See order dated 1-24-94



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,829

SANDY SIMMS

Respondent.

_____/

MOTION TO ADOPT BRIEF

COMES NOW Petitioner, State of Florida, by and through the undersigned Assistant Attorney General and moves to adopt the brief and arguments therein in State v. Christopher Gene Summers, Case No. 82,632, as its brief in the instant cause and as grounds therefor would state:

1. The Certified Question in the instant case is identical to that in State v. Christopher Gene Summers.

2. Petitioner's brief was due before this Court on January 7, 1994.0

3. On December 15, 1993 Petitioner moved this Court to consolidate the instant case with that in Summers since the issues were identical.

4. Petitioner failed to file a motion to toll time brief was due when it filed its motion to consolidate.

5. On January 13, 1994 this Court denied Petitioner's motion to consolidate.

6. Petitioner cannot improve upon or change the arguments already set out in the brief before this Court in State v. Christopher Gene Summers.

WHEREFORE Petitioner respectfully requests this Court issue its order allowing Petitioner to adopt the brief previously filed in State v. Christopher Gene Summers.

Respectfully submitted,

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OF COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CYNTHIA J. DODGE, ESQUIRE, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830 this 19th day of January, 1994.

OF COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 82,632
2dDCA# 91-03686

CHRISTOPHER GENE SUMMERS,

Respondent.
_____/

# PETITIONER'S BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

Petitioner, the State of Florida, seeks review of a decision of the Second District Court of Appeal filed October 1, 1993 in which the court certified the following question:

> 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?

This Honorable Court has jurisdiction pursuant to article V, §3(b)(4), Florida Constitution. This court has postponed its decision on jurisdiction and has directed petitioner to serve the merits brief on or before January 3, 1994.

The essential facts of the case are summarized in the Second District's opinion. See Summers v. State, 18 Fla. L. Weekly D2154, D2155 (Fla. 2d DCA, Oct. 1, 1993). The respondent was placed on probation in cases 88-7827 and 88-14789.[1] On February 28, 1989 the court revoked respondent's probation in cases 88-7827 and 88-14789. In case 88-14789 respondent was sentenced to eighteen (18) months imprisonment for burglary of a conveyance and five (5) years probation for the dealing in stolen property charge. (R. 79) In case 88-7827 the respondent was given five

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[1] In case 88-7827 the respondent was charged with dealing in stolen property. (R. 5,6) In case 88-14789 he was charged with burglary of a conveyance, grand theft, and dealing in stolen property. (R. 58, 59) The respondent was sentenced after entering guilty pleas in each case. (R. 10,11,15,16,62,63,65)

(5) years probation consecutive to the prison sentence in case 88-14789 but concurrent with the probation in that case. (R. 29)

On June 5, 1990 the respondent was charged with burglary, petit theft, and dealing in stolen property in case 90-7880. (R. 116,118) On June 19, 1990 the respondent pled guilty to these charges and was sentenced to three and one half (3½) years prison for burglary and probation for the dealing in stolen property. (R. 122,124) As a result of the new offenses in case 90-7880 the circuit court modified the respondent's probation in cases 88-7827 and 88-14789. In case number 88-7827 the respondent was sentenced to three (3) years probation; in case number 88-14789 the respondent was sentenced to three (3) years probation for the dealing in stolen property charge. (R. 38, 93-94)

On July 2, 1990 the respondent was charged with burglary of a dwelling and grand theft in case number 90-10338. (R. 141,142) On July 18, 1990 the respondent entered guilty pleas to both charges. (R. 148) In that case respondent was placed on probation as a habitual felony offender. (R. 144,149) On July 24, 1991 the respondent was again charged with grand theft in case 91-8844. (R. 171-172) As a result of the new charges, affidavits of violation of probation were filed in cases 88-7827, 88-14789, 90-7880 and 90-10338. (R. 45, 99, 131, 154) On October 16, 1991 a hearing on the violations of probation was held. (R. 194)

Ultimately, the trial court found the respondent guilty of violating probation. (R. 205) In case number 90-10338 the

respondent was sentenced to thirty (30) years imprisonment for burglary of dwelling and ten (10) years imprisonment, consecutive to the thirty (30) years, for the grand theft charge. Each of the sentences were imposed under the habitual felony offender statute. (R. 205)

In case number 90-7880 the respondent was sentenced to fifteen (15) years probation on the dealing in stolen property charge; in case 88-7827 the respondent was sentenced to fifteen (15) years probation on an additional dealing in stolen property charge; in case 88-14789 the respondent was sentenced to fifteen (15) on yet another dealing in stolen property charge. The terms of probation run concurrently with each other but consecutive to the prison sentences.

