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FEB 9 1994

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STEPHANIE A. CARDER, )  
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 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 82,668

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

J  
JAMES R. WULCHAK  
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IN THE SUPREME COURT OF FLORIDA

STEPHANIE A. CARDER, )  
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 Petitioner, )  
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CASE NO. 82,668

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The defendant entered a plea of guilty to felony retail theft. State v. Carder, 625 So.2d 966 (Fla. 5th DCA 1993). On the sentencing guidelines scoresheet, she scored in the permitted range of 2½ to 5½ years incarceration. Id. The court imposed what it termed a "back end split sentence," whereby the defendant was placed first on a term of 2½ years of probation followed by 2½ years imprisonment. Id. The court indicated that if the defendant successfully completed the term of probation, the court would entertain a motion at that time to eliminate the term of imprisonment. Id.

The state appealed the sentence to the District Court of Appeal, Fifth District, contending that this sentence was an

unlawful downward departure without written reasons and that the sentence was illegal since it was not one of the authorized alternatives provided by Poore v. State, 531 So.2d 161 (Fla. 1988). State v. Carder, supra; Initial brief of appellant, 5th DCA Case No. 92-2797. While recognizing that Section 948.01(11), Florida Statutes (1991), may authorize such "stick following the carrot" type of sentences, the district court nonetheless found the sentence to be an illegal downward departure:

It appears to us that the purpose of the guideline sentence concept is to assure that a sentence between the minimum and maximum is actually imposed on and served by the defendant unless there are appropriate reasons expressed in writing to do otherwise. A back end split sentence is nothing more than a straight probationary sentence with the threat of a specific term of incarceration included in the judgment should a violation occur. The threatened incarceration, however, will not occur unless there is a violation of the terms of probation. This conditional imposition of incarceration is a departure from the mandatory concept of guideline sentencing and written reasons are required.

State v. Carder, supra at 967. The district court certified a question to this Court, stating:

It is possible that the legislature intended to exempt from guideline consideration those sentences imposed under the authority of section 948.01(11). We therefore certify the following question to the Supreme Court:

IS A REVERSE SPLIT SENTENCE A DOWNWARD DEPARTURE FROM THE GUIDELINES WHICH REQUIRES WRITTEN JUSTIFICATION?

Id. at 967.

A notice to invoke this Court's discretionary jurisdiction was timely filed.<sup>1</sup> This merit brief follows.

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<sup>1</sup> Following the district court's mandate, the defendant moved to withdraw her plea and the judgment and sentence at question here were vacated. The petitioner then filed a suggestion of mootness, which this Court denied.

### SUMMARY OF ARGUMENT

Section 948.01(11), Florida Statutes (1991), specifically authorizes the type of sentence imposed here, a reverse split sentence with a term of probation to be followed by incarceration (which may or may not be modified by the court upon successful completion of the probationary period). A specific statute covering a particular subject matter controls over a broader statutory provision covering the same generalized subject matter. Additionally, where two different statutory constructions are possible, the rule of lenity mandates that, in a criminal case, the courts construe the statutes in the light most favorable to the accused.

Moreover, if the guidelines are still applicable to the sentencing scheme, the sentence **as imposed** does fall within the guidelines range since a term of imprisonment **was** imposed. Since the term of incarceration may or may not actually be served, depending on some future actions of the defendant and upon a future motion to the trial court, a downward departure does not occur until such time as the incarcerative portion of the sentence is vacated.

For these reasons the sentence imposed here is lawful. The certified question should be answered in the negative and the case remanded for imposition of the original "back end split sentence."

## ARGUMENT

SINCE FLORIDA STATUTES SPECIFICALLY AUTHORIZE A REVERSE SPLIT SENTENCE, IT IS NOT A DOWNWARD DEPARTURE TO IMPOSE A TERM OF PROBATION TO BE FOLLOWED BY A TERM OF INCARCERATION.

Section 948.01(11), Florida Statutes (1991), specifically authorizes the imposition of a reverse or "back end" split sentence, whereby a probationary term is to be followed by a period of incarceration (which may or may not be vacated by the court at some future date, depending on the actions of the defendant). That section provides:

The court may also impose a split sentence whereby the defendant is sentenced to a term of probation which may be followed by a period of incarceration or, with respect to a felony, into community control, as follows:

(a) If the offender meets the terms and conditions of probation or community control, any term of incarceration may be modified by court order to eliminate the term or incarceration.

(b) If the offender does not meet the terms and conditions of probation or community control, the court shall impose a term of incarceration equal to the remaining portion of the order of probation or community control.

The provisions of this specific statute authorizing a probationary term first to be followed by incarceration, it is submitted, should apply over the more general sentencing guidelines statute. The law provides that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. See, e.g., Adams v. Culver, 111 So.2d 665, 667 (Fla.



