IN THE SUPREME COURT OF FLORIDA

GEANETTA MOORE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-2136

# RESPONDENT'S ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

ALAN R. DAKAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0118064

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as the State. Petitioner, Geanetta Moore, the Appellant in the DCA and the defendant in the trial court, will be referred to as the petitioner.

The record on appeal consists of one volume, which will be referenced with the symbol “R.”

All emphasis through bold lettering is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The State agrees with the petitioner’s statement of the case and facts. The State presents the following recapitulation for the reader’s convenience.

The petitioner was charged with grand theft and felony failure to appear in case number 99-4516 (R. 2-3). In case number 99-2202 she pleaded to another grand theft and felony failure to appear (R. 6 – 10). She was sentenced to 24 months state prison in case number 99-2202, followed by five years of probation in case number 99-4516 (R. 13 – 20).

Subsequently, after having served her time in case number 99-2202, the petitioner admitted violating her probation in case number 99-4516 (R. 47 – 53). The trial court revoked her

probation and sentenced her to concurrent terms of 36 months in state prison. The trial court declined to give her credit for the time she served in case number 99-2202. The trial court also denied the petitioner's motion to correct sentencing error filed under Florida Rule of Criminal Procedure 3.800(b)(1) (R. 78 – 79), finding that she was not entitled to credit, since the sentences were pronounced under the Criminal Punishment Code instead of the sentencing guidelines. On appeal the district court of appeal affirmed the trial court and agreed that the petitioner was not entitled to credit under the Criminal Punishment Code. *See* appendix and Moore v. State, 859 So.2d 613 (Fla. 1st DCA 2003). The appellate court certified the question as one of great public interest (See issue on appeal, *infra*. p. 4), and this timely petition for discretionary review followed.

## SUMMARY OF ARGUMENT

Tripp v. State, 622 So.2d 941 (Fla. 1993), and its progeny do not apply to sentences rendered under the Criminal Punishment Code. Tripp was decided in order to assure that split sentences did not exceed the maximum guideline sentence as determined by the single scoresheet. However, under the Criminal Punishment Code there is no maximum guideline sentence. The trial court is free to sentence the offender to the maximum statutory sentence on each case, and may run those sentences consecutively. The trial court may also sentence an offender to the statutory maximum sentence upon violation of probation. Thus, the sentences in a split sentence situation are no longer an interrelated unit. Therefore there is no logical reason to award credit for prison time previously served for the first offense against a newly imposed prison sentence on the second offense following a revocation of probation.

## ARGUMENT

### ISSUE I

WHEN SENTENCING PURSUANT TO THE CRIMINAL PUNISHMENT CODE (§§ 921.002 – 921.0027, Fla. Stat. (1999)) FOR A VIOLATION OF A PROBATIONARY TERM ORIGINALLY IMPOSED TO RUN CONSECUTIVELY TO A PRISON TERM IMPOSED FOR A DIFFERENT OFFENSE, DO Tripp v. State, 622 So.2d 941 (Fla. 1993), AND ITS PROGENY REQUIRE THE TRIAL COURT TO AWARD CREDIT FOR TIME PREVIOUSLY SERVED ON THE SENTENCE IMPOSED FOR THE DIFFERENT OFFENSE?

### Standard of Review

This certified question presents a question of pure law. The standard of review for a legal question is *de novo*. "Appellate courts are not required to defer to trial judges and administrative law judges on pure issues of law. The standard of review of legal issues involve no more than a determination whether the issue was correctly decided." Section 9.4 Philip J. Padovano, FLORIDA APPELLATE PRACTICE (2d ed. 1997)

### Merits

The Criminal Punishment Code ("CPC") is a completely different sentencing paradigm from the old sentencing guidelines. Under its provisions a trial judge may sentence an offender up to and including the statutory maximum sentence. Section 921.002(1)(g) *Fla. Stat*. (1999). The

sentences may be imposed concurrently or consecutively. Section 921.0024(2) *Fla. Stat*. (1999). In essence, all that the Criminal Punishment Code does is set the lowest permissible sentence.

Tripp v. State, 622 So.2d 941 (Fla. 1993), was decided in relation to a sentencing scheme that provided for a minimum **and** a maximum sentence which generally was not the statutory maximum. The primary and secondary cases remained intertwined because they defined what the maximum sentence for the cases could be. That is not so under the Criminal Punishment Code. Under the CPC there is no scoring to determine what the maximum sentence shall be.[1]

Tripp dealt with a specific problem unique to the sentencing guidelines:

> 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 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. 622 So.2d at 942

The Supreme Court pointed out that without a credit for the jail time served, trial judges could easily circumvent the guidelines by imposing the maximum jail time for the primary offense and then, on a violation of probation ". . . impose a sentence which again meets the maximum incarcerative period.

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[1]Except that if the minimum sentence exceeds the statutory maximum, then the trial court must impose the minimum sentence rather than the statutory maximum. § 921.002(1)(g), *Fla. Stat*. (1999)/

That concern no longer exists under the Criminal Punishment Code. As this Court knows, under the CPC the statutory maximum operates as the ceiling for any sentence. *See* Section 921.002(1)(g), *Fla. Stat*.(1999)("The trial court judge may impose a sentence up to and including the statutory maximum for any offense, **including an offense that is before the court due to a violation of probation** or community control."). See also Hall v. State, 773 So.2d 99, 100-101 (Fla. 1st DCA 2000)(Judge can sentence from lowest permissible sentence up to the statutory maximum. The lowest permissible sentence is not a presumptive sentence). And, since the problem identified in Tripp no longer exists, then Tripp and its progeny, which deal with the old sentencing guidelines, should no longer be applicable except to sentences originally rendered under the sentencing guidelines.

