IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 82,632

CHRISTOPHER GENE SUMMERS, :

Respondent/Cross-Petitioner, :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT AND INITIAL BRIEF OF CROSS- PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On June 1, 1988, the Hillsborough County state attorney charged the Appellant, CHRISTOPHER SUMMERS, with having dealt in stolen property on March 28-29, 1988 (R5). On October 12, 1988, after a guilty plea, he was placed on probation for three years (R15). On October 31, 1988, he was charged with having committed burglary of a conveyance, grand theft, and dealing in stolen property on September 30, 1988 to October 1, 1988 (R58). On November 8, 1988, after a guilty plea, he was sentenced to three years probation for burglary and dealing in stolen property, concurrent to his other probation (R63).

On December 8, 1988, he was charged with violating his probation by leaving a probation and restitution center without permission and by failing a urine test (R19, 67). On December 9, 1988, probation was modified to include one year at the probation and restitution center (R20). On February 9, 1989, he was charged with having violated his probation by not making reports, not paying costs of supervision, not reporting to his probation officer, and committing new offenses of dealing in stolen property and theft (R22, 71). On February 28, 1989, after a guilty plea, probation was revoked and he was sentenced to eighteen months in prison for burglary of a conveyance and five years probation for the remaining two counts of dealing in stolen property (R25, 27, 77).

On May 31, 1990, he was charged with having violated his probation by not making written reports, not paying costs and

restitution, and committing several new offenses (R35-36, 90-91). On June 5, 1990, he was charged with having committed burglary of a structure and dealing in stolen property on May 12-13, 1990 (R116). On June 19, 1990, after a guilty plea, probation was revoked, and he was sentenced to three and a half years prison for burglary of a structure and three years probation for the remaining three counts of dealing in stolen property (R38, 93, 122). On July 2, 1990, he was charged with having committed burglary of a dwelling and grand theft on May 11, 1990 (R141). On July 18, 1990, after a guilty plea, he received two years probation concurrent to his other probation (R149, 152).

On July 17, 1991, he was charged with having violated his probation by committing grand theft on June 23, 1991 (R45, 99, 131, 154). On August 7, 1991, he was charged by information with this offense (R171).

At a revocation hearing on October 16, 1991, Donna Martin testified that Summers and codefendant Scott Tonyan were in Plant City with her and wanted to go out in her boat, but she did not have the money (R196). Tonyan and Summers were lovers (R198). Summers said he could get $100 from someone in Tampa if she would lend him her car so that he could pick it up (R196). She gave her car keys to Summers, who passed them to Tonyan, because Summers did not have a license (R196). She told them to return by 11 p.m. (R196) In her car were three gold chains, a shark pendant, a gold and diamond ring, a $6,500 check to her mother, title to the car, and other possessions (R196, 198). One chain and the ring were in

the center console, and the other items were in the locked glove compartment (R198-99).

Shortly before dawn the next morning, someone drove the car to the front of her house, left the keys in the car, jumped out, and ran away (R197). The chains, pendant, and ring were missing (R197). The chains and pendant were worth well over $300 (R198). The ring was returned (R198). Summers told her later that they gave the items to someone for money and were supposed to get them back later, but the person could not wait and sold them (R198). Summers used the money to buy cocaine. (R199) Although she wanted her money back, she denied telling Tonyan that she would modify her testimony so as to have an appropriate outcome for her (R200-01).

Tonyan testified that they were drinking with Martin and her girlfriend lover. (R203) Martin offered to take them out in her boat if they gave her $100 (R202). Tonyan said they knew people to ask for money, but they did not have a car (R202). She offered them the use of her car (R202). She threw the keys to Summers, who gave the keys to Tonyan, because Summers did not have a license (R203). Summers loaded a lawn mower in the car (R203). Martin leaned into the car and said she had some jewelry in the glove compartment that her girlfriend thought was in the pawnshop (R203). She told them to lock the car if they left it, so no one would steal the jewelry (R203). Tonyan took the jewelry and sold it for money to go to Tampa (R203). They spent the money on alcohol with friends in Tampa (R204). When Tonyan talked to the

police, he was scared of going to jail and blamed Summers by telling them that Summers took two of the gold chains and gave them to somebody (R204). Tonyan pleaded guilty to this offense and received two years probation (R204).

Judge Coe revoked probation, found that Summers was an habitual offender, and sentenced him to forty years in prison for burglary of a dwelling and grand theft, followed by fifteen years probation concurrent for the remaining three counts of dealing in stolen property (R207). Summers pleaded no contest to the new offense, grand theft, reserving a right to appeal the decision in the revocation hearing. (R215) The prosecutor stipulated to dispositiveness (R215). Judge Coe sentenced Summers to two and a half years in prison concurrent to the other prison term (R215).

He appealed his sentences, and the Second District Court reversed and remanded to have the habitual offender sentences stricken in cases 88-7827 and 88-14789. Prior time for probation already served was also ordered on the probation terms. This ruling on the probation term was appealed by the State. The Second District Court of Appeal rejected Mr. Summers' issue on the sufficiency of the evidence.

SUMMARY OF THE ARGUMENT

The question of whether or not a defendant must be given credit for previous time served on probation when he has had his probation violated and re-imposed can be found in the clear statutory language of section 948.06(1), Florida Statutes (1987), which states that upon a violation of probation a trial court can impose any sentence it might have originally imposed prior to placing the defendant on probation. Since "sentence" is not probation, the legislature clearly meant a prison term and did not intend to include probation. Contrary to the State's position, section 948.06(1), Florida Statutes (1987), is not as broad as the State would have this Court believe; section 948.06(1), Florida Statutes (1987), does not allow the trial court to place a defendant on probation at the very beginning each time the defendant violates probation without giving credit for the prior probation time served. Case law is consistent with Respondent's position in that references to imposing any sentence that might have originally been imposed clearly refer to prison sentences--prison sentences for which no credit may be given for the previous time spent on probation.

If the statutory language is not clear or is susceptible of alternative meanings, then rules of statutory construction must be applied: Statutes pertaining to a common theme must be read together and construed to a common sense conclusion. In this case the legislature has set forth statutory maximums for criminal offenses which have been held applicable to probationary terms. A

common sense conclusion is that probation cannot be re-imposed ad infinitum beyond the statutory maximum sentence each time probation is revoked.