1959). See also Basic v. United States, 446 U.S. 398, 406 (1980).

The preamble to Chapter 91-225, Laws of Florida (1991), which enacted this subsection of 948.01, makes clear that the legislative intent was to allow for this type of "stick following the carrot" sentence outside of the stricter confines of the sentencing guidelines. That preamble states:

WHEREAS, Florida is facing an ever-increasing prison and jail population and a severe budgetary shortfall, and

WHEREAS, incarceration is an expensive method of dealing with offenders, and

WHEREAS, offenders are currently serving, on the average, less than one-third of their sentences, and

WHEREAS, judges sentencing offenders are faced with either placing an offender on probation or sending the offender to prison, resulting in an unacceptably short period of time being served due to overcrowded prisons, and

WHEREAS, there is a lack of sufficient intermediate sanctions, punishments, and treatment programs, and

\* \* \*

WHEREAS, both the inmate population within the Department of Correction and the population under parole and probation supervision by the Department of Corrections had increased from 125,337 in November 1989 to 134,116 in November 1990, and

WHEREAS, it is critical that state and local correctional authorities cooperate and combine forces to protect the public, reduce recidivism and effectively punish criminal behavior, and

WHEREAS, the state should reserve its prison system for the most serious and violent criminals and should begin, through this first phase of corrections partnership, to provide community-based correctional programs and treatment,

. . . .

Thus, it is clear that the legislature was providing an alternative "sufficient intermediate sanction" by the reverse split sentence which may take the specifically authorized punishment outside of the restrictions of the sentencing guidelines which would cause further overcrowding of the prison system.

Further, the rule of lenity provides that statutes shall be strictly construed and, where the statutes are susceptible of differing constructions, they shall be construed most favorably to the accused. §775.021(1), Fla. Stat. (1991). Thus, the two statutes, one the more general sentencing guidelines statute and the second the more specific reverse split sentence statute, should be construed to permit the reverse split sentence to be imposed regardless of the constraints of the guidelines setup.

Finally, the sentence imposed here, which involves both a 2½ year term of probation and a 2½ year prison term, does fall within the permitted guidelines range as the prison term was **imposed**. While the district court was partially correct in stating that the prison term **may** be vacated at some time in the future, the fact remains that it was still imposed and may, in fact, be required to be served, depending on the actions of the defendant in the future and depending upon whether, following a motion by the defendant in the future, the court decides to vacate the incarceration (which it may not choose to do). If the sentencing guidelines do apply to this type of reverse split sentence, it is submitted that the sentence is not a downward

departure until such time in the future, following the probationary period, that the trial court decides to rule favorably on a defense motion to vacate the term of incarceration. At that time, the court could issue written reasons for its then downward departure, which the state could then appeal. But, by the terms of the sentence imposed here and the terms of section 948.01, the vacation of the term of imprisonment may never come to pass, and the defendant may have to serve the period of incarceration. Thus, it is premature for the state to be attacking the sentence imposed which was in conformity with section 948.01(11) and the sentencing guidelines.

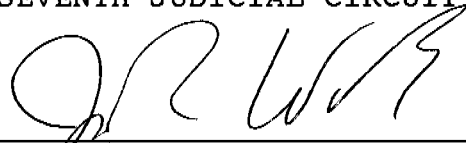
Therefore, the sentence imposed here was authorized by statute and is a viable legal alternative sanction to be imposed by the trial court. The certified question should be answered in the negative and the case remanded for reimposition of the original "back end split sentence."

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court quash the decision of the District Court of Appeal, Fifth District, answer the certified question in the negative, and remand for reimposition of the original sentence.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

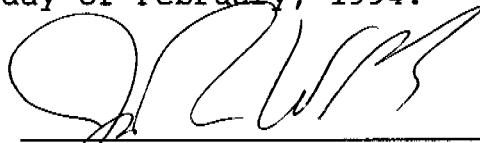


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal, and mailed to Ms. Stephanie A. Carder, 216 Grace Avenue, Cocoa, FL 32922, this 7th day of February, 1994.



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JAMES R. WULCHAK  
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STEPHANIE A. CARDER, )  
 )  
 Petitioner, )  
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 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
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CASE NO. 82,668

A P P E N D I X

Decision in State v. Carder,  
625 So.2d 966 (Fla. 5th DCA 1993)

the wife attorney's fees. *See Deakyne v. Deakyne*, 460 So.2d 582 (Fla. 5th DCA 1984).

REVERSED and REMANDED.

GRIFFIN and DIAMANTIS, JJ., concur.



STATE of Florida, Appellant,

v.

Stephanie A. CARDER, Appellee.

No. 92-2797.

District Court of Appeal of Florida,  
Fifth District.

Oct. 22, 1993.