This reading of Tripp was reiterated in Hodgdon v. State, 789 So.2d 958 (Fla. 2001), where the issue was whether a defendant was entitled to credit for time served against each individual count on which probation was violated. The Supreme Court held that the defendant would be entitled only to credit for time served as to the entire sentence imposed on the probation violation as opposed to credit against each individual count. In arriving at such a holding the court reiterated,

> This Court's holding in Tripp was intended to prevent the circumvention of the guidelines by treating sentences computed on one scoresheet as an

> interrelated unit. **Tripp was never intended to provide a sentencing boon or windfall to defendants upon violations of probation**. 789 So.2d at 963 (emphasis supplied)

It is true that the Supreme Court in State v. Witherspoon, 810 So.2d 871 (Fla. 2002), held that ". . . Tripp should be applied notwithstanding the fact that the newly imposed sentence is within the guidelines." 810 So.2d at 873. The Court reviewed Hodgdon and recited that

> We reasoned 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.' 810 So.2d at 873.

However, this language is still related to a guideline that provides a specific maximum, which is normally not the statutory maximum, as well as a minimum sentence.

This is not the case with respect to the Criminal Punishment Code. Under the Code, the defendant can be sentenced to the statutory maximum for the primary offense, and, on violation of probation, can be sentenced to the statutory maximum for the additional offense (i.e. the crime for which the defendant was placed on probation). This is true notwithstanding the fact that both crimes are scored under a single scoresheet. The statute specifically states that a trial court is authorized to sentence a defendant to the statutory maximum on a violation of probation. *See* Section 921.002(1)(g), *Fla. Stat*.(1999).

The net effect is that for all intents and purposes the crimes are treated as separate crimes, both giving rise to the potential of a sentence at the statutory maximum. Thus there is no relationship between the crimes once there has been a violation of probation. The only point at which the two crimes are related is in setting the lowest permissible sentence for the primary offense.

In this case the court was dealing with two completely separate crimes. It is only by fortuitous happenstance that the crimes were such as would be scored on the same scoresheet. The trial judge could have sentenced the petitioner to the statutory maximum for each crime and run those sentences consecutive. Instead, the trial court showed lenience and sentenced the petitioner to probation on the second case. The petitioner did not take advantage of this lenience, but violated probation. She should not now receive of windfall of credit for time served on a separate case simply because the trial court did not sentence her to a consecutive prison sentence in the first place.

Since the crimes are actually separate for purposes of sentencing under the Criminal Punishment Code, there is no valid reason why the appellant should be entitled to credit for jail time for the primary offense. To do so is to give the petitioner a windfall which is precisely what this Court has stated should not happen. *See* Hodgdon, *supra*. p. 6.

The State submits that to give credit for time served would be contrary to the legislative intent behind the Criminal Punishment Code. As is pointed out in Section 921.002(1)(b), *Fla. Stat*. (1999), "The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment." The offender who violates probation is not punished when he or she would be given credit for time served in a separate, unrelated case.

The First District Court of Appeal recognized these distinctions in its holding in the decision under review:

> Given these differences, we conclude that Tripp and its progeny have no bearing on sentences such as appellant's, imposed pursuant to the Criminal Punishment Code. Although appellant's offenses were scored on a single scoresheet, the scoresheet was relevant only to determining the lowest permissible sentence. The trial court remained free to sentence up to the statutory maximum on each offense (including offenses before it on a violation of probation) and to impose those sentences either concurrently or consecutively. The sentences cannot be considered an interrelated unit. Thus, when probation on one offense is ordered to run consecutively to incarceration on another, there is simply no logical reason to award credit for the prison time previously served for the first offense against a newly imposed prison sentence on the second offense following a revocation of probation. To do so would provide a windfall to the defendant, in contravention of the Code's relatively clearly expressed intent. Accordingly, we hold that appellant was not entitled to credit against her sentences in case number 99-4516 for the time she had previously served in prison on the sentences imposed in case number 99-2202

The district court of appeal correctly determined that Tripp and the cases subsequent to Tripp do not apply with respect to the Criminal Punishment Code. Consequently the opinion of the district court of appeal should be affirmed.

Thomas v. State, 805 So.2d 850 (Fla. 2d DCA 2001), is simply wrongly decided. In Thomas the court assumes that Tripp is applicable because a single scoresheet was used. It was based on a trial court ruling that Tripp did not apply because the probation in the second case was run concurrent with the sentence in the primary case, rather than consecutive. The court does not analyze the impact of the Criminal Punishment Code, but only holds that Tripp applies because of the use of a single sentencing score sheet. It is interesting to note, however, that the Thomas court suggests that ". . . the Tripp rule should come into play only where necessary to keep sentences within the guidelines but that the supreme court has not yet receded from Tripp to impose such a limitation." 805 So.2d at 851. Of course the "guidelines" under the Criminal Punishment Code do not exist for the upper limit of the sentences. The Thomas court does not take this into account, and therefore comes to the wrong decision in cases involving the Criminal Punishment Code. Accordingly this Court should disapprove of the Thomas decision, and approve the decision under review here as stating the correct rule of law.

## CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 859 So. 2d 613 should be approved, and the sentences entered in the trial court should be affirmed.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on January 20, 2004.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____

ALAN R. DAKAN
Assistant Attorney General
Florida Bar No. 0118064

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L03-1-34593]

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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ALAN R. DAKAN
Attorney for State of Florida

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