In addition to the above issue, Mr. Summers raises other issues: The evidence established only that Summers was present at the crime scene. His codefendant testified that Summers did not sell the jewelry. The evidence did not establish that Summers participated or intended to participate in the crime. Accordingly, probation should not have been revoked, and a judgment should not have been entered for the new substantive offense. Also, parts of sentences for some offenses have repeatedly been placed in the middle of sentences for other offenses. This sentencing pattern violated the rule against intermittent sentences.

ARGUMENT

ISSUE I

MUST A TRIAL COURT, UPON REVOCATION OF PROBATION, CREDIT PREVIOUS TIME SERVED ON PROBATION TOWARD ANY NEWLY-IMPOSED TERM OF PROBATION SO THAT THE TOTAL PROBATIONARY TERM IS SUBJECT TO THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE? (THE CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL)

Contrary to the State's position, Respondent contends the Second District Court of Appeal was correct to answer the above-stated question in the affirmative. Respondent would point out that the Second District Court of Appeal is not alone in this opinion. The First District Court of Appeal has also so held in Blackburn v. State, 468 So. 2d 517 (Fla. 1st DCA 1985); and more recently in Moore v. State, 623 So. 2d 795 (Fla. 1st DCA 1993). The Fourth District Court of Appeal has so held in Schertz v. State, 387 So. 2d 477 (Fla. 4th DCA 1980). Both the Second District Court of Appeal and First District Court of Appeal refer to the Fifth District Court of Appeal case of Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992), in their decisions allowing for credit for prior probationary terms; and on the face of Ogden, it would appear that the Fifth District Court of Appeal has also aligned itself with the Second District Court of Appeal and First District Court of Appeal:

> We held in Kolovrat that the period of probation could not be extended beyond five years, the statutory maximum. Accord Blackburn v. State, 468 So. 2d 517 (Fla. 1st DCA 1985);

> Watts v. State, 328 So. 2d 223 (Fla. 2d DCA 1976). Otherwise, probation and likewise community control could be extended by a court ad infinitum beyond the statutory maximum incarceration each time probation or community control is revoked. We doubt the legislature intended such a result.

Ogden, 605 So. 2d at 158. However, the Fifth District's earlier decision in Ramey v. State, 546 So. 2d 1156 (Fla. 5th DCA 1989), which the Fifth District tried to harmonize with Ogden and Kolovrat v. State, 574 So. 2d 294 (Fla. 5th DCA 1991), on a factual basis, is not a decision that can be harmonized with some of the Second District Court of Appeal's decisions. See Pla v. State, 602 So. 2d 692 (Fla. 2d DCA 1992) (in case 84-9595 the defendant was initially placed on 5-years probation and was sentenced to 3 1/2 years prison followed by 1 1/2 years probation upon a violation; the Second District Court of Appeal found the probation illegally extended beyond the maximum penalty). Although the Fifth District is strongly leaning in its 1992 and 1991 decisions to the Second and First District's viewpoint, the 1989 Ramey case which allowed a true split sentence of 2 1/2 years prison plus 3 1/2 years probation after the defendant had already served 13 months probation on a 5-year offense demonstrates an inconsistency in dealing with prior probationary terms served in lieu of the statutory maximum. The Third District has clearly gone the other way in Quincutti v. State, 540 So. 2d 901 (Fla. 3d DCA 1989).

In coming to its decision that once probation is violated the game starts anew, the Quincutti court cites not only to section 948.06(1), Florida Statutes (1987), but also to Poore v.

State, 531 So. 2d 161 at 164 (Fla. 1988). When this Court refers to the trial court's right to impose any sentence upon a violation of probation it could have originally imposed, it is obvious that this Court refers to "sentence" as a prison term:

> If the defendant violates his probation in alternative (3), (4) and (5), section 948.06-(1) and Pearce permit the sentencing judge to impose any sentence he or she originally might have imposed, with credit for time served and subject to the guidelines recommendation.

Poore, 531 So. 2d at 164. (Emphasis added.)

> We stress, however, that the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation. We reject any suggestion that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. To the contrary,the guidelines manifestly are intended to apply to any incarceration imposed after their effective date, whether characterized as a resentencing or revocation of probation.

Id. at 165. (Emphasis added.) The same can be said for this Court's reference to "sentence" in State v. Holmes, 360 So. 2d 380 at 383 (Fla. 1978). In allowing a trial court to impose any "sentence" which might have been originally imposed upon a violation of probation minus jail time previously served but without credit for probation time, obviously this Court was thinking of a "sentence" as a period of incarceration. See also Franklin v. State, 545 So. 2d 851 (Fla. 1989). Since case law has clearly defined "sentence" as a period of incarceration as opposed to probation and probation has been held not to be a sentence (a concept the State agrees with at page 8 of its brief) in Villery v.

Florida Parole and Probation Com'n., 396 So. 2d 1107 (Fla. 1981), a clear reading of § 948.06(1), Fla. Stat. (1987), which allows for the imposition of any sentence a trial court might have originally imposed upon a violation of probation is a reference to a prison sentence - not a reimposition of probation. As Villery points out, this is consistent with the Florida Rules of Criminal Procedure and Florida Statutes which prohibit the pronouncement and imposition of a sentence upon a defendant placed on probation. Probation is a sentencing alternative, but it is not a sentence. Thus, when the statute is referring to any sentence that might have been originally imposed, it is clearly not referring to probation. The State's interpretation of reimposing a probationary term to the statutory maximum without credit for any prior time spent on probation as a "sentence" that could have been originally imposed is in direct contradiction to its claim that probation is not a sentence. If a trial court is going to reject "sentencing" a defendant who has violated probation and is going to continue to allow a defendant a 'state of grace' by re-imposing probation, it has to do so with the statutory maximums in mind and give the defendant credit for prior time served on probation; for statutory maximums do apply to probationary periods. Conrey v. State, 624 So. 2d 793 (Fla. 5th DCA 1993); Blackburn; Watts v. State, 328 So. 2d 223 (Fla. 2d DCA 1976). See also State v. Holmes, 360 So. 2d 380 (Fla. 1978).

If this Court believes the statute of § 948.06(1), Fla. Stat. (1987), is not clear on its face, then this Court must resort to rules of statutory construction in interpreting what this statute

means. The first rule applicable is that the legislative intent is the pole star; "this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled cannons of construction." State v. Sullivan, 95 Fla. 191 at 207, 116 So. 255 at 261 (1928). As further explained in Wakulla County v. Davis, 395 So. 2d 540 at 542 (Fla. 1981):

> In determining our pole star, legislative intent, we are not to analyze the statute in question by itself, as if in a vacuum; we must also account for other variables. Thus, it is an accepted maxim of statutory construction that a law should be construed together and in harmony with any other statute relating to the same purpose, even though the statutes were not enacted at the same time. Garner v. Ward, 251 So. 2d 252 (Fla. 1971).

