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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

SHIRLEY HORNER,

Petitioner,

vs. Case No. 79,840

STATE OF FLORIDA,

Respondent.

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DISCRETIONARY REVIEW FROM THE
FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT
IN LAKELAND, FLORIDA

# BRIEF OF RESPONDENT ON CERTIFIED CONFLICT

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OTHER AUTHORITIES:

## SUMMARY OF THE ARGUMENT

Jurisdiction for this review is found in Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi); and, Article V, Section 3(b)(4), Florida Constitution (1991). The former and latter read:

> The discretionary jurisdiction of the Supreme Court may be sought to review decisions of the district courts of appeal that are certified to be in direct conflict with decisions of other district courts of appeal.
>
> and
>
> The supreme court may review any decision of a district court of appeal ... that is certified by it to be in direct conflict with a decision of another district court of appeal.

At bar, the Second District has rendered an opinion in Horner v. State, So.2d ___, 17 FLW D1064, 1992 WL 81074 (Fla. 2d DCA Nos. 91-01802, 91-01813, 91-01818, consolidated)(Opinion filed April 24, 1992) where the court below has certified conflict with Lanier v. State, 504 So.2d 501 (Fla. 1st DCA 1987) and Washington v. State, 564 So.2d 563 (Fla. 1st DCA 1990). See, Pet.App. A-1, p. 4. Respondent contends that there is no error to interrupt a split sentence in a 1983 revocation sentencing with a year of probation imposed in a 1988 revocation sentencing where there is no period of complete freedom between incarceration and probation. A Probation & Restitution Center is a community-based facility where Ms. Horner might learn not to pass bad checks.

## :N1 REGARDING ORAL ARGUMENT

Respondent suggests that this case may be submitted for a decision on the briefs. Respondent urges that the facts and legal arguments are adequately set forth in the briefs and in the opinion below where conflict was certified; and, the decisional process would not be significantly aided by oral argument.

## ISSUE ON REVIEW

**WHEN IMPOSING A SENTENCING SCHEME WHICH INVOLVES INCARCERATION AND PROBATION, MAY THE TRIAL COURT IMPOSE A TERM AT A RESTITUTION CENTER WHICH WILL FILL A TIME GAP BETWEEN RELEASE FROM INCARCERATION AND COMMENCEMENT OF PROBATION IN REGARD TO ONE SENTENCE?**

**(As Stated by Respondent)**

In Lanier v. State, 504 So.2d 501 (Fla. 1st DCA 1987), the First District held that when Michael Lanier was given a "split sentence", the non-incarcerative portion of the sentence [probation] must immediately follow the trial prison sanctian. Thus, the trial court erred in imposing a probationary term which did not immediately follow a term of imprisonment. The First District noted that Florida's statutes do not authorize intermittent sentences and that there was a policy interest in having sentences served in a continuous uninterrupted stretch. Three years later in Washington v. State, 564 So.2d 563 (Fla. 1st DCA 1990), the First District reached out for this issue in an Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) review. The Court found that the sentencing scheme devised by the trial court was not authorized by statute. The practical effect of the sentencing pronounced in Claudia Washington's case was to create an unauthorized gap between prison time and probation in regard to one of the sentences. The First District pointed to §948.01(8), Fla. Stat. (1987) which reads: "The period of probation ... shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances." (emphasis supplied)

The First District certified the following as a matter of great public importance to this Court:

> WHEN IMPOSING A SENTENCING SCHEME WHICH INVOLVES INCARCERATION AND PROBATION, MAY THE TRIAL COURT IMPOSE CONSECUTIVE PERIODS OF PROBATION WHEN THE RESULTING PERIOD OF COURT CONTROL WILL CREATE A TIME GAP BETWEEN RELEASE FROM INCARCERATION AND COMMENCEMENT OF PROBATION IN REGARD TO ONE SENTENCE.
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> (Text of 564 So.2d at 564)

Regretfully, the Office of the Attorney General did not appear in the case; and, no Notice to Invoke Jurisdiction was filed and the question was not presented to this Court.

