IN THE SUPREME COURT OF FLORIDA

MYREN WAYNE LARSON,

Petitioner,

v. CASE NO. 75,085

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The petitioner, Myren Wayne Larson, relies upon the facts contained in the district court's opinion now sought to be reviewed by this court, and the respondent, State of Florida, does likewise. A copy of the opinion is attached as an appendix to this brief.

JURISDICTIONAL STATEMENT

Article V, section 3(B)(3) of the Florida Constitution states, in pertinent part, the following:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must appear within the four corners of the majority decision," and "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, **485** So.2d **829** (Fla. **1986).** See also Paddock v. Chacko, **14** F.L.W. 593 **(Fla.** December 7, **1989).**

SUMMARY OF ARGUMENT

There is no direct and express conflict between Larson and Diorio, because Diorio was receded from in Goodson. Neither is there any direct and express conflict between Larson and Miller, because Miller adopted the holding in Goodson. There is, however, direct and express conflict between Larson and Coulson on the same question of law.

Having acknowledged conflict, the State respectfully submits that this court, nevertheless, should decline to accept jurisdiction for at least three reasons. First, except in Diorio and Miller, in twelve years, Coulson has never been cited for the proposition at issue here. This hardly illustrates a state of confusion in the law among the several district courts necessitating resolution by this court. Second, in the case at bar, not only did Larson not object to the condition of probation, but he affirmatively agreed to it pursuant to a negotiated plea. Therefore, the district court's analysis of the absence of a contemporaneous objection in substance was unnecessary. Third, since a probation order can be modified at any time, Larson can always move the trial court to eliminate the condition from his probation. He can also challenge the validity of the condition in the context of a revocation proceeding.

ARGUMENT

ISSUE

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN LARSON V. STATE, 14 F.L.W. 2630 (FLA. 1ST DCA NOVEMBER 14, **1989)** EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN DIORIO V. STATE, 359 SO.2D 45 (FLA. 2D DCA 1978) AND WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN COULSON V. STATE, 342 SO.2D 1042 (FLA. 4TH DCA **1977)** AND MILLER **V.** STATE, 407 SO.2D 959 (FLA. 4TH DCA **1981)** ON THE SAME QUESTION OF LAW.

In Larson, pursuant to a negotiated plea agreement, the defendant pled nolo contendere to felony witness tampering. The district court stated, in pertinent part, the following:

> As part of the plea agreement, he agreed not to reside in Leon County during the probationary period and to stay away from both the victim [who was also the witness] and the Florida State campus [where the victim/witness was attending school]. . . .
>
> The trial court thereupon found that the plea was entered freely, intelligently, and voluntarily, and placed appellant on five years' probation, with the conditions that he stay out of Tallahassee, Florida, during the term of his probation . . . .
>
> Appellant next argues that the trial court's probation order, containing the condition that he stay out of Tallahassee for five years, violates his constitutional right to petition the government for redress of grievances. Appellant additionally argues that the condition is not reasonably related to the offense for which he was convicted and restricts what is otherwise lawful behavior without having any appreciable effect on his criminal conduct. We do not address the merits of this cause, because the error of which appellant now complains was not appropriately preserved for appellate review. The defendant may not appeal conditions of

> his probation which he neither objected to nor filed a motion to strike or to correct. [citation omitted]

Id. at 2630-2631.

Larson contends that the above decision is in conflict with a decision from the Second District Court of Appeal and with two decisions from the Fourth District Court of Appeal. The State disagrees in part.

In Diorio v. State, 359 So.2d 45 (Fla. 2d DCA 1978), the first case cited by Larson, the court stated, in pertinent part, the following:

> One of the conditions of probation was that appellant make restitution to the victim of the accident in the amount of $1,000 over and above any and all monies paid by any insurance company. Appellant was given no notice that a restitution condition would be imposed, and no opportunity to be heard with respect to that condition of his probation. When the condition was imposed, appellant made no objection. . . .
>
> We hold that his right of appeal is not contingent upon the registering of objections at the time probation is granted.