This concept of regarding closely allied statutory subjects in pari materia was more recently reiterated in Scates v. State, 603 So. 2d 504 at 506 (Fla. 1992).

The next rule in interpreting ambiguous statutes is the law favors a rational, sensible construction; and courts are to avoid an interpretation which would produce unreasonable consequences. Wakulla County v. Davis, 395 So. 2d 540 at 543 (Fla. 1981); State v. Webb, 398 So. 2d 820 at 824 (Fla. 1981); Catron v. Roger Bohn, D.C., P.A., 580 So. 2d 814 at 818 (Fla. 2d DCA 1991).

Last but not least, "where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused." Scates, 603 So. 2d at 505.

Putting all of these rules together in this situation, the following can be concluded: Inasmuch as the legislature has set forth statutory maximums for criminal cases which have been held

applicable to probationary terms, a common sense conclusion is that probation cannot be re-imposed ad infinitum beyond the statutory maximum each time probation is revoked. To allow a trial court to extend probation ad infinitum would be an unreasonable, unsensible result. It would also be an interpretation least favorable to the accused. A defendant should be allowed all credit for previous time served on probation for as long as probation is re-instated. If credit is not allowed, then the legislature's intent of statutory maximums is being circumvented. See Tripp v. State, 622 So. 2d 941 (Fla. 1993) (guidelines could be easily circumvented if trial court could impose guidelines on one count and probation on another and then not give credit for time served on the probation count when probation is later violated).

The Hon. Judge Schoonover, in the dissenting portion of the Summers decision, clearly believes that reimposing probation ad infinitum beyond the statutory maximum is not an absurd result and points to three other states that have allowed the concept. The first thing that must be noted about other jurisdictions on this issue is that the issue is purely a matter of statutory construction based on the wording of each jurisdiction's statute. For example, the California case mentioned by Judge Schoonover of In re Hamm, 133 Cal. App. 3d 60, 183 Cal. Rptr. 626 (Cal. Ct. App. 1982), dealt with specific statutory language that clearly allowed the re-imposition of "probation" as if starting from the very beginning after a violation:

> "If an order setting aside the judgment, the revocation of probation, or both is made after

> the expiration of the probationary period, the court may again place the person on probation for such period and with such terms and conditions as it could have done immediately following conviction."

In re Hamm, 183 Ca. Rptr. at 627, citing Penal Code § 1203.2(e) (emphasis added.) The Court, however, did not just look at the statutory language in a vacuum; it examined other statutes in the area. In particular, the Court looked at how a different interpretation would affect misdemeanants as opposed to felons. A different interpretation other than allowing the re-imposing of probation beyond the statutory maximum would, under California law, result in felons being treated differently than misdemeanants to the misdemeanants' detriment. Such statutory problems are not present in Florida.

And if some jurisdictions do allow probation to be imposed ad infinitum under their particular statutory scheme, other jurisdictions do not. The federal system, which has a 5-year cap on probation, has apparently been strictly interpreting that cap. See United States v. Undaneta, 771 F. Supp. 28 (E.D. N.Y. 1991), and cases cited therein.

Other concerns were raised by Judge Schoonover and echoed by the State. Restitution was a major concern. Apparently, both the State and Judge Schoonover would like probationary terms extended ad infinitum in order to allow restitution to be paid back. The gist of this argument is that the defendant may be a good probationer but unable to make full restitution within the statutory limits. This Court has already given us the answer. If a

defendant cannot make full restitution due to an inability to pay, then his probation cannot be revoked and extended in the absence of a wilful violation. Hewett v. State, 613 So. 2d 1305 (Fla. 1993). See also Kolovrat v. State, 574 So. 2d 294 at 296 (Fla. 5th DCA 1991); Laing v. State, 622 So. 2d 560 (Fla. 3d DCA 1993). If, on the other hand, a defendant is 'wilfully' not making restitution payments, then he knows he faces revocation and imprisonment. That is the recourse society has against a defendant who has received the benefit of the court's mercy by being placed on probation but subsequently violates that trust. Either the probationer is making an effort to rehabilitate himself or he is not. The concept of the poor unfortunate probationer who must go to prison through no fault of his own does not exist. For society's victims who are not able to receive full restitution during the limited period of statutory maximum sentences from probationers who lack the ability to pay, there are alternatives. As this Court pointed out in Hewett, a judgment can be entered against the defendant with the hope that someday the defendant's circumstances will change.

The concern that a defendant needs to be continuously reinstated on probation and that probation must have no limits so as to obtain a goal of rehabilitation while not rewarding the errant probationer is rather an inconsistent argument for the State to make. If a probationer is continuously violating his probation, rehabilitation is not occurring. More probation ad infinitum would appear to be defeating the goal of probation which is rehabilitation. The fact that both the defendant and the Court knows the

ultimate consequence of failing to successfully live on probation is prison, this knowledge gives the incentive needed for the probationer to avoid violating his probation and a recourse for society if rehabilitation fails. After a certain point, continuing on with probation makes no sense. That point is the statutory maximum.

As for the State's desire to keep as many people out of the prison system as possible due to a lack of space, that is a problem that affects the State as a whole and will continue to do so because of many factors such as money, habitual offender sentences, and minimum mandatories. That problem cannot, however, be used as the polestar to determine statutory language as to the maximum length of probation terms. Probation is a creature of legislation, not of public policy. Legislatively, statutory maximums apply to probation, and extending probationary terms beyond that statutory maximum ad infinitum is not within legislative intent.

Finally, the anomaly addressed by the majority in Summers in footnote 6, wherein a defendant who does not violate his probation until near the end of his probationary period and is then subject to the statutory maximum prison sentence could result in almost double the statutory maximum having been served on probation and in prison, is a problem that does exist. At least a defendant on probation understands that prison is the alternative should he fall from grace, and there is a limit to the probationary term. What defendant's do not understand is how they can be placed on 10-15-20

years up to life on probation for a third-degree felony. Such a concept makes no sense. The decision in Summers should be upheld.

