IN THE SUPREME COURT OF FLORIDA

ROBERT JAMES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 74,405
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Florida Bar No. 192356
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER **AUTHORITIES**

Florida Rules of Criminal Procedure

Florida Statutes

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with robbery with a firearm, attempted robbery with a firearm and shooting into an occupied vehicle in 1982. He entered guilty pleas to these three offenses on September 1, 1983 (R-15-16) and was sentenced as a youthful offender pursuant to Section 958.04(2) to four years imprisonment followed by two years community control (Supp. Record).

On February 16, 1987, an affidavit of violation of community control was filed alleging that petitioner had committed a new law violation and had failed to file monthly reports for August, November and December of 1986 (R-17).

On September 24, 1987, petitioner's violation of probation hearing was held. Based on the testimony of the probation officer, the court revoked petitioner's community control (R-7). Petitioner's score under the guidelines fell within the seven to nine year grid, counting the automatic one grid bump up for violation of community control (R-10-11). The court imposed a sentence of nine years with credit for jail time previously served (R-11-12).

Notice of appeal was timely filed. In his brief to the District Court of Appeal, Fourth District, petitioner argued a sole point, that pursuant to Section 958.14, Florida Statutes (1985), a sentence of only six years imprisonment may be imposed upon violation of probation or community control on a youthful

offender. In its decision on rehearing on May 31, 1989, the court did not discuss the effect of the amendment Section 958.14 on the legality of petitioner's sentence. Instead, it certified as a question of great public importance, the question then pending before this Court but by now decided in Franklin v. State, 14 F.L.W. 281 (Fla. June 15, 1989):

> HAVING SENTENCED A DEFENDANT TO A TERM OF INCARCERATION FOLLOWED BY PROBATION OR COMMUNITY CONTROL, WITHOUT SUSPENSION OF ANY PART OF THE PERIOD OF INCARCERATION, MAY THE TRIAL COURT, AFTER VIOLATION OF THE PROBATION OR COMMUNITY CONTROL, IMPOSE ANY SENTENCE THAT COULD HAVE BEEN ORIGINALLY IMPOSED WITH CREDIT FOR TIME SERVED AND WITHIN THE SENTENCING GUIDELINES UNLESS VALID REASONS FOR DEPARTURE ARE GIVEN?

James v. State, (on rehearing) 14 F.L.W. 1335 (Fla. 4th DCA May 31, 1989) (Appendix - 1-2).

Petitioner timely filed his notice to invoke the jurisdiction of this Court. On July 12, 1989, this Court established a briefing schedule. This brief follows.

SUMMARY OF ARGUMENT

This Court has jurisdiction because of the certified question of great public importance. Once this Court has jurisdiction it may, if it finds it necessary to do so, consider any issue that may effect the case.

Of prime importance to this case is the effect of Section 958.14, Florida Statutes (1985), which provides that upon violation of probation or community control of a youthful offender, a sentence of only six years imprisonment may be imposed. The effect of this statute was not briefed by the parties nor considered by this Court in Franklin v. State, 14 F.L.W. 281 (Fla. June 15, 1989).

However, the issue has been considered now by all five district courts of appeal and the First, Second, and Third have required a youthful offender to be sentenced upon violation of probation to no more than six years under the provisions of the amended statute.

Petitioner requests this Court to exercise its jurisdiction and to decide an issue that was overlooked or omitted by the parties in Franklin v. State; what is the effect of the legislature's statutory cap on the sentence that can be imposed upon a youthful offender upon violation of community control?

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S SENTENCE OF NINE YEARS IMPRISONMENT BECAUSE THE MAXIMUM SENTENCE AUTHORIZED BY THE LEGISLATURE UPON VIOLATION OF COMMUNITY CONTROL BY A YOUTHFUL OFFENDER IS SIX YEARS.

Petitioner was initially sentenced as a youthful offender to four years imprisonment followed by two years community control (Supp. Record). Upon a revocation of petitioner's community control, the trial judge sentenced him to nine years imprisonment (R-19-21), which is the maximum within the guidelines recommended range. Petitioner's score of 126 points fell within the range of five-and-a-half to seven years imprisonment. Florida Rules of Criminal Procedure 3.988(c). The trial court increased petitioner's sentence to one within the next higher grid, which the rules allow upon violation of probation or community control without requiring a reason for departure. Florida Rules of Criminal Procedure 3.701(d)(14).

However, upon violation of probation or community control as a youthful offender, a sentence of only six years imprisonment may be imposed. Section 958.14, Florida Statutes (1985), provides:

> **958.14 Violation of probation or community control program. --** A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s.948.06(1). However, no youthful offender shall be committed to the custody of the department for such violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he was found guilty, whichever is less, with credit for time served while incarcerated. (Emphasis supplied).

In Allen v. State, 526 So.2d 69 (Fla. 1988), this Court stated that once a defendant had been sentenced as a youthful offender that the sentencing court must adhere to the six year cap established by the legislature. Id. at 70.

Three district courts have required that a youthful offender be sentenced upon violation of probation to no more than six years under the provisions of the amended statute. Reams v. State, 528 So.2d 558 (Fla. 1st DCA 1988), Watson v. State, 528 So.2d 101 (Fla. 1st DCA 1988), Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986), Hall v. State, 536 So.2d 268 (Fla. 3d DCA 1988), Buckle v. State, 528 So.2d 1285 (Fla. 2d DCA 1988), Miles v. State, 536 So.2d 262 (Fla. 3d DCA 1988), Dixon v. State, 14 F.L.W. 965 (Fla. 3d DCA 1989).