On appeal to the Second District the respondent challenged his probationary sentences. He argued that the three concurrent probationary terms of fifteen (15) years each should not have been imposed since these additional fifteen (15) year probationary terms exceed the statutory maximum when added to the time he has previously served on probation. The Second District agreed with the respondent. In an en banc opinion the court reversed and remanded for resentencing, ordering the trial court to allow the respondent credit for time previously served on probation toward the most recently imposed probationary terms for the same offense. The Second District then certified the question of great public importance currently under review in this court.

## SUMMARY OF THE ARGUMENT

The state submits that the majority in the lower court is in error; the correct analysis is contained in the dissenting opinion of Judge Schoonover. The controlling statute provides that upon revocation of probation, the sentencing judge may impose any sentence that might originally have been imposed. In Poore v. State, infra, the court stated that when probation is revoked the court may impose any sentence that might originally have been imposed with credit for time served and subject to the guidelines recommendation.

Credit for time served is inappropriate since probation is not a sentence. The legislature knew of the distinction between probation and a sentence when it enacted the statute. Legislative intent is determined by the plain language of a statute. Under the plain language of section 948.06 (1) the trial court is required to impose any sentence which might originally have been imposed. Credit is given for a sentence since the purpose is punishment; it is withheld for probation because the purpose is rehabilitation. Furthermore, it is legislative policy to limit incarceration as a sentencing alternative to those with convictions for serious offenses and longer criminal histories. A court has the discretion to revoke and impose another term of probation if that is the better sentencing alternative.

One who cannot successfully complete probation is not rehabilitated because probation is a minimal sanction. Finally, the

denial of credit for time spent on probation is supported by the court's decisions in State v. Perko, infra, Williams v. State, infra, and Fraser v. State, infra. The certified question should be answered in the negative.

## ARGUMENT

**A TRIAL COURT IS NOT REQUIRED TO CREDIT PREVIOUS TIME SERVED ON PROBATION FOLLOWING REVOCATION AND RE-IMPOSITION OF PROBATION BECAUSE PROBATION IS NOT A "SENTENCE" BUT THE GRACE OF THE STATE FOR THE PURPOSE OF REHABILITATION RATHER THAN PUNISHMENT; THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THE TRIAL JUDGE TO REIMPOSE ANY SENTENCE THAT MIGHT ORIGINALLY HAVE BEEN IMPOSED WITHOUT CREDIT FOR TIME SERVED ON PROBATION.**

The Second District decided the instant case en banc in order to resolve 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). The effect of the decision in Servis was to give the defendant credit for time he had already served on probation; the effect of the decision in Smith was to disregard the statutory maximum in cases where probation is imposed, revoked, and imposed again. In a sharply divided six to five opinion, the lower court agreed that upon revocation of probation a trial court may impose any sentence that could originally be imposed. The majority, however, construed State v. Holmes, 360 So. 2d 380 (Fla. 1978) and Snead v. State, 616 So. 2d 964 (Fla. 1993) as requiring that a trial court which imposes further probation following a revocation credit that defendant's previous probationary time.

The state submits that the majority view is error; the correct analysis is contained in the dissenting opinion of Judge Schoonover. According to the dissent, Smith was controlling and should have been followed. Section 948.06(1), Florida Statutes (1987) clearly states:

> 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 in community control.

Section two (2) of the statute further provides that "[n]o part of the time that the defendant is on probation or in community control shall be considered as any part of time that he shall be sentenced to serve."