ISSUE II

THE EVIDENCE DID NOT ESTABLISH MORE THAN PRESENCE AT THE CRIME SCENE. (AS RAISED BY CROSS-PETITIONER.)[1]

The same evidence was used to revoke probation and to support the finding of guilt for the new substantive offense. This evidence was insufficient to support both the revocation and the finding of guilt. The latter aspect of this issue was preserved when the defense reserved a right to appeal what was in effect the denial of a motion to dismiss for insufficient evidence. The prosecutor stipulated to dispositiveness. (R215)

The State's evidence showed only that Summers was driving the car when they left and that, when the car was returned by an unknown person, the jewelry and other items were missing. Summers told Martin that "they" sold the jewelry, but this did not necessarily mean that Summers was one of "them." Tonyan admitted that he sold the items, and he might have sold them with someone other than Summers. Moreover, Summers's use of the money to buy cocaine did not establish an intent to participate in the proceeds of the sale at the time Tonyan sold it. Finally, Tonyan's admission on cross-examination that he had put the blame on Summers when he talked to the police was impeachment by prior inconsistent state-

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[1] Respondent/Cross-Petitioner is raising two issues decided against him by the Second District Court of Appeal. Once this Court takes jurisdiction over a case, all issues - not just those presented to obtain jurisdiction - may be decided - Bakers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985); and Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977).

ment and therefore was not substantive evidence that could be considered. Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988).

This case is like Howard v. State, 552 So. 2d 316 (Fla. 2d DCA 1989), in which this Court found the evidence insufficient to support revocation of probation. In Howard as in the present case, the defendant was present at the scene of the crime. He was found in the car with the stolen items. These circumstances were suspicious but they did not prove that the defendant participated in the crime itself. Moreover, as in the present case, the actual perpetrator of the crime admitted being the guilty person. While a trier of fact is free to disbelieve the testimony of this witness, it may not "somehow resurface as proof of guilt." Mere presence at the scene is not enough to convict, absent proof that the defendant did something with the intent to help the crime occur.

The trial court erred by revoking probation and entering a judgment for the new substantive charge. This Court should vacate the judgment and the order revoking probation and remand for reinstatement of the probation.

ISSUE III

SUMMERS HAS BEEN SENTENCED INTERMITTENTLY. (AS STATED BY CROSS-PETITIONER.)

In case number 88-7827, Summers was placed on probation for three years, then taken off probation while he served an unrelated prison sentence in another case, before starting another five years probation in case number 88-7827, then taken off probation while he served an unrelated prison sentence in another case, before starting another three years of probation in case number 88-7827, then taken off probation while he served an unrelated forty-year prison sentence in another case, before he starts another fifteen-year term of probation in case number 88-7827. Similar events occurred in case numbers 88-14789 and 90-7880. For the grand theft in case number 90-10338, he was initially placed on probation for two years before later being taken off probation for thirty years while he serves another prison sentence, before he starts a ten year prison sentence for the grand theft.

Thus, Summers's sentences for particular crimes have repeatedly started, stopped, and started again. He has illegally been forced to pay his debt to society for these offenses intermittently. Beckner v. State, 604 So. 2d 842 (Fla. 2d DCA 1992); Calhoun v. State, 522 So. 2d 509 (Fla. 1st DCA 1988). This result was contrary to the "well settled rule against . . . serving parts of sentences sandwiched between chunks of other sentences." Drew v. State, 478 So. 2d 69, 70 (Fla. 5th DCA 1985). A defendant is "entitled to serve his debt to society in one stretch and not in

bits and pieces." Segal v. Wainwright, 304 So. 2d 446, 448 (Fla. 1974). Remand is therefore necessary for resentencing.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Respondent asks this Honorable Court to uphold the opinion of the Second District Court of Appeal as to Issue I and reverse as to Issues II and III.

APPENDIX

Christopher Summers v. State of Florida,
Case No. 91-3686, Opinion filed October 1, 1993.

Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, Hollywood, for Appellee.

EN BANC

(DANAHY, Judge.) In this appeal, Christopher Gene Summers raises one issue concerning his conviction for grand theft and five issues concerning his sentencing upon revocation of probation. We find no merit in his contention that there was insufficient evidence to convict him of grand theft and therefore affirm this conviction and sentence (Circuit Court Case No. 91-8844). Of the five sentencing errors raised, three have no merit.[1] We agree with Summers' contentions concerning the remaining two issues. Accordingly, we reverse and remand for resentencing. In reversing we have elected, on our motion, to decide this appeal en banc to resolve an intradistrict conflict between *Servis v. State*, 588 So. 2d 290 (Fla. 2d DCA 1991), and *Smith v. State*, 463 So. 2d 494 (Fla. 2d DCA 1985).[2] In resolving this conflict we certify the question presented to the supreme court as one involving great public importance.

HABITUAL OFFENDER ENHANCEMENT

In Circuit Court Case Nos. 88-7827 and 88-14789, the trial court improperly enhanced the sentences pursuant to the Habitual Offender Statute, section 775.084, Florida Statutes (1989). The record reflects that the appellant did not have the requisite number of predicate offenses to qualify for such enhancement and, additionally, at the time of the original sentencing was not properly notified of the state's intent to seek habitualization. Upon remand the habitual offender classification of the sentences in these two cases should be stricken. Furthermore, upon resentencing, enhancement of the sentences pursuant to section 775.084 is precluded. This is so because the court will be sentencing Summers upon a violation of probation and such enhancement was not a sentencing option available to the court at the time of the original sentencing. *Snead v. State*, 616 So. 2d 964 (Fla. 1993).

CONFLICT ISSUE

We turn now to the resolution of our intradistrict conflict. The record shows that the trial court had originally placed Summers on probation in Circuit Court Case Nos. 88-7827, 88-14789, and 90-7880, which he subsequently violated several times. After each violation and revocation of probation, new probationary terms were imposed so that at the time Summers committed the most recent violations, he was serving concurrent terms of probation in these cases. After the latest revocation of these probations the trial court again imposed three concurrent probationary terms of fifteen years each, the statutory maximum. Summers argues such sentencing is error since these additional fifteen-year probationary terms exceed the statutory maximum when added to the time he has previously served on probation. Since it is undisputed that a trial court upon a revocation of probation may *impose* any sentence the court might have originally imposed, *Poore v. State*, 531 So. 2d 161 (Fla. 1988), and *Franklin v. State*, 545 So. 2d 851 (Fla. 1989), the trial court made no error in reimposing probation. However, the question which then arises is whether, once the trial court decides to impose more probation, the court must allow credit for the period of time actually served on probation before revocation thus reducing the subsequent probationary term imposed for that same crime.

