope of the certified conflict in this case."); Barnett v. Barnett, 768 So. 2d 441 n.1 (Fla. 2000) ("We decline to address petitioner's second issue on appeal because it is beyond the scope of the certified conflict in this case."); Jones v. State, 759 So. 2d 681, 682 n.1 (Fla. 2000) ("Further, we decline to address Jones' ineffective assistance of trial counsel claim here, as the Third District fully addressed that claim in the decision below and the claim clearly is outside the scope of the certified conflict before us."); Williams v. State, 759 So. 2d 680 n.1 (Fla. 2000) ("Moreover, we decline to address Williams' claim challenging the Third District's interpretation of section 775.084(1)(c)1., Florida Statutes (1997), which is clearly outside the scope of the certified conflict issue.").

A conservative application of discretionary review in this instance is in keeping with the general premise that, as a case "travels up the judicial ladder, review should consistently become narrower, not broader." Haines City Community Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995); The Florida Bar re Williams, 718 So. 2d 773, 778 n. 5 (Fla. 1998).

On the merits, the argument overlooks the domino relationship between the 1990 case and the 1994 case. Mr. Matthews was

sentenced in both cases on the same date to consecutive prison terms (R-24-26, 27-33). Were the trial court to have awarded Tripp credit on the 1990 case, Mr. Matthews would have completely served that sentence on the date it was imposed, March 3, 1995 and his sentence on the 1994 case would have begun on March 3, 1995. Instead, according to the Department of Corrections, the sentence on the 1990 case did not expire until May 29, 1996 and the sentence on the 1994 case did not begin to run until May 29, 1996 (R-118-119).

By wrongfully denying Tripp credit in the 1990 case, the circuit court effectively extended Mr. Matthews' sentence on the 1994 case by 1 year and 88 days, representing the period from March 3, 1995, the date the 1994 sentence should have commenced, to May 29, 1996, the date the Department calculated that it began.

As the Fourth District Court of Appeal held:

> The record reflects that had Tripp credit been applied in the 1990 case, his sentence in the 1994 case would have started one year and 88 days sooner than it did. Prior to Palmer, case law indicated that Tripp credit would not be applied to a violation of probation from time served by the defendant on counts for which he was sentenced as a habitual felony offender. See Duncan v. State, 686 So.2d 701 (Fla. 2d DCA 1996)(holding that Tripp credit is not applicable to habitual felony offender sentence).
>
> This court has determined that a prisoner is entitled to correct a credit for time served

> in an earlier case that impacts a subsequent release date. See Pizano v. State, 829 So.2d 396 (Fla. 4th DCA 2002). In Pizano, the appellant had completed his 1995 sentence when he argued that he was entitled to be re-sentenced under the 1994 guidelines pursuant to Heggs v. State, 759 So.2d 620 (Fla.2000). The state argued that the issue was moot because he had already completed his sentence. This court rejected the state's argument because he was still in prison serving sentences in two other cases that ran consecutive to the 1995 case. The 1995 sentence was combined with the other two concurrent sentences to calculate his release date. As a result, although he had completed his 1995 sentence, the error in that case continued to affect his release date. Therefore, this court reversed and remanded with instructions that the appellant be re-sentenced under the 1994 guidelines so that his release date could be re-calculated. Id. at 397.
>
> Here, as in Pizano, the failure to apply Tripp credit to his sentence in the 1990 case affected Matthews' release date in the 1994 case. As Matthews' sentence in 94-1592 commenced consecutive to his sentence in 90-1156, he is entitled to the Tripp credit. See Vellucci v. Cochran, 138 So.2d 510 (Fla.1962); Silvester v. State, 794 So.2d 683 (Fla. 4th DCA 2001)(Judge Klein concurring specially and interpreting Vellucci to mean that "if a defendant has wrongfully served the first of two consecutive sentences, the time he wrongfully served on the first sentence should be credited to the sentence which was to begin at the expiration of the first sentence.").

Matthews v. State, 854 So. 2d at 239-240.

The decision of the appellate court is supported by this Court’s holding in Vellucci v. Cochran, 138 So. 2d 510 (Fla. 1962) as well as the rule of law that a court may at any time

correct the award for credit for time served. State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998).

In Vellucci, this Court agreed with the defendant that he was illegally detained on an escape charge because he was a minor at the time and his parents were not given notice as required by the statute in effect at the time. This Court concluded that the judgment was null and void. However, the defendant was subject to retrial on the charge. Furthermore, this Court did not order the defendant's release from custody because a consecutive prison sentence had been imposed in an unrelated escape case. Instead, this Court fashioned the following remedy:

> If upon retrial of the first charge of escape the petitioner is resentenced to a term of imprisonment equal to the term originally ordered for such offense, of course, the credit should be given to him for the time he has served under the void judgment and sentence; **if he is acquitted or is convicted and sentenced to a term less than that already served under the void judgment and sentence, then credit should be given to the petitioner accordingly in the determination of the date of his discharge from the lawful sentence imposed for the second offense.**

138 So. 2d at 512. The Vellucci remedy recognized that the amount of time served on the second sentence was directly effected by what occurs in the first case because it ran consecutive to the first. Likewise, the amount of time served in the 1990 case directly effected the amount of time served in the

1994 case because the sentences were consecutive. Thus, unlike Moore v. Moore, 764 So. 2d 676 (Fla. 1st DCA 2000), Archibald v. State, 715 So. 2d 1154 (Fla. 4th DCA 1998) and Lee v. State, 230 So. 2d 478 (Fla. 4th DCA 1970) cited by petitioner which do **not** address the issue of jurisdiction to correct a sentence which although expired effects a consecutive sentence which is still being served, the issue of credit for time served here was not moot at the time the motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800 (b)(2) was filed[3].

Last, petitioner's argument *inter alia* that the motion to correct sentence was insufficient, like the mootness argument, is peripheral to the certified conflict and need not be considered in resolving the issue. Moreover, it is based upon a faulty premise.

Mr. Matthews raised the issue by filing a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), not pursuant to Florida Rule of Criminal Procedure 3.800 (a) as asserted by petitioner at page 6 (SR 1-3). Furthermore, as the motion read, Mr. Matthews asked the Court to credit the 4 1/2 year sentence imposed on count III with the 5 years in prison imposed on counts I and II. Thus, contrary to

[3]Respondent reiterates his suggestion that the issue is now moot since he has been released on both cases without having received any additional credit as the result of the appellate court decision.

petitioner’s claim there was nothing speculative in the request.

Simply stated, this Court should approve the decision of the Fourth District Court of Appeal which held that credit for 5 years in prison ordered on counts I and II must be award to the sentence imposed on Count III upon violation of probation.

CONCLUSION

Based upon the argument and authorities presented above, the Court should approve the opinion of the Fourth District Court of Appeal in Matthews v. State, 854 So. 2d 238 (Fla. 4th DCA 2003)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to JEANINE M. GERMANOWICZ, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, this _____ day of JANUARY, 2004.

MARCY K. ALLEN
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Courier New, 12 point.

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