In Buckle v. State, supra, the defendant was convicted of an offense which occurred in 1984. He was declared a youthful offender in accordance with Chapter 958, Florida Statutes (1985). In 1987, the defendant was found in violation of his youthful offender community control and sentenced to seven years imprisonment. The defendant maintained that the maximum lawful sentence he could receive for violation of youthful offender community control was six years as specified by Section 958.14, Florida Statutes (1987). The appellate court agreed. In so doing, the Second District noted that at the time the offense arose, no provisions specifically placed a cap on the term of incarceration

which could be imposed upon revocation of youthful offender community control. The six year limitation was set forth in 1985. The appellate court however, rejected the state's claim that the amended statute did not apply to the defendant by holding:

> As this court said in Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986), even though the crime and the original sentencing occurred prior to the 1985 amendment to section 958.14, that amendment is applicable to all violations of probation occurring after its effective date because it is the violation of probation which subjects the youthful offender to the provisions of section 958.14.

Id. at 1286.

Similarly, the sequence of events here require application of the six year cap. The instant offenses arose in 1982. Petitioner entered guilty pleas to these offenses on September 1, 1983, and was declared a youthful offender and sentenced to four years imprisonment followed by two years community control (Supp. Record). Petitioner was found in violation of his youthful offender sentence and was sentenced upon revocation of community control in September of 1987. In accordance with Section 958.14, Florida Statutes (1985), whose effective date is July 1, 1985, the maximum penalty he could receive was six years imprisonment, Id. at 1286.

In Watson v. State, the First District articulated an additional rationale for imposing the six year limitation where the violation occurs after the law's enactment, Discussing the effect of this Court's decision in Brooks v. State, 478 So.2d 1052 (Fla. 1985), where the defendant's community control was

revoked and he was sentenced prior to the effective date of Section 958.14, Florida Statutes (1985), and Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984), the First District said:

> Shortly after the decisions in Brooks [v. State, 478 So.2d 1052 (Fla. 1985)] and Clem [v. State, 462 So.2d 1134 (Fla. 4th DCA 1984)] the legislature amended § 958.14 by adding the following sentence:
>
> > However, no youthful offender shall be committed to the custody of the department for such violation for a period longer than six years or for a period longer than the maximum sentence for the offense for which he was found guilty, whichever is less, with credit for time serve while incarcerated.
>
> In view of this action, the only logical conclusion is that the legislature intended to change the case law interpretation of § 958.14, or in any event to change the law, so that once the circuit court has given a defendant youthful offender status and has sentenced him as a youthful offender, it must continue that status and only resentence the defendant as a youthful offender for a violation of the probation or community control portion of his youthful offender sentence. A youthful offender's sentence after revocation of probation or community control is therefore limited to a maximum of six years less credit for time served. To assume that the legislature did not intend a change in the law would be to assume it intended to enacted a nullity. The language of § 958.14, as amended, relating specifically to resentencing of youthful offenders after violation of probation or community control, should prevail over the preexisting general provisions of § 948.06(1) relating to any violation of probation or community control by anyone.

Id. at 102. (Emphasis supplied.)

Essentially, by enacting Section 958.14, Florida Statutes (1985), the legislature made clear its intention that upon revocation of youthful offender community control, the youthful

offender classification continues. State v. Hicks, 14 F.L.W. 1536 (Fla. 3d DCA June 27, 1989), Dixon v. State, supra, contra Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988), reviewed on other grounds, 14 F.L.W. 281 (Fla. June 15, 1989). Youthful offender status continues because youthful offender eligibility is determined in reference to the defendant's age at the time of commission of the crime and not the defendant's age at the time of sentencing. Conner v. State, 422 So.2d 80 (Fla. 2d DCA 1982). Thus, the passage of the statute was not a change in the law but rather a clarification of the youthful offender scheme. See Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985).

Finally, petitioner points out that although this case reached this Court on a certified question of great public importance that has already been answered in Franklin v. State, 14 F.L.W. 281 (Fla. June 15, 1989), that this Court may, if it finds necessary to do so, consider any issue effecting the case. Cantor v. Davis, 489 So.2d 18 (Fla. 1986), Trushin v. State, 425 So.2d 1126 (Fla. 1983). The effect of this statute was not briefed by the parties in Franklin nor is the statute discussed in the Court's decision in Franklin.

The question of applicability of the six year cap established by the legislature has now been considered by each district court of appeal and although the First, Second and Third Districts agree with petitioner's arguments herein, the Fifth and Fourth Districts have refused to give effect to the statutory six

year cap. Because this Court has jurisdiction due to the certified question and because it is necessary for proper guidance of the district courts whose decisions are in such disarray, this Court should determine the issue and decide whether a sentence in excess of the six year cap provided by the legislature may be imposed upon a youthful offender upon violation of community control.

CONCLUSION

Wherefore, based on the above going considerations, petitioner respectfully requests this Court to quash the decision of the district court and to remand, consistent with the decisions from the First, Second and Third Districts with instructions that petitioner's sentence be reduced to no more than six years imprisonment.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

Margaret Good

MARGARET GOOD
Florida Bar No. 192356
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 26th day of July, 1989.

Margaret Good

MARGARET GOOD
Assistant Public Defender