In *Servis*, the defendant was initially placed on five years probation for second-degree grand theft, a third-degree felony with a five-year statutory maximum. The defendant subsequently violated the terms of his probation. The trial court then revoked and extended his probation for an additional three years. In *Servis* we affirmed the order of revocation but reversed the three-year term imposed and directed the trial court to reinstate the original order of probation. We did so because the court "could not legally extend probation beyond" the five-year statutory maximum. The effect of our decision in *Servis* was to give the defendant credit for the time he had already served on probation.

In *Smith*, on the other hand, we held that when a defendant's probation is revoked and further probation is imposed, he is not entitled to credit for the time he has already served on probation for that offense. The defendant in *Smith* was originally sentenced to two years incarceration followed by three years probation. The offense carried a five-year statutory maximum. While serving the probationary portion of his sentence, the defendant violated its terms. The trial court revoked his probation and ordered him to serve another five-year term of probation. In *Smith* we rejected the defendant's argument that the trial court erred in imposing the additional five years of probation. Instead we determined that the trial court "was not required to deduct the time already served on probation." 463 So. 2d at 495. *Smith* drew a distinction between modification and revocation of probation, indicating that if the court had merely modified the probation, instead of revoking it, adding on the statutory maximum of five years probation would have been error. But since the trial court in *Smith* had revoked the probation, credit would not be due because the court would be entitled to "impose any sentence it could have originally entered less any jail time previously served." *Id.* The consequence of the *Smith* decision is to disregard the statutory maximum for punishment in cases where probation is imposed, revoked, and imposed again. For support, *Smith* cited the supreme court's opinion in *State v. Holmes*, 360 So. 2d 380, 383 (Fla. 1978), which stated that if probation is revoked, "no credit shall be given for time spent on probation."

After reconsidering *Holmes* and in light of *Snead v. State*, 616 So. 2d 964 (Fla. 1993), as we will discuss *infra*, we conclude that we must partially recede from *Smith*.

A close reading of *Holmes* does not support the broad conclusion that credit for probation already served should not be applied to new probationary terms imposed after revocation. *Holmes* dealt with an original sentencing where a probationary split sentence was initially imposed, not with a new probationary term imposed after revocation of probation. In the circumstance actually facing it our supreme court held that the combined terms of incarceration and probation may not exceed the statutory maximum. 360 So. 2d at 383. The supreme court then went on to advise that in a future case where probation is subsequently revoked, a trial court could impose any sentence it might have originally imposed minus jail time previously served as part of the same sentence and that no credit may be given for the time spent on probation. We understand this to mean only that the time already spent on probation may not be credited toward the new sentence, i.e., the term of incarceration imposed. This construction of the supreme court's statements concerning what should happen in a future proceeding respects the distinction between probation and a "sentence."[3]

In *Snead*, the supreme court recently faced a case where, upon revocation of probation, the newly-imposed sanction exceeded that which was legally available at the original sentencing. It held that the newly-imposed sanction was unlawful. It based its reasoning on section 948.06(1), Florida Statutes (1989), also the controlling statute in the instant case, which mandates that " 'if probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.' " 616 So. 2d at 965. Since the state had not properly notified Mr. Snead of an intent to habitualize him before his plea hearing, it was, upon revocation of probation, "not an option the trial court could have considered based on the facts of th[e] particular case." *Id.*

Combining the teachings of *Holmes* and *Snead* we are left with the following analysis in the instant case. At the original sentencing hearing, the court had five sentencing options, *see Poore* and

Franklin, one of which was the option of imposing a straight probationary term limited by the ceiling of the statutory maximum. *See also*, *Watts v. State*, 328 So. 2d 223 (Fla. 2d DCA 1976). If at the original sentencing the court had opted to impose a probationary split sentence and upon revocation of probation the court decided to impose further incarceration, it must credit previous jail time. *Holmes*. It follows then that if the trial court decides to place the defendant on further probation, it must also credit previous probationary time, least of all for consistency's sake. We believe this advances the objective of uniformity and consistency in Florida's sentencing scheme to which the law and the courts aspire. *See, e.g.*, *Branam v. State*, 554 So. 2d 512 (Fla. 1990). Our analysis and conclusion also comport with the policy expressed in *Snead*: "We believe that this result provides the trial court with the flexibility necessary to punish offenders who violate the terms of their probation, while still providing defendants who enter a plea agreement with the requisite notice of the most severe punishment that can be imposed." 616 So. 2d at 966. Our holding today will provide the same requisite notice of the most severe punishment that can be imposed—the statutory maximum.[4]

In the same context of reimposing probation post-revocation the Fifth District in *Ogden v. State*, 605 So. 2d 155, 158 (Fla. 5th DCA 1992), pointed out:

> Otherwise [than being limited to the statutory maximum], probation and likewise community control could be extended by a court *ad infinitum* beyond the statutory maximum incarceration each time probation or community control is revoked. We doubt the legislature intended such a result.

We agree with our sister court that the legislature did not intend such "*ad infinitum*" extensions which might result in a lifetime spent on probation where, if incarceration were imposed, it would have been limited by the statutory maximum to a number of years certain. It is clearly established that combined periods of incarceration plus probation are limited by the statutory maximum. *Glass v. State*, 574 So. 2d 1099 (Fla. 1991); *Holmes*. As we have discussed above, since an initial probationary term itself is limited to the statutory maximum further probation imposed after revocation should be similarly limited.[5] Our reasoning in *Watts v. State*, 328 So. 2d 223 (Fla. 2d DCA 1976), in the context of an original imposition of probation, is equally applicable here:

> There is validity to not allowing probation to extend beyond the period of maximum sentences. First, a penal statute must be strictly construed in favor of those against whom it would operate; and second, to infer that a court could extend, probation beyond such a maximum permitted punishment would lead to unacceptable results. . . . [T]he absence of any limit raises the possibility that a judge could direct many years of probation even for a misdemeanor, a concept which has the potential to inject further disparities into the corrective process.

In summary, we affirm in part and reverse in part and remand for resentencing in accordance with this opinion. On remand the trial court will allow Summers credit for time previously served on probation toward the most recently imposed probationary term for the same offense.[6]

We certify to the supreme court the following as a question of great public importance:

> MUST A TRIAL COURT, UPON REVOCATION OF PROBATION, CREDIT PREVIOUS TIME SERVED ON PROBATION TOWARD ANY NEWLY-IMPOSED TERM OF PROBATION SO THAT THE TOTAL PROBATIONARY TERM IS SUBJECT TO THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE?