The effect, then, of a revocation of probation is to place a defendant nunc pro tunc to the time of his or her original sentencing. Florida courts generally have not given defendants credit for time served on probation when resentencing following a violation of probation. In Poore v. State, 531 So. 2d 161 (Fla. 1988) the court discussed the various sentencing alternatives in Florida and the trial court's option upon resentencing:

> Thus, we conclude that a judge has five basic sentencing alternatives in Florida: (1) a period of confinement; (2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement suspended and the defendant placed on probation for that suspended portion; (3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation; (4) a Villery sentence, consisting of period of probation preceded by a period of confinement imposed as a special condition; and (5) straight probation.
>
> If the defendant violates his probation in alternatives (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. (e.s.)

531 So. 2d at 164. See also Franklin v. State, 545 So. 2d 851 (Fla. 1989); State v. Holmes, 360 So. 2d 380, 383 (Fla. 1978); Priest v. State, 603 So. 2d 141 (Fla. 4th DCA 1992); Ramey v. State, 546 So. 2d 1156 (Fla. 5th DCA 1989); Quincutti v. State, 540 So. 2d 900 (Fla. 3d DCA 1989); Pendergrass v. State, 487 So. 2d 35 (Fla. 4th DCA 1986). Thus, credit for time served does not include time spent on probation.

This view is supported by the court's decision in Pennington v. State, 398 So. 2d 815 (Fla. 1981) where the court held that it was not a denial of equal protection or double jeopardy guarantees to deny a defendant credit for time served in a drug rehabilitation center as a condition of probation upon revocation of probation.

Furthermore, credit for time served on probation is inappropriate since probation is not a sentence. As recognized in Villery v. Florida Parole & Probation Comm'n, 396 So. 2d 1107, 1110 (Fla. 1980), two basic alternatives are available to the trial judge at the time of sentencing. He may either sentence the defendant or place him on probation. The term "sentence" is defined in rule 3.700 of the Florida Rules of Criminal Procedure as "the pronouncement by the court of the penalty imposed upon a defendant for the offense of which he has been adjudged guilty."

Generally, a fine or a sentence of imprisonment or both is the "penalty" which may be imposed. Villery 396 So. 2d at 1110.

Rule 3.790(a) of the Florida Rules of Criminal Procedure states that the pronouncement and imposition of a sentence of imprisonment shall not be made upon a defendant who is placed on probation regardless of whether he is adjudicated guilty. As the committee note to the rule 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.

This rule is consistent with section 948.01(3), Florida Statutes (1989) which requires the court to stay and withhold the imposition of a sentence when placing a defendant on probation. Only after probation is revoked may pronouncement and imposition of a sentence be made upon the defendant. Fla. R. Crim. P. 3.790(b).

It must be assumed that the legislature knew of the distinction between probation and a sentence at the time it enacted section 948.06 because the legislature is presumed to know existing law at the time it enacts a statute. Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (3rd DCA), review dismissed, 582 So. 2d 624 (Fla. 1991); Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263 (5th DCA), review denied,

523 So. 2d 578 (Fla. 1988). Moreover, legislative intent controls the construction of statutes, and that intent is determined primarily from the language of the statute; the plain meaning of the language is the first consideration and, when that language is clear and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to the rule of statutory construction. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); Opperman, 515 So. 2d at 266 n.4. Upon revocation of probation section 948.06(1) requires the court to impose any sentence which it might have originally imposed before placing the probationer on probation. Subsection (2) further provides that no part of the time that a defendant is on probation shall be considered as any part of the time to serve upon resentencing.

The withholding of credit for time served on probation comports with the differing policies underlying probation in contrast to sentencing. The concept of probation is rehabilitation rather than punishment. (e.s.) Berhardt v. State, 288 So. 2d 490 (Fla. 1974). As the court stated in Loeb v. State, 387 So. 2d 433, 436 (Fla. 3rd DCA 1980) "[a]n order granting probation is not a sentence; it is the grace of the state, in lieu of the sentence, granted in hopeful anticipation of the defendant's rehabilitation." See also Addison v. State, 452 So. 2d 955 (Fla. 2d DCA 1984). In contrast, the Florida sentencing guidelines provide that the primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal but assumes a subordinate role. See Fla. R. Crim. P. 3.701.

