FILED
SID J. WHITE
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,839

THE STATE OF FLORIDA,

Petitioner,

vs.

DARRELL ROUNDTREE,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the District Court. The Respondent, **DARRELL ROUNDTREE**, was the Appellant below. The parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

(LIMITED TO THE ISSUE OF JURISDICTION)

Petitioner, The State of Florida, seeks review of a decision of the Fourth District Court of Appeal filed May 25, 1994 in which the court certified the following question:

> MUST A TRIAL COURT, UPON REVOCATION OF PROBATION (AND/OR COMMUNITY CONTROL), CREDIT PRIOR TIME SERVED ON PROBATION (AND/OR COMMUNITY CONTROL) TOWARD A NEWLY IMPOSED PROBATIONARY TERM SO THAT THE TOTAL PROBATIONARY TERM SERVED AND TO BE SERVE DOES NOT EXCEED THE MAXIMUM SENTENCE ALLOWED BY LAW?

This Honorable Court has jurisdiction pursuant to Article V, Section 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 July 15, 1994.

On June 18, 1991, Respondent pled guilty to three grand thefts in three separate cases. R 114. In each case Respondent was declared an habitual felony offender and was

placed on three years of probation. R 114,46-47,79,120. Grand theft auto is a third degree felony punishable by five years in state prison. Sections 812.014(2)(c), Fla.Stat. (1991); 775.082(3)(d), Fla.Stat. (1991). Respondent's habitual felony offender status increased the statutory maximum penalty to ten years in state prison. Section 775.084(4)(a)3, Fla.Stat. (1991). On September 20, 1991, an affidavit of violation of probation was filed in each case. R 48,81,122.

On January 3, 1992, Respondent's probation sentences were revoked (R 55,88,126), and Respondent was sentenced to a new term of three years probation in each case. R 53-54,86-87,124-125.

On February 12, 1992, an affidavit of violation of probation was filed in each case. R 56,89,127. On June 3, 1992, Respondent's probation sentences were revoked again and he was placed on two years community control followed by two years probation in each case. R 59-63,91-95,154-158.

On October 6, 1992, an affidavit of violation of community control was filed in each case. R 64,96-97,159-160. Respondent admitted the violation and was before the trial court for sentencing on March 15, 1993. R 1. In case number 90-16639, Respondent was sentenced to ten years in state prison as an habitual felony offender. R 28,168-169. In case number 91-5608, Respondent was sentenced to five years in state prison followed by five years probation. R 28,65-66. In case number 91-5507, Respondent was sentenced

to ten years probation. R 28,99-100. The three sentences were ordered to run consecutively, i.e. ten years in prison, followed by five years in prison followed by five years probation, followed by ten years probation. R 28.

On appeal to the Fourth District Court of Appeal the respondent challenged his probationary sentences. He argued that the probationary sentences in case number 91-5608 and 91-5507 exceed the statutory maximum of ten years because the probationary terms have not been reduced by the number of months respondent completed probation or community control. The Fourth District Court of Appeal agreed but certified the question of great public importance as was done in Summer v. State, 625 S. 2d 876 (Fla. 2nd DCA 1993) (en banc), *cert. accepted*, S.Ct. Case No. 82,632 (Fla. Supreme Court, Jan. 1994). Briefs have been filed in State v. Summer, Case No. 82,632.

SUMMARY OF ARGUMENT

Section 948.06(1), Florida Statutes provides that, upon revocation of probation, the sentencing judge may impose any sentence that might originally have been imposed. Moreover, the case law from 1978, State v. Holmes, 360 So. 2d 380 (Fla. 1978) and it progeny, until 1993 in Summers v. State, 625 So. 2d 876 (Fla. 2nd DCA 1993) (en banc), cert. accepted Case No. 82,632, the Florida courts generally have not given defendants credit for time served on probation/community control when resentencing following a violation of probation/community control. Credit for time served is inappropriate since probation is not a sentence. 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. The certified question should be answered in the negative.

ARGUMENT

A TRIAL COURT IS NOT REQUIRED TO CREDIT PREVIOUS TIME SERVED ON PROBATION/COMMUNITY CONTROL FOLLOWING REVOCATION AND RE-IMPOSITION OF PROBATION/COMMUNITY CONTROL EVEN THOUGH THE TOTAL PROBATIONARY/COMMUNITY CONTROL TERM SERVED AND TO BE SERVED EXCEEDS THE MAXIMUM SENTENCE ALLOWED BY LAW?

Section 948.06 states in its pertinent part,

> (1) ....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......
>
> (2) No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he shall be sentenced.

In State v. Holmes, 360 So. 2d 380 (Fla. 1978) this Court held that, upon violation of probation, a trial court may impose any sentence which he might have originally imposed minus jail time previously served as part of the sentence and that no credit shall be given for time spent on probation. See, Pennington v. State, 398 So. 2d 815 (Fla. 1981) (where this 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.) The Second District Court followed the Holmes'

ruling in Smith v. State, 463 So. 2d 494 (Fla. 2nd DCA 1985).