Most recently, the Fifth District has addressed this question in State v. Savage, 589 So.2d 1016 (Fla. 5th DCA 1991). There, James Savage filed a Fla.R.Crim.Pr. 3.850 in the trial court. The trial court granted the motion and the "State" appealed. The motion to vacate sentence was based on communication between the Probation and Parole Services and the trial judge. A probation employee communicated to the trial court that their records indicated that on 02/04/87, John Savage was sentenced in Baker County to 2 1/2 years for the offense of transmitting contraband; and, their records also reflected that the sentence imposed in Brevard County expired on 08/14/87. This was a matter of consequence because John Savage was not on probation at the time of death of Barbara Ann Barber; thus, the agency erred in submitting an affidavit of violation of probation in both the Brevard & Baker County cases. The First District found that the trial court had jurisdiction to hear the postconviction attack because the motion was not directed at the

case pending on appeal in this Court. Then the Court harmonized the discord:

> Generally, imprisonment segments of consecutive sentences cannot be interrupted by probation. Additionally, the probationary portion of a split sentence "must immediately" follow the prison sanction. Turner v. State, 551 So.2d 1247 (Fla. 5th DCA 1989); Lanier v. State, 504 So.2d 501, 503 (Fla. 1st DCA 1987). See also Washington v. State, 564 So.2d 563, 564 (Fla. 1st DCA 1990).
>
> In Porter v. State, 585 So.2d 399 (Fla. 1st DCA 1991), however, the court distinguished between cases involving related sentencing orders such as found in Washington, Turner, and Lanier, and cases that involve unrelated sentencing orders rendered at different times and in different counties where the defendant's intervening criminal activity caused the interruption of his sentence. In Porter, the court recongized the sanctity of a judge's jurisdiction and authority to lawfully dispose of cases before him without the interference of unrelated sentencing orders.
>
> Simple logic would seem to dictate that, where a defendant is incarcerated in another jurisdiction, a probationary period from an unrelated sentence would be tolled since a probationary term should not be allowed to expire simply because a defendant has decided to incus new prison time as a result of a separate and distinct offense. Ware v. State, 474 So.2d 332 (Fla. 1st DCA 1985), review denied, 484 So.2d 10 (Fla. 1986)
>
> (Text of 589 So.2d at 1017-1018)

The case was remanded to the trial court with directions to vacate the order granting postconviction relief; and, the Fla.R.Crim.Pr. 3.850 was to be denied.

Judge Altenbernd, in writing for the Second District [when certifying conflict with Lanier and Washington] also points to Latham v. State, 596 So.2d 140 (West Reserved Citation], 17 FLW

D781, 1992 WL 51243 (Fla. 1st DCA No. 91-2045)(Opinion filed 03/17/91). See, Pet.App. A-1, p. 4, fn 6. Gregory Latham prosecuted a direct appeal attacking his sentencing from a revocation of probation. In the Latham case there were several ambiguities or errors in the sentencing plan. There the trial court revoked Mr. Latham's probation, and imposed a sentence of 3 1/2 years, less credit for time served on a 1989 grand theft conviction with the remainder of the sentence, if any, to be probation. As to the 1990 grand theft charge, Mr. Latham was adjudicated guilty and placed on community control for 2 years, followed by probation for three years. The 1990 conviction was to be served consecutively to the 1989 sentence. One of Mr. Latham's claims was that his probationary period was interrupted by a period of community control. The First District observed:

> ... Further, where a sentencing scheme involves periods of incarceration or community control followed by periods of probation, the statutes do not authorize intermittent periods of incarceration and probation. Rather, the incarcerative portions of the sentences must be served in a continuous period, to be followed immediately by the non-incarcerative portion of the sentence. Washington v. State, 564 So.2d 563 (Fla. 1st DCA 1990); Lanier v. State, 504 So.2d 50 (Fla. 1st DCA 1987); Sanchez v. State, 538 S9.2d 923 (Fla. 5th DCA 1989). See also Porter v. State, 585 S9.2d 399 (Fla. 1st DCA 1991).
>
> ...
>
> As to the sentencing disposition in the 1990 case involving the new grand theft offense, the trial court imposed a two-year period of community control, followed by three years probation. This sanction was to be served consecutively to the 1989 sentence. The state acknowledges that the practical effect of this consecutive sentencing disposition

> would be a period of incarceration, followed by probation, followed by community control, followed by probation, i.e., an interrupted, hence illegal, sentence.
>
> In view of the ambiguity attendant upon the sentencing disposition in the 1989 case, and the impermissible gap between the respective incarcerative periods and probationary periods caused by the 1990 consecutive sentencing disposition, the sentencing orders and probationary orders are reversed, and cause is remanded for new sentencing.
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> (Text of 17 FLW at D782)