Criminal procedure rule 3.701 further provides that the use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. Therefore, the rule provides that the sanctions used in sentencing convicted felons be the least restrictive necessary to achieve the purposes of the sentence. Considering the legislative policy favoring the withholding of imprisonment when it is inappropriate in light of the ends of justice and the welfare of society, and the clear language of the statute, it is only logical to conclude that a sentencing court has the discretion to revoke a probationary sentence and reimpose another sentence of probation if the court determines that another term of probation is the better sentencing alternative. See State v. Viloria, 759 P. 2d 1376 (Hawaii 1988).

The emphasis of further probation is appropriate since a defendant that is not capable of successfully completing a term of probation cannot be said to be rehabilitated. As Judge Peterson pointed out in Ford v. State, 572 So. 2d 946, 947 (5th DCA 1990), disapproved on other grounds, 622 So. 2d 941 (Fla. 1993) " ... conditions of probation are usually no more burdensome than those conditions which law-abiding citizens customarily and routinely live with in their walks through life." It is consistent with the goal of rehabilitation then, that defendants not be awarded credit for an unsuccessful probation following a revocation.

The state submits that the Summers majority misreads Holmes. Holmes provides that the combined period of a split sentence at the time of the original sentence cannot exceed the maximum period of incarceration provided by statute for the offense charged. Holmes further provides that upon revocation of probation, the trial judge may impose any sentence which could originally be imposed minus jail time previously served as part of the sentence. Id. at 383. The state interprets Holmes to mean that upon revocation of a probationary split sentence, a Villery sentence, or straight probation, the trial court may impose any sentence which it might have originally imposed without credit for time spent on probation.

The guidelines analysis presented by the Summers majority is inconsistent with the purpose of probation, i.e., rehabilitation. Both Holmes and section 948.06(1), Florida Statutes, plainly state that a defendant is entitled to no credit for time served on probation. The state fails to see how the majority result advances the uniformity and consistency of criminal sentencing in the state. All criminal defendants are on constructive notice that a violation of probation will subject them to the imposition of any sentence which could originally have been imposed. Under the majority analysis defendants could violate probation repeatedly with the knowledge that further probation would be limited by the time previously served on probation. Allowing credit for time spent on probation would also interfere with the state policy of restitution for crime victims. Summers, 18 Fla. L. Weekly at D2157.

In State v. Perko, 588 So. 2d 980 (Fla. 1991) the defendant was given a split sentence of incarceration followed by probation for grand theft auto. Upon his release from prison the defendant committed a drug related offense, violating the terms of his probation. When sentencing for the new drug offense, the trial court declined to give the defendant credit for time served and gain time accrued while he was incarcerated for the grand theft offense. However, the Fourth District reversed and ordered that the defendant be given the credit he requested relying on Daniels v. State, 491 So. 2d 543 (Fla. 1986) and State v. Green, 547 So. 2d 925 (Fla. 1989).

On review, the Perko court per Justice Kogan distinguished Daniels and Green commenting:

> ... we know of no law that requires the state to reward defendants for the length of their prison records. Here, the opinion of the district court resulted in Perko being rewarded with a reduced sentence on the new drug offense solely because he previously had committed a grand theft. Presumably Perko would have received a greater sentence had his criminal record been unblemished. This is not the law.

588 So. 2d at 982. As in Perko, there is no law that requires a trial court to reward defendants who violate probation by giving them credit for time served. Only the prospect of receiving any sentence which could originally be imposed provides incentive to rehabilitate and make restitution.

In Williams v. State, 594 So. 2d 273 (Fla. 1992) the court expressed sensitivity to the dilemma faced by trial judges in cases of multiple violations of probation:

> Here we have the problem of the multiple probation violator for whom there is no longer any consequence or remedy for further probation violations. Niehenke had already served all of the time permitted under the sentencing guidelines (including the one-cell bump-up)....
>
> Although violation of probation is not an independent offense punishable at law in Florida surely neither the Florida Supreme Court nor the legislature, by adopting the guidelines, intended to abolish it as a practical matter. Yet if multiple probation violators are confined to the one-cell bump-up that is precisely what has happened. The trial courts will have lost any power to enforce conditions of probation. This is an area drastically in need of clarification.