In Smith v. State the defendant argued that since five years is the maximum permissible sentence of combined incarceration and probation for his original crime, the court erred in requiring him to serve an additional five years of probation. The Second District Court held that the trial court had the authority to place defendant on a new term of probation for a period of five years. Following Holmes, the Second District Court held that the trial court was not required to deduct the time already served on probation.

In the same year the Second District Court decided Braxton v. State, 524 So. 2d 1141 (Fla. 2nd DCA 1988). Braxton involved credit for time served on community control after a violation of community control. The Second District Court stated, "Community control is 'a harsh and more severe alternative to ordinary probation,' State v. Mestas, 507 So. 2d 587, 588 (Fla. 1987), but for present purposes we do not equate community control with incarceration. For these purposes we think community control should be considered akin to probation." *See also,* Mathews v. State, 529 So. 2d 361 (Fla. 2nd DCA 1988) (community control is not the functional equivalent of jail, for sentencing purpose, therefore, time defendant spent in community control would not be credited against sentence.)

The First District Court also followed the same reasoning as in this Court's ruling in Holmes. In Butler v. State, 530 So. 2d 325 (Fla. 1st DCA 1988) the First District held that the defendant is entitled to credit for actual time served in jail or prison, however, he is not entitled to credit for the time spent on probation or community control.

Recently, this Court addressed the question of credit for time served on community control. Fraser v. State, 602 So. 2d 1299 (Fla. 1992). 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 (5 1/2) 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. 2nd 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 second question certified was:

> 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 be given credit for time served on community control under section 921.161, Florida Statutes (1985)?

Fraser, 582 So. 2d at 172. This Court stated, "Under the circumstances presented here, we answer the question in the affirmative." Fraser, 601 So. 2d at 1300. This Court held,

> Consequently, cases finding that probation or parole should not be credited toward jail sentence are inapplicable to the question presented. See, e.g., Pennington v. State, 398 So. 2d 815 (Fla. 1981); Simmons v. State, 217 So. 2d 343 (Fla. 2d DCA 1969), *overruled on other grounds by* Brumit v. Wainwright, 290 So. 2d 39 (Fla. 1973).
>
> 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 a 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 scoresheet. Here Fraser has not breached the trust placed in him by the trial court. He faces a four and a half year prison sentence now simply because of the trial court's initial failure to provide contemporaneous written reasons 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.

Fraser, 602 So. 2d at 1300. If 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 addition, Fraser also holds that community control is not the functional equivalent of jail for sentencing purpose. For purposes of re-sentencing upon a revocation of probation or community control, community control must be considered akin to probation and parole. Vice versa, probation should be considered akin to community control where the general rule is not to give defendants credit for time served. *See,* Butler, supra; Mathews, supra; Braxton, supra.

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).

This Court noted that under Green this Court held that when sentencing for the violation of probation, the trial court must give the defendant credit for time served and gain time accrued during any earlier imprisonment for the offense underlying the violation of probation. In Daniels this Court held that a defendant being kept in jail pending sentencing for a new crime that also resulted in a violation of probation must receive credit for all time spent in that jail against both the sentence for the new crime and the sentence for the violation of probation. Perko upholds the general rule that there is no law that requires a trial court to reward defendants who violate probation or community control by giving them credit for time served on probation or community control. Only the prospect of receiving any sentence which could originally be imposed provides incentive to rehabilitate and make restitution. 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.

In Pendergrass v. State, 486 So. 2d 35, 36 (Fla. 4th DCA 1986) the Fourth District Court held that when probation is revoked before a defendant has been sentenced to period of incarceration followed by period of probation, no credit is given for time spent on probation, citing to State v. Holmes, 360 So. 2d 380, 383 (Fla. 1978). The Fourth District Court followed this reasoning in Priest v. State, 603 So. 2d 141 (Fla. 4th DCA 1992).

In Ramey v. State, 546 So. 2d 1157 (Fla. 5th DCA 1989) the defendant was placed on two concurrent five year terms of probation for separate third degree felony offenses. After 13 months and one day, his probation was revoked and he was sentenced on the original offenses to concurrent split sentences of five (5) years imprisonment, with the remainder after 3 1/2 years to be served on probation. Ramey argued that the sentences imposed, when added to the time he had served on probation before revocation, exceed the maximum five (5) year penalty for third degree felonies. The Fifth District Court disagreed noting that "Section 948.06(1), Florida Statutes (1987) authorizes the court, upon revocation of probation, to "impose any sentence which it might have originally imposed before placing the ...offender on probation."

