IN THE SUPREME COURT

STATE OF FLORIDA

FRED LORENZO BROOKS,

Petitioner,

vs. CASE NO. 66,417

STATE OF FLORIDA,

Respondent.
_____/

INITIAL BRIEF ON THE MERITS

ON BEHALF OF PETITIONER

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PRELIMINARY STATEMENT

The Petitioner was the Defendant in the trial court below and the Appellant in the District Court of Appeal, and will be referred to in this Brief as the Petitioner or as Brooks. The Respondent was the State in the trial court and the Appellee in the District Court of Appeal, and will be referred to as the State in this Brief.

The Record on Appeal consists of four volumes containing the docket instruments and the transcripts of proceedings on violation of probation and sentencing. Reference to the docket instruments contained in Volume I will be designated by "R" followed by the appropriate page number. Reference to the transcript of violation of probation hearing and sentencing proceedings, contained in the other three Volumes, consecutively numbered 1 through 186, will be designated by "T" followed by the

appropriate page number. A copy of the Opinion of the District Court of Appeal filed December 18, 1984, is an appendix to this Brief.

STATEMENT OF THE CASE AND FACTS

Upon a plea of guilty, the Petitioner was adjudicated guilty and sentenced in 1979, as a youthful offender, on two counts of armed robbery. On both counts, he was sentenced to six years; four years imprisonment (of which one year was to be mandatory); and two years of community control program. The sentences were to run consecutively. (R 12-13).

On October 17, 1983, an Affidavit of Violation of Probation was filed against the Petitioner alleging a violation of Condition 5 which required:

> "(5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order to such a violation to constitute a violation of your probation."
>
> (R 17).

A violation of probation hearing was held for the Petitioner and a co-defendant on February 1, 1984. (T 26, 31). At the probation violation hearing the Petitioner's trial counsel argued that the Court did not have jurisdiction to consider a violation of probation because the Petitioner had been sentenced originally to incarceration followed by community control pursuant to the Youthful Offender Statute. The Petitioner's Motion on this ground was denied. (T 116, 120, 144). The trial court found a violation of probation and sentenced the Petitioner to two years on each Count. (T 175-180, R 22-28).

The Petitioner took timely appeal to the First District

Court of Appeal, (R 29-30), resulting in the issuance of the Opinion contained in the appendix to this Brief, filed December 18, 1984. The District Court of Appeal's decision affirmed the sentence on the authority of Clem v. State, 9 F.L.W. 1868 (Fla. 4th DCA, Aug. 29, 1984); Spurlock v. State, 449 So.2d 973 (Fla. 5th DCA 1984). The District Court of Appeal certified the same questions as in Clem v. State, supra, as being of great public importance, and the Petitioner filed his Notice to Invoke the Discretionary Jurisdiction on January 17, 1985.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT HAD JURISDICTION TO ENTER SANCTIONS AGAINST THE PETITIONER, A YOUTHFUL OFFENDER, FOR VIOLATION OF TERMS OF A COMMUNITY CONTROL PROGRAM WHERE THE PETITIONER WAS PLACED IN COMMUNITY CONTROL AFTER SERVING A PERIOD OF CONFINEMENT.

The Petitioner was originally sentenced to a total of eight years on two counts of armed robbery in 1979. Although the Record does not expressly show it, the Petitioner was obviously given an early release on that sentence as his Affidavit of Violation of Probation was filed October 17, 1983. (R 12-13, 17). On each count, the Petitioner was given four years incarceration, followed by two years of community control. (R 12-13). It is the Petitioner's position that, once having sentenced the Defendant, the trial court lost jurisdiction over the Petitioner. The Youthful Offender Act, Chapter 958, provides a sentencing alternative for youthful offenders without significant criminal records. If a court feels that incarceration is not necessary in a given case, Section 958.05(1), Florida Statutes, allows the court to

> "Place the youthful offender on probation in a community control program with or without an adjudication of guilt, for a period not to exceed two years or extend beyond the 23rd birthday of the defendant."

Alternatively, the court may determine that incarceration is appropriate and, in that event, Section 958.05(2), provides:

"The court may commit the youthful offender to the custody of the Department for a period not to exceed six years. A sentence of the court shall specify a period of not more than the first four years to be served by imprisonment in a period of not more than two years to be served in a community control program. The defendant shall serve the sentence of the court unless sooner released as provided by law."

Section 958.10 provides that:

"(1) A youthful offender, when placed in a community control program upon release from imprisonment by parole or by accumulation of statutory gain-time allowances, shall be supervised in the program for a period not to exceed either 2 years or the balance of the maximum term to which he was sentenced, whichever is less; and the release shall be under such conditions as may be set by written order of the Parole and Probation Commission.

(2) During the period spent in the community control program, the youthful offender shall perform the terms and conditions of his release agreement and shall be subject to revocation or modification of the release agreement as if he were on parole. The provisions of §945.30 shall apply to youthful offenders released on parole or by accumulation of statutory gain-time allowances, except those youthful offenders within or without the state under an interstate compact adopted pursuant to chapter 949."

Section 958.14, Florida Statutes, provides:

"A violation or alleged violation of the terms of a community control program shall subject the youthful offender to the provisions of §948.06(1)."

Although, superficially, there may appear to be a conflict between Sections 958.10(2) and Section 958.14, upon closer analysis, the two Sections are not necessarily inconsistent. The first Section provides that a youthful offender who is released from incarceration and placed on community control is subject to revocation or modification of his release agreement "as if he were on parole." Section 958.14

provides that an offender who violates the terms of the community control program is treated pursuant to Section 948.06(1), which in turn provides the procedure for disposition by the court which imposed the probation or community control.

However, these Sections must be read in context and in para materia. First, it should be noted that Chapter 948 which provides for probation and community control clearly contemplates this disposition as an alternative to incarceration. Similarly, the provisions in the Youthful Offender Statute contemplate either a probationary disposition or an incarcerative disposition of a given defendant. The option of the court under Section 958.05(1) is to place a defendant in community control in lieu of incarceration. Section 958.05(2) allows the court, if it deems necessary, to sentence the youthful offender to the Department of Corrections and to provide an incarceration period of not more than four years, followed by a community control program not in excess of two years. The plain language of this Section shows that the Defendant is being "committed" to the "custody of the Department" and that the defendant has to serve the "sentence" of the court unless sooner released as provided by law.

Since probation is not a sentence, Villery v. Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980), the release into community control after incarceration on a sentence pursuant to 958.05(2), is akin to parole and a violation thereof subjects the offender to Section 958.10(2). The provisions of

Section 958.14 apply to community control that is a result of disposition under Section 958.05(1) and in lieu of disposition under 958.05(2).

CONCLUSION

WHEREFORE, the Petitioner prays this Court will find that a sentence under Section 958.05(2), Florida Statutes, places a youthful offender under the jurisdiction of the Parole and Probation Commission and that any violations of the terms and conditions of the community control subsequent to release from incarceration shall be under the exclusive jurisdiction of the Parole and Probation Commission. Accordingly, the Petitioner prays this Court will reverse the decision of the District Court of Appeal and remand this case with directions that the violation of probation be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief on Merits on Behalf of Petitioner has been furnished to BARBARA A. BUTLER, Esquire, Assistant Attorney General, 513 Duval County Courthouse, Jacksonville, Florida 32202, by United States Mail, this 11th day of February, 1985.

ATTORNEY FOR PETITIONER