Against this background, the Second District has certified conflict of holdings. In Horner v. State, ___ So.2d ___, 17 FLW D1064 [the case an review], Judge Altenbernd set forth the sentencing pronounced for Shirley Gayle Horner this past May 17, 1992, on a revocation of probation in three cases. Ms. Horner has received 3 1/2 years' incarceration and 22 years' probation. Ms. Horner has an established propensity to pass worthless checks. In order to meet her habilitative needs, Ms. Horner is required to spend up to 22 years at the Bradenton Probation and Restitution Center (and if Ms. Horner is successful, she may apply for early termination from the Restitution Center]. The Second District affirmed the period of incarceration and term of probation; but, the condition of probation which required Ms. Horner to spend an extended term at the Restitution Center was stricken. Judge Altenbernd writes:

> The defendant raises three issues concerning this sentencing structure. First, she challenges the year 'of probation in case one because that split sentence was interrupted by the year of probation in case two. She maintains that this creates an unauthorized gap between prison time and probation. Her argument is supported by Lanier v. State, 504

> So.2d 501 (Fla. 1st DCA 1987), and Washington v. State, 564 So.2d 563 (Fla. 1st DCA 1990).
>
> We recognize that section 948.01(8), Florida Statutes (1989), requires a period of probation to "commence immediately upon release of the defendant from incarceration" whenever a "split sentence" is imposed. We interpret this provision to preclude a period of complete freedom between incarceration and probation. Cf. Massey v. State, 389 So.2d 712 (Fla. 2d DCA 1980)(90-day jail sentence could not be served in weekend increments of "intermittent incarceration"). Under the guidelines, a trial judge is frequently obligated to sentence a defendant on several counts or several separate informations at one sentencing hearing. See Clark v. State, 572 So.2d 1387 (Fla. 1991). We see no logical reason why the legislature would authorize these consecutive terms of probation if the incarceration were imposed in only one of the cases, but would prohibit these consecutive terms if the identical incarceration were imposed concurrently in two cases. fn 5 Since there is no gap between the incarceration and the probation imposed at this sentencing hearing, we affirm this aspect of the sentencing method and announce conflict with Lanier and Washington. fn 6
>
> fn 5 Indeed, if the trial court had not imposed a split sentence including a concurrent 3 1/2-year term of incarceration in case one, it could have sentenced the defendant to yet another 5-year term of probation.
>
> fn 6 See also Latham v. State, 17 FLW D781 (Fla. 1st DCA Mar. 17, 1992).
>
> (Text of 17 FLW at D1064 through D1065)

At bar, was the trial court presented with related and/or unrelated sentencing? There were three cases on direct review from the revocation proceeding. Case one focused on a 1983 worthless check in the amount of $167.00 given to a grocery store; Case two focused on a February, 1988 theft of $300.00;

and, Case three focused on seven worthless checks, totalling $3,871.00, written in February of 1988. The three cases are related as to county as all offenses arose in Charlotte County, Florida; but, the three cases are unrelated as to time. The latter has been recognized by Judge Altenbernd. However, in this case, Ms. Horner has not been enlarged to complete freedom. Why? Because Ms. Horner was to report to the probation and restitution center. See generally, §944.026(1)(c), Florida Statutes (1991). The Court below declined to limit the use of the probation and restitution center in a case such as this where the guidelines would authorize a comparable period of incarceration. Thus, the "State" contends that there is no unauthorized gap between prison time and probation. Further, the record shows that the probation was consecutive to the prison sentence. These is no "gap". That Ms. Horner has 48-hours in which to report to the probation department does not mean that there is a "gap" in the probation term. The probation term commences prior to arrival at the Restitution Center.

Also, a trial court is often required to sentence a defendant on several counts or several separate informations at one proceeding. Under the reality of the "guidelines", has not the Court addressed the habilitory needs of Shirley Horner? Judge Altenbernd's reasoning is not flawed: "We see no logical reason why the legislature would authorize these consecutive terms of probation if the incarceration were imposed in only one of the cases, but would prohibit these consecutive terms if the identical incarceration were imposed concurrently in two cases." See, Pet. App. A-1, p. 4.

## CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, Respondent would ask that this Court disapprove and overule Lanier and Washington to the extent that they conflict with Horner and adopt the Horner opinion as its own.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail *to* Julius Aulisio, Ass't Public Defender, Office of the Public Defender, P.O. box 9000--Drawer PD, Bartow, FL 33830 on this 2nd day of June, 1992.

OF COUNSEL FOR RESPONDENT