Id. at 45-46. Subsequently, Goodson v. State, 400 So.2d 791 (Fla. 2d DCA 1981) was decided, which states, in pertinent part, the following:

> The court, however, added a requirement that Goodson make restitution of $62.50 to his victim. Neither Goodson nor his counsel objected. . . .
>
> In this case, Goodson was not denied an opportunity to be heard. Rather, he chose to silently accept the court's resolution of the questions concerning the amount of restitution and his ability to pay the

> amount. Under these circumstances, the trial court's order of restitution will not be reversed merely because the trial court did not furnish advance notice that restitution may be imposed as a condition of probation.
>
> To the extent that our decision may be inconsistent with statements made in . . . Diorio v. State, 359 So.2d 45 (Fla. 2d DCA 1978) . . . we recede from such statements.
>
> Accordingly, we affirm the order placing the appellant on probation with the special condition that he make restitution.

Id. at 792-793 (emphasis supplied)

In Miller v. State, 407 So.2d 959 (Fla. 4th DCA 1981), the second case cited by Larson, the court stated, in pertinent part, the following:

> One of the conditions of probation was that restitution be made to the various victims of his defalcations, amounting to over $30,000.
> . . .
>
> Ordinarily a defendant is not required to object to conditions of probation in order to preserve them for appellate review. . . .
>
> Regardless of the general rule regarding objections to probation conditions, a condition requiring restitution is treated somewhat differently in that notice and an opportunity to be heard must be given a defendant before restitution can be mandated.
> . . .
>
> We adopt that holding of the Second District [in Goodson cited above] but will apply the rule only prospectively to cases in which the order of probation is entered after the date of this decision.

Id. at 960-961.

In Coulson v. State, 342 So.2d 1042 (Fla. 4th DCA 1977), the third case cited by Larson, the court stated, in pertinent part, the following:

> [T]he trial court also imposed as conditions that Coulson: ". . . 13) OBTAIN and maintain employment" and "14) DRAW no unemployment compensation during period of probation." ...
>
> The state contends that Coulson has not preserved the foregoing point on appeal because he offered no objection to the condition at sentencing, arguing that his silence acted as a waiver of objection. We reject such a position.

Id. at 1042-1043.

The State respectfully submits that there is no direct and express conflict between Larson and Diorio, because the Second District Court of Appeal receded from Diorio in Goodson. If there is any doubt that Goodson was intended to apply only to the imposition of restitution as a condition of probation, subsequent cases from the Second District Court of Appeal have held that a contemporaneous objection is required to challenge conditions of probation on direct appeal. See, e.g., Burns v. State, 513 So.2d 165 (Fla. 2d DCA 1987).

The State further respectfully submits that there is no direct and express conflict between Larson and Miller, because the Miller court adopted the holding in Goodson.

There is direct and express conflict between Larson and Coulson. That being said, the State would point out that Coulson was decided twelve years ago, and since then, except in Miller and Diorio, this case has never been cited for the proposition at issue here. Indeed, in one case, the court held that a defendant should object to the probationary conditions at the trial level and cited to Coulson, but for an entirely unrelated purpose. See

Bentley v. State, 411 So.2d 1361, 1365, fn 4 (Fla 4th DCA 1982) (en banc), rev. denied, 419 So.2d 1195 (Fla. 1982

Having acknowledged the existence of direct and express conflict between Larson and Coulson, the State, nevertheless, respectfully submits that this court should not invoke its discretionary jurisdiction for at least three reasons. First, it can hardly be said that there is substantial confusion in the law among the district courts, where in twelve years Coulson has never been cited for the proposition at issue here, except in the two cases analyzed above. Second, in the case at bar, pursuant to a negotiated plea, Larson agreed to serve his probation outside Leon County. Not only did Larson not object to the condition, but he affirmatively agreed to it. The condition was imposed to keep Larson away from the victim/witness. Under these circumstances, the district court's analysis of the absence of a contemporaneous objection was unnecessary. Third, since a probation order can be modified at any time, Larson can always move the trial court to eliminate the condition from his probation. He can also challenge the validity of the condition in the context of a revocation proceeding.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this court to decline to accept discretionary jurisdiction to review the Larson decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to Lawrence M. Korn, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 15th day of December, 1989.

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Assistant Attorney General