State appealed sentence imposed in the Circuit Court for Brevard County, John Dean Moxley, Jr., J., placing defendant on probation to be followed by term of incarceration unless defendant met terms and conditions of probation. The District Court of Appeal, Harris, C.J., held that sentence that made incarceration conditional was downward departure requiring written reasons.

Reversed and remanded for resentencing.

**Criminal Law** ¶982.6(4), 1261

Sentence that made incarceration following probation conditional on defendant's failure to meet terms and conditions of probation amounted to downward departure from guideline sentence requiring written reasons; purpose of guideline sentence concept is to assure that sentence between minimum and maximum is actually imposed and served unless there are appropriate reasons expressed in writing to do otherwise, and "back end split sentence" imposed in instant case was nothing more than straight probation with

1. This appears to be an incorrect statutory refer-

threat of specific term of incarceration included in judgment should violation occur. West's F.S.A. § 948.01(11); West's F.S.A. RCrP Rule 3.701(d)(11).

See publication Words and Phrases for other judicial constructions and definitions.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Robin Compton Jones, Asst. Atty. Gen., Daytona Beach, for appellant.

James B. Gibson, Public Defender, and M.A. Lucas, Asst. Public Defender, Daytona Beach, for appellee.

HARRIS, Chief Judge.

Appellant, State of Florida, timely appeals the sentence imposed against appellee, Stephanie A. Carder.

The facts are not in dispute. Carder pled guilty to felony retail theft. Her scoresheet total of 83 points placed her within a permitted range of 2½ to 5½ years incarceration. The trial court, instead, imposed the following sentence:

#### BACK END SPLIT SENTENCE

The Court does hereby adjudge the defendant guilty of Felony Retail Theft and does hereby place the defendant on probation for a term of 2½ years. After you have served your probation of 2½ years, then you will be sentenced to 2½ years in State Prison in the Custody of the Department of Corrections.

If you meet the terms and conditions of the probation, the term of incarceration will be modified by the Court to eliminate the term of incarceration in State Prison. If you do not complete or comply with the conditions imposed during probation, then the specified period of incarceration will follow the period of probation supervision. Not less than thirty (30) days before the term of probation expires, you will need to set a hearing with the Court to demonstrate that you have met the terms and conditions of your probation. (Section 948.01(13) Florida Statutes).<sup>1</sup>

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The issue is whether this sentence which makes incarceration conditional is a downward departure without written reasons in violation of Florida Rules of Criminal Procedures 3.701(d)(11):

Any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for departure.

It appears to us that the purpose of the guideline sentence concept is to assure that a sentence between the minimum and maximum sentence range is actually imposed on and served by the defendant unless there are appropriate reasons expressed in writing to do otherwise. A back end split sentence is nothing more than a straight probationary sentence with the threat of a specific term of incarceration included in the judgment should a violation occur. The threatened incarceration, however, will not occur unless there is a violation of the terms of probation. This conditional imposition of incarceration is a departure from the mandatory concept of guideline sentencing and written reasons are required.

It is possible that the legislature intended to exempt from guideline consideration those sentences imposed under the authority of section 948.01(11). We therefore certify the following question to the Supreme Court:

IS A REVERSE SPLIT SENTENCE A DOWNWARD DEPARTURE FROM THE GUIDELINES WHICH REQUIRES WRITTEN JUSTIFICATION?

REVERSED and REMANDED for resentencing.

PETERSON and DIAMANTIS, JJ., concur.



tion 948.01(11), Florida Statutes. Although this section is somewhat inartfully drawn, it appears

STATE of Florida, Appellant,

v.

David Lee RICHARDSON and Gary  
Levan Rivers, Appellees.

Nos. 92-2013, 92-2014.

District Court of Appeal of Florida,  
Fifth District.

Oct. 22, 1993.

Appeal from the Circuit Court for Orange  
County; John H. Adams, Sr., Judge.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Nancy Ryan, Asst. Atty. Gen., Daytona Beach, for appellant.

Mark E. NeJame, of NeJame & Hyman, P.A., Orlando, for appellee, David Lee Richardson.

Scott L. Sterling, Orlando, for appellee, Gary Levan Rivers.

PER CURIAM.

The state has appealed an order granting defendants a new trial after their convictions for possession and delivery of cocaine. The trial judge concluded that his own conduct deprived the defendants of a fair trial. After studying the record, we are perplexed by his conclusion that his order on the motion in limine had anything to do with the "red truck" evidence or that it was ambiguous, confusing or misleading in that regard. We further question how Richardson and Rivers could have reasonably expected the in limine ruling would keep the red truck evidence out of the trial. Nevertheless, the lower court's discretion in this context is extremely broad. See *Baker v. State*, 336 So.2d 364, 371 (Fla. 1976). Accordingly, we affirm.

HARRIS, C.J., and GRIFFIN and  
DIAMANTIS, JJ., concur.



to authorize this "stick following the carrot" type sentence.