In Quincutti v. State, 540 So. 2d 900 (Fla. 3rd DCA 1989) the defendant was convicted of a third degree felony and sentenced to five years probation, subject to a condition of sixty days in jail. After serving four and

one-half years, he violated the probation. Upon revocation, the trial judge sentenced him to one year of community control. The defendant's sole point on appeal was that the community control term should not have exceeded six months since it is impermissible to subject the defendant to the process of the court beyond the five year statutory limitation. The Third District Court disagreed, "...because it is now established that, upon a violation of probation, the trial court may 'impose any sentence it originally might have imposed, with credit for time served and subject to the guidelines recommendation." Citing to Poore v. State 531 So. 2d 161, 164 (Fla. 1988) and Section 948.06(1), Fla.Stat. (1987).

Thus, it appears in an unbroken line of case from the late 1970's to 1993 that this Court and the district courts have consistently held that upon violation of probation or community control the defendant is not entitled to credit for time spent on probation or community control. 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. In William's v. State, 594 So. 2d 273 (Fla. 1992) this 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 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. *See also,* Butler v. State, 530 So. 2d 325 (Fla. 1st DCA 1988) ("The court should not be relegated to the role of a toothless tiger with the ability only to roar when a violation occurs, therefore, defendant is not entitled to credit for time spent on probation or community control.)
The Williams court appropriately recognized that defendants who violate probation can expect to be penalized for failing to take advantage of the opportunity. Consequently, the

Florida Courts generally have not given defendants credit for time served on probation when resentencing following a violation of probation.

Furthermore, credit for time served on probation is inappropriate since probation is not a sentence.[1] 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

[1]Petitioner continues to consider community control as not the functional equivalent of jail for sentencing purposes. For these purposes, community control should be considered akin to probation or parole.

> 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 Statues, 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. 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. 2nd 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 police 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).

As the dissent in Summers v. State, 625 So. 2d 876, 882 (Fla. 2nd DCA 1993) states:

> 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 welfare of society do not require that the defendant presently suffer the penalty imposed by law. Section 948.01(3), Fla.Stat. (1989). Probation is a matter of grace. Bouie v. State, 360 So. 2d 1142 (Fla. 2nd 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 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.

The emphasis of further probation is appropriate since a defendant who 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 within 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 case law and section 948.06(1), Florida Statutes, plainly state that a defendant is entitled to no credit for time served on probation. Any other conclusion would not advance 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 Fourth District

Court's analysis, via Summers v. State, 625 So. 2d 876 (Fla. 2nd DCA 1993) (en banc), cert. accepted, Case No. 82,632 (Florida Supreme Court), 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.

Given the legislative policy favoring the withholding of imprisonment when it is inappropriate, and the clear language of the statue, a trial court has 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. In contrast to the defendant in Fraser, the respondent in the instant case has repeatedly 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. The respondent should not be rewarded for his numerous violations by crediting him with the time he allegedly spent successfully on probation or community control. Accordingly, the certified question must be answered in the negative.

CONCLUSION

Based on the foregoing points and authorities the State respectfully requests this Court answer the certified question in the negative.

Respectfully submitted,

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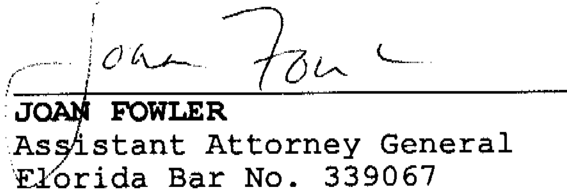

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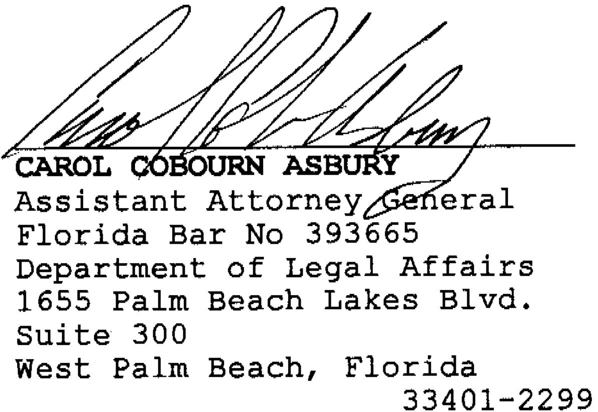

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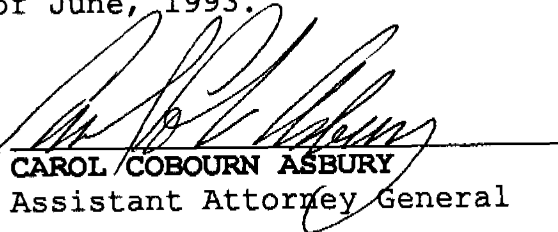
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF ON THE MERITS** was furnished by courier to **PAUL PETILLO,** Assistant Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida 33401 this 7th day of June, 1993.



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