(ALTENBERND, CAMPBELL, HALL, PARKER and BLUE, JJ., Concur. SCHOONOVER, J., Concurs in part and dissents in part with an opinion, in which FRANK, C.J., and THREADGILL, PATTERSON and ALTENBERND, JJ., Concur.)

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[1]These issues deal with the propriety of habitualizing the appellant and then imposing probationary terms, allegations of intermittent sentencing, and allegations of increasing habitual offender sentences previously imposed.

[2]We have also consistently followed *Servis*, and thus conflict with *Smith*, in *Carter v. State*, 606 So. 2d 680 (Fla. 2d DCA 1992), *Davis v. State*, 604 So. 2d 844 (Fla. 2d DCA 1992), *Pla v. State*, 602 So. 2d 692 (Fla. 2d DCA 1992), *Medina v. State*, 604 So. 2d 30 (Fla. 2d DCA 1992), and *Teasley v. State*, 610 So. 2d 26 (Fla. 2d DCA 1992), *review denied* __ So. 2d __ (Fla. 1993).

[3]The Committee Note to Florida Rule of Criminal Procedure 3.790 states that "[a] probationary period is not a sentence." Although the Committee Note to Rule 3.790 has never been adopted as part of this rule, *In re Florida Rules of Criminal Procedure*, 196 So. 2d 124 (Fla. 1967); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972); *In re Amendments to Florida Rules of Criminal Procedure*, 536 So. 2d 992 (Fla. 1988), this advice is sound since the supreme court has maintained the distinction. *See Villery v. Florida Parole & Probation Commission*, 396 So. 2d 1107 (Fla. 1980), and its progeny. As the Committee Note properly comments:

> A probationary period is not a sentence, and any procedure that tends to mix them is undesirable, even if this mixture is accomplished by nothing more than the terminology used by the trial court in its desire to place a person on probation. See sections 948.04 and 948.06(1), Florida Statutes, in which clear distinctions are drawn between the period of a sentence and the period of probation.

Since a sentence, i.e., incarceration, is the most severe sanction for unlawful conduct and is limited to the statutory maximum, the better policy is to find the probation sanction similarly limited.

We are concerned that the effect of maintaining this distinction may have unanticipated consequences. *See infra*, note 6.

[4]Our holding also comports with the spirit of *Tripp v. State*, 18 Fla. L. Weekly S166 (Fla. Mar. 25, 1993), which held that credit for jail time served on one offense must be applied to reduce jail time imposed on a separate offense where the new jail time for the second offense is imposed upon revocation of probation for that second offense. *Tripp*'s result was mandated in order to eliminate unwarranted variation in sentencing under the guidelines. 18 Fla. L. Weekly at S167. The goal of eliminating unwarranted variation in sentencing is also furthered by respecting the limit of the statutory maximum imposed for each offense.

[5]There is no dispute that if a trial court, upon a finding that a violation of probation has occurred, decides to modify or extend the probation instead of revoking it, the statutory maximum must be observed. *Schertz v. State*, 387 So. 2d 477 (Fla. 4th DCA 1980). It could be argued, then, that if there is instead the additional factor of a formal revocation (which requires an adjudication of guilt if not previously done) beyond a mere modification or extension, the revocation case is factually distinguished from the modification or extension case and need not comply with the requirement to observe the statutory maximum when reimposing a term of probation.

We find no reason for such a distinction, however, because it elevates form over substance. Regardless whether a term of probation is subsequently revoked, modified, or extended, there is a finding that a violation of probation has occurred. Since a probationary term originally imposed is limited by the statutory maximum, the better and more consistent policy is that any reimposition of probation, be it imposed upon extension, modification, or revocation, will also respect that statutory limit. As a practical matter, repeated violations of probation will most often result in incarceration. Therefore, limiting total probation served to the statutory maximum will not unduly restrict a trial court's sentencing discretion or alternatives.

[6]We continue to adhere to our views expressed in *Watts*, at 223, that "[t]here is validity to not allowing probation to extend beyond the period of maximum sentences." But in applying the rationale expressed in *Watts*, we are mindful that in our attempt to harmonize the cases and strictly construe Florida's sentencing laws a legal anomaly could result. Given our holding in the instant case, that probation time, like jail time, is limited to the statutory maximum, theoretically a defendant could serve almost double the statutory maximum time under legal constraint. To illustrate, if he is placed on probation for the statutory maximum time but violates it late in the term, upon revocation he can still be incarcerated for the statutory maximum time as well. Given such facts, this result is unavoidable if statutory maximums are to be given any respect at all. It appears to us that any anomaly created by such a result in the probationary split sentencing scheme is best left for the legislature.

(SCHOONOVER, Judge, Concurring in part and Dissenting in part.) I agree that the appellant must be resentenced in two of the cases pending against him and that upon resentencing his sentences cannot be enhanced pursuant to section 775.084. *See Snead v. State*, 616 So. 2d 964 (Fla. 1993).

I also agree that we should resolve any intradistrict conflict that exists. Because I take the position that there is a valid distinction between the words "revoke," "modify," or "extend," I do not agree that there is a conflict between *Servis v. State*, 588 So. 2d 290 (Fla. 2d DCA 1991), and *Smith v. State*, 463 So. 2d 494

(Fla. 2d DCA 1985). These two cases can be reconciled. I agree, however, that there is a conflict between *Smith* and those cases of our court which follow *Servis* without even discussing *Smith*. *See, e.g., Duchesne v. State*, 616 So. 2d 172 (Fla. 2d DCA 1993); *Carter v. State*, 606 So. 2d 680 (Fla. 2d DCA 1992); *Davis v. State*, 604 So. 2d 844 (Fla. 2d DCA 1992); *Pla v. State*, 602 So. 2d 692 (Fla. 2d DCA 1992).

In view of the position taken by the majority, I would also attempt to resolve interdistrict conflict as well as intradistrict conflict by certifying to the supreme court that our decision is in conflict with *Ramey v. State*, 546 So. 2d 1156 (Fla. 5th DCA 1989), and *Quincutti v. State*, 540 So. 2d 900 (Fla. 3d DCA 1989).

Although I agree that conflict exists, and that it should be resolved, I would resolve it by approving *Smith*. I, therefore, respectfully dissent from that portion of the opinion which recedes in part from *Smith*.