Id. at 274 (quoting Niehenke v. State, 561 So. 2d 1218 (5th DCA 1990), quashed on other grounds, 594 So. 2d 289 (Fla. 1991), Sharpe, J. dissenting). The Williams court per Justice Grimes held that where there are multiple violations of probation the sentences may be successively bumped to one higher guideline cell for each violation. The court felt that to hold otherwise might discourage judges from giving probationers a second or third chance. Id. at 275.

The Williams court appropriately recognized that defendants who violate probation can expect to be penalized for failing to take advantage of the opportunity. More recently, in Fraser v. State, 602 So. 2d 1299 (Fla. 1992) the court addressed the question of credit for time served on community control. In Fraser, the defendant pled guilty to unarmed robbery and auto theft. The court imposed concurrent five (5) year sentences for

the auto theft conviction and five and one half (5½) years imprisonment on the robbery conviction. The court suspended the sentences and placed the defendant on community control for five (5) years and seven (7) years which represented a downward departure from the sentencing guidelines. Id. at 1299.

The state appealed the sentence and the district court reversed pursuant to Pope v. State, 561 So. 2d 554 (Fla. 1990) which holds that where the trial court fails to provide written reasons for departure, the trial court must impose a guideline sentence on remand. See State v. Fraser, 564 So. 2d 1262 (Fla. 2d DCA 1990). At resentencing, the trial court again imposed the downward departure sentence and provided written reasons. The state appealed again and the district court reversed again. However, the district court certified two (2) questions of great public importance. Fraser, 602 So. 2d at 1300.

The first question was answered in Smith v. State, 598 So. 2d 1063 (Fla. 1992) which holds that Pope applies retroactively. The second certified question asked:

> When the trial court sentences a defendant to a period of time under the Department of Corrections, pursuant to a violation of community control, can he be given credit for time served on community control under section 921.161, Florida Statutes (1985)?

Fraser, 582 So. 2d at 172. The court answered the question in the affirmative under the circumstances presented. (e.s.) The Fraser court reasoned as follows:

> In this case, Fraser was successfully completing a sentence of community control when he was informed that, through no fault of his own, the sentence was illegally imposed. We are not confronted here with situation in which a defendant has transgressed and is therefore rightly facing an increased punishment. Nor are we faced with a defendant who has reaped an undeserved windfall, as in Cheshire v. State, 568 So. 2d 908 (Fla. 1990), where the lower guideline sentence was the result of an erroneous miscalculation of the score-sheet. Here Fraser has not breached the trust placed in him by the trial court. He faces a four and one half (4½) year prison sentence now simply because of the trial court's failure to provide a contemporaneous written reason for departure. We agree with Fraser that it would be unfair and inequitable to penalize him for a clerical mistake for which he was not responsible. (e.s.)

Fraser, 602 So. 2d at 1300. It follows that Fraser was given credit for time served on community control because he had not violated conditions of community control. His community control was revoked not because of a community control violation but because of a clerical error.

In contrast to the defendant in Fraser, the respondent in the instant case has transgressed by violating his conditions of probation and is rightly facing an increased punishment. The respondent has breached the trust placed in him by the trial court. Accordingly, the respondent should not be given credit for time served on probation where the general rule is not to give defendants credit for time served on community control. See Butler v. State, 530 So. 2d 324 (5th DCA 1988), overruled on

other grounds, 547 So. 2d 925 (Fla. 1989); Mathews v. State, 529 So. 2d 361 (Fla. 2d DCA 1988); Braxton v. State, 524 So. 2d 1141 (Fla. 2d DCA 1988). Compare Tal-Mason v. State, 515 So. 2d 738, 739 (Fla. 1987) ("[c]oercive commitment to a state [mental] institution was indistinguishable from pretrial detention in 'jail,'...").

In light of the foregoing and for the reasons expressed in Judge Schoonover's concurring and dissenting opinion the state requests that the certified question be answered in the negative.

## CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, the petitioner respectfully requests that this Honorable Court answer the certified question in the negative.

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 US Mail to Deborah Brueckheimer, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 on this 3rd day of January, 1994.

Debi Tangley
COUNSEL FOR PETITIONER