Until 1974 when a defendant was placed upon probation, the term for which he was placed upon probation could not extend for more than two years beyond the maximum sentence. This provision was eliminated in 1974 and it is now clear that when a defendant is initially placed upon probation the term of that probation cannot exceed the length of the maximum sentence provided by law. *Swift v. State*, 362 So. 2d 723 (Fla. 2d DCA 1978); *Watts v. State*, 328 So. 2d 223 (Fla. 2d DCA 1976).

The question in the instant case does not, however, deal with the term of probation that can initially be imposed. We are concerned with the court's sentencing alternatives when a probationer violates the terms of his probation and the court determines that it should be revoked.

The majority agrees that upon revocation of probation a trial court may impose any sentence it could originally impose and, therefore, that the court in this case did not err in reimposing probation. The majority, however, then construes *Holmes* and *Snead* and concludes that those cases require a holding that "if the trial court decides to place a defendant on further probation, it must also credit previous probationary time, least of all for consistency's sake." I disagree.

First, I am not sure how the majority holding will lead to consistency. Under the majority view, if a probationer fails to make a restitution payment at the beginning of his probation, the court, if it finds the violation willful, may choose to revoke his probation and then impose it again. The court could also revoke a defendant's probation and sentence him pursuant to the guidelines which would include a one cell bump up. On the other hand, if he improperly failed to make restitution payments during the latter part of his probation, the court would not be able to impose a meaningful probation and would have to sentence him to a term of imprisonment. One of the purposes of probation is to assist victims in receiving restitution and that purpose would fail.

Although it involved an improper extension of probation rather than an imposition of a new term of probation, *Servis*, illustrates this problem. In *Servis*, the defendant was originally placed upon probation for the maximum time allowed. Although the appellate record in this court is no longer complete, it appears that he made all cost of supervision payments required of him, and except for restitution payments, met all of the terms and conditions of his probation. When his probation was about to expire and he still owed most of his agreed upon restitution, a warrant was issued and he was found in violation of his probation. The court, instead of sentencing the appellant to three years in prison as allowed by the guidelines, extended his probation for three years or until he had made full restitution. On appeal, this court, following the principle accepted by the majority, reversed. Upon remand, if the guidelines were followed, a person who had been a good probationer for five years, and who wanted to pay restitution, could be sentenced to up to three years in prison because he had used up his right to more probation. If the court desired to just place him back on probation, the court would find that the probation had expired and the victim, therefore, would not receive restitution. Either result is inconsistent with the purpose of rehabilitation and certainly does not assist in obtaining restitution for victims.

The majority states that the legislature did not intend ad infinitum extensions which might result in a lifetime spent on probation. A lifetime on probation will not occur if a probationer follows the terms of his probation. Also, "it cannot be said that the legislature intended to leave society without any recourse against those defendants who receive the benefit of the court's mercy by being placed on probation and, subsequently, violate the terms thereof." *Mulder v. State*, 356 So. 2d 870 (Fla. 4th DCA 1978).

Next, we must remember that a probationary term is not a sentence. *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107 (Fla. 1980). A person may only be placed on probation if it is within the guidelines and if it appears to the court upon a hearing of the matter that a defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. § 948.01(3), Fla. Stat. (1989). Probation is a matter of grace. *Bouie v. State*, 360 So. 2d 1142 (Fla. 2d DCA 1978). It provides a period of grace to aid in the rehabilitation of a penitent offender. *Burns v. United States*, 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266 (1932). If a probationer violates the terms of probation and it still appears to the court that the requirements of probation are met, there is no reason another period of grace should not be allowed.

When events that bring about a revocation occur, a new chapter is opened and the court ought to be able to mete out any punishment within the limits prescribed for the crime. *Johnson v. State*, 378 So. 2d 335 (Fla. 2d DCA 1980), *cert. denied*, 402 So. 2d 9 (Fla. 1981). Section 948.06(1), Florida Statutes (1989), provides that if probation is revoked, the court may impose any sentence which it might have originally imposed before placing the probationer on probation. The majority agrees that under this provision a court may impose another term of probation. If probation is not a sentence and may be imposed even though it has been violated once, the duration of this "grace" period should not be restricted by requiring a court to subtract prior periods of "grace" from the maximum period authorized by law.

Finally, a review of our decision in *Smith* and the authority relied upon therein indicates it was correctly decided and should be followed in this case. *See also Ramey*; *Quincutti*. *But see Kolovrat v. State*, 574 So. 2d 294 (Fla. 5th DCA 1991).

In addition to the opinions mentioned above, several other states have considered a statute similar to section 948.06(1). In the case of *State v. Viloria*, 70 Haw. 58, 759 P. 2d 1376 (Haw. 1988), the Supreme Court of Hawaii said that if a statute is clear and unambiguous on its face, and does not lead to an absurd result, the statute must be given its plain and obvious interpretation. The court held that given the legislative policy favoring the withholding of imprisonment when it is inappropriate, and the clear language of the statute, a court had the discretion to revoke probation and reimpose another term of probation even if it resulted in a total length of probation greater than the statutory maximum. *See also Kahlsdorf v. Wyoming*, 823 P. 2d 1184 (Wyo. 1991); *In re Hamm*, 133 Cal. App. 3d 60, 183 Cal. Rptr. 626 (Cal. Ct. App. 1982).

I would, based upon the above discussion and authorities, adopt the *Smith* decision and recede from any cases in conflict with it.

Since the majority does not agree and this matter is being remanded for the determination of credit for time served on probation, I would instruct the court in that regard. The record indicates that a portion of the time the appellant spent on probation for the cases under consideration was also spent serving a jail sentence. The appellant should not be given credit for this time on both his jail sentence and on the term of his probation. Additionally, the appellant absconded from supervision shortly after

he was placed on probation and at another time escaped from custody. His probationary term must be tolled during the time he was gone and not under supervision. *Williams v. State*, 529 So. 2d 366 (Fla. 2d DCA 1988); *Weeks v. State*, 496 So. 2d 942 (Fla. 2d DCA 1986). This will result in the appellant's probation being extended beyond the maximum term that was originally imposed.

* * *

Torts—Insurance—No-fault threshold—Error to deny plaintiff's motion for directed verdict on issue of permanency of injury where only expert medical evidence as to plaintiff's temporomandibular joint injury was that injury was permanent and where none of expert testimony was severely impeached

DONNA HOLMES, Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. 2nd District. Case No. 92-03710. Opinion filed September 29, 1993. Appeal from the Circuit Court for Lee County; R. Wallace Pack, Judge. Lawrence J. Robinson, Sarasota, for Appellant. Roger T. Minor of Fuller & Minor, P.A., Fort Myers, for Appellee.

(RYDER, Acting Chief Judge.) Donna Holmes challenges the trial court's final judgment in this personal injury action brought pursuant to section 627.737(2), Florida Statutes (1991). The final judgment was entered pursuant to the jury's verdict that State Farm's insured's negligence caused Ms. Holmes' injury, but that she did not sustain a permanent injury. We agree with her contention that the trial court erred in denying her motion for a directed verdict on permanency, and, therefore, we reverse.

Ms. Holmes was injured when she was struck from behind by a truck. She presented expert testimony at trial that she had suffered permanent injuries to her back and temporomandibular joint (TMJ). There was conflicting testimony concerning the permanency of the back injury. At the close of the evidence and again after the verdict's return, she moved for a directed verdict on the ground that the only expert medical evidence as to the TMJ injury was that it was permanent. The sole issue raised on appeal is the correctness of the trial court's denial of the motion for directed verdict as to the TMJ injury.

Holmes' expert witnesses opined that, based on a reasonable degree of medical probability, the accident caused her TMJ injury and that the injury was permanent. State Farm presented no expert witnesses concerning the permanency of the TMJ injury. During cross-examination of Dr. Chuong, one of plaintiff's expert witnesses, State Farm elicited testimony that Ms. Holmes suffered from severe preexisting dental problems. After her dental problems were cleared up, she still had TMJ problems. Also, he generally discussed causes of TMJ injury other than trauma, including dental problems. Photographic exhibits introduced by State Farm showed that the collision was not severe, according to Ms. Holmes' attorney.

"When the proponent of permanency supports that hypothesis with expert testimony, the opponent of permanency, in order to carry the issue to the jury, must either: (1) present countervailing expert testimony; (2) severely impeach the proponent's expert; or (3) present other evidence which creates a direct conflict with the proponent's evidence." *Jarrell v. Churm*, 611 So. 2d 69, 70 (Fla. 4th DCA 1992). State Farm has not satisfied this test.

State Farm, citing *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 609 So. 2d 714 (Fla. 2d DCA 1992), argues that there was conflicting evidence from which the jury could have found that the injuries were not the result of the insured's negligence regardless of the medical testimony in the case. The testimony in *Weygant*, however, included plaintiff's own testimony indicating that her injuries were not permanent in nature and that they were not caused by the auto accident. There was evidence that Weygant had suffered similar injuries as a result of other incidents occurring both before and after the accident in question.

State Farm also cited *Easkold v. Rhodes*, 614 So. 2d 495 (Fla. 1993), which held that the jury was free to determine the experts' credibility and to decide the weight of that testimony in the face of conflicting lay evidence. There, the conflicting lay evidence consisted of plaintiff's own contradictory depositions from which the jury could have concluded that she did not accurately report her medical history to the medical experts.

We distinguish the facts of the *Weygant* and *Easkold* decisions where the conflicting evidence directly addressed the question of permanency, causation and the plaintiff's credibility from the instant case. State Farm's assertion that conflicts in the evidence support an affirmance is based upon conflicts both minor and indirect. Moreover, State Farm elaborated on the nature of the "conflicting" testimony. None of the plaintiff's expert witnesses was severely impeached. Confronted with this lack of evidence to support the requirements of the *Jarrell* decision, we must reverse.

We therefore reverse and remand with directions to enter a directed verdict for plaintiff on the issue of permanency and for a trial on damages.

Reversed and remanded. (HALL and PATTERSON, JJ., Concur.)

* * *

Attorney's fees—Arbitration—Securities—State statute expressly providing that attorney's fees for time spent in arbitration are recoverable but only in the trial court upon a motion for confirmation or enforcement of the award is not preempted by Federal Arbitration Act—Parties failed to demonstrate conflict between state and federal codes or to show that under federal code attorney's fees issue was intended for arbitral determination—Trial court properly modified arbitration award to expunge language that parties bear their own attorney's fees and awarded prevailing broker reasonable attorney's fees

JOE and ELLEN LEE, Appellants, v. SMITH BARNEY, HARRIS UPHAM & CO., INC., and RICHARD W. JOHNSON, Appellees. 2nd District. Case No. 92-04057. Opinion filed September 29, 1993. Appeal from the Circuit Court for Polk County; J. Tim Strickland, Judge. Robert Dyer and George Franjola of Allen, Dyer, Doppelt, Franjola & Milbrath, P.A., Orlando, for Appellants. Alex J. Sabo and Paul Hanlson of Morgan, Lewis & Bockius, Miami, for Appellees.

(FRANK, Chief Judge.) Joe and Ellen Lee appeal the trial court's final judgment awarding Smith Barney, Harris Upham and Company, Inc. (Smith Barney), an attorney's fee of $20,000. We have considered the two points raised by the Lees; only one merits discussion. We affirm.

The Lees demanded arbitration pursuant to Smith Barney's membership in the American Stock Exchange, whose constitution provides that members "shall arbitrate all controversies arising in connection with their business . . . between them and their customers . . ., if the customer chooses to arbitrate." After a three day proceeding a panel of arbitrators appointed by the American Arbitration Association entered an award denying all claims filed by the Lees and ordered that the parties "bear their own costs and expenses, including attorney's fees." Thereafter Smith Barney sought modification of the arbitral award in the trial court, contending that the arbitrators had no power under Florida law to decide entitlement to attorney's fees. Smith Barney simultaneously requested fees in a separate motion filed pursuant to section 517.211(6), Florida Statutes (1991), the statute entitling the prevailing party "[i]n any action brought under this section," to reasonable attorney's fees so long as such an award is not deemed "unjust." The trial court agreed with Smith Barney and modified the arbitral award. Thus, it expunged the language that the parties bear their own attorney's fees and awarded Smith Barney a reasonable fee of $20,000. The Lees appealed.

The Lees assert that the Federal Arbitration Act (FAA) grants authority to arbitrators to determine entitlement to attorney fees and that the FAA's provisions supersede or preempt the provisions of the Florida Arbitration Code, which removes attorney's fee questions from the range of arbitrable issues. *See* §682.11, Fla. Stat. (1989). The Lees rely upon *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991), for the proposition that federal arbitrators are entitled to pass upon the

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 4th day of February, 1994.

Respectfully submitted,

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