ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,540

ANITA FRANCOIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal, and the Petitioner, Anita Francois, was the Defendant and the Appellant, respectively. In this brief, the parties will be referred to as the Petitioner and the Respondent. The symbol "R." designates the record on appeal. The symbol "SR." shall designate the supplemental record on appeal.

The symbol "T1." will indicate the transcript of proceedings on April 17, 1989.

The symbol "T2." will indicate the transcript of proceedings on June 29, 1994.

The symbol "T3." will indicate the transcript of proceedings on June 16, 1995.

The symbol "T4." will indicate the July 26, 1995 hearing on the Petitioner's motion to vacate her sentence.

STATEMENT OF THE CASE AND FACTS

The State, on May 16, 1988, filed an information charging the Petitioner for Aid to Families with Dependent Children (AFDC) Fraud and Food Stamp Fraud in violation of § 409.325 of the Florida Statutes. (R. 1-2). The Petitioner was arraigned on March 21, 1989, and trial was set for April 17, 1989, before the Honorable Alfonso C. Sepe. (T1. 3). After the Petitioner pled nolo contendere to the charges, the court withheld adjudication and sentenced the Petitioner to two (2) years of probation with the special condition that she make restitution in the amount of $3,748. (R. 10).

On October 16, 1990, the first of several Affidavits of Violation of Probation was filed against the Petitioner. (R. 17-18). On May 2, 1991, an Order of Modification of Probation was filed, extending the Petitioner's probation period an additional two years to May 2, 1993. (R. 26-27).

On April 30, 1993, a second Affidavit of Violation of Probation was filed against the Petitioner. (R. 28). On June 17, 1993, the Petitioner admitted to violating her probation and her

probation was extended an additional year to June 17, 1994. (R. 4-5).

On June 13, 1994, a third Affidavit of Violation of Probation was filed against the Petitioner. (R. 32). On June 29, 1994, the Petitioner stipulated to the extension of her probationary period for an additional year up to June 29, 1995. (T2. 3-5).

On September 22, 1994, this Court decided the case of State v. Summers, 642 So. 2d 742 (Fla. 1994).

On June 9, 1995, a fourth Affidavit of Violation of Probation was filed against the Petitioner showing her to be in arrears in the amount of $2,768.32. (R. 35). An amended Affidavit of Violation of Probation showing an arrearage of $1,810.02 was filed on July 5, 1995. (R. 38). At that point a hearing was held before the Honorable Bernard Shapiro. (T3. 4-33). The Petitioner was found guilty of violating her probation and the trial court sentenced her to ninety (90) days in the Dade County Jail, revoked her probation, and entered an order of restitution in the amount of $1,810.02. (T3. 33). The Petitioner filed a motion to vacate sentence on September 26, 1995, claiming relief under State v.

Summers. (R. 47-49). The motion was denied. (T4. 42).

The Defendant filed a timely notice of appeal. (R. 50). The Third District affirmed the trial court's decision. Francois v. State, 21 Fla. L. Weekly D1552 (Fla. 3d DCA July 3, 1996)(Appendix B). The court stated that their decision concerning the calculation of credit time for probation conflicted with the Fourth and Fifth District Courts of Appeal. Id. at D1552. The Petitioner, on July 17, 1996, filed a notice to invoke discretionary jurisdiction with this Court. This Court, on July 23, 1996, entered an Order Postponing Decision on Jurisdiction, and set a briefing schedule on the merits.

QUESTIONS PRESENTED

I.

WHETHER PROBATIONERS SHOULD BE GIVEN CREDIT TIME TOWARDS NEWLY-IMPOSED PROBATIONARY TERMS ONLY FOR THOSE PERIODS THAT THE PROBATIONER HAS SATISFACTORILY COMPLIED WITH THEIR CONDITIONS OF PROBATION.

II.

WHETHER THE PETITIONER IS ESTOPPED FROM CHALLENGING THE LEGALITY OF HER SENTENCE UNDER STATE v. SUMMERS, 642 So. 2d 742 (Fla. 1994) ONCE PETITIONER HAD ACCEPTED THE BENEFITS OF PROBATION AND VIOLATED THE CONDITIONS OF PROBATION.

SUMMARY OF THE ARGUMENT

The Petitioner, on her first point, disagrees with the Third District's method of calculating probationary credit time towards newly-imposed probationary terms for the same offense. The Petitioner contends that she should be given credit for all of the time that elapsed between the imposition of probation and each revocation order, regardless of when she violated the conditions of her probation. The Third District, in Francois v. State, 21 Fla. L. Weekly D1551 (Fla. 3d DCA July 3, 1996), held, and the State agrees, that credit should be granted only for probation satisfactorily completed between the imposition of probation and the time when probation is violated. If the date of the violation cannot be ascertained by the trial court at the revocation hearing, then the probationer is given credit for the period from the imposition of probation to the filing of the affidavit of violation of probation.

It is unnecessary for the Petitioner's case to remanded for a calculation of credit time under Francois due to the fact that the Petitioner has waived her argument under State v. Summers, 642 So. 2d 742 (Fla. 1994), by failing to preserve the issue. The Summers

case was handed down by this Court on September 22, 1994. The Petitioner requested, accepted, and enjoyed probationary terms that ran subsequent to the Summers decision. Only when the Petitioner violated her probation and was sentenced to ninety days in jail did she claim relief under Summers. A probationer cannot accept and enjoy a sentence of probation, and, upon violating probation, complain that the sentence was improperly imposed.

ARGUMENT

I.

CREDIT TIME TOWARDS NEWLY-IMPOSED PROBATIONARY TERMS FOR THE SAME OFFENSE SHOULD BE CALCULATED BASED UPON THOSE PERIODS THAT THE PROBATIONER HAS SATISFACTORILY COMPLIED WITH THEIR CONDITIONS OF PROBATION.

This Court, in State v. Summers, 642 So. 2d 742 (Fla. 1994), held that "upon revocation of probation credit must be given for time previously served on probation toward any newly-imposed probationary term for the same offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense." Id. at 744. The first issue in this Petition involves the calculation of a probationer's credit time towards a newly-imposed probationary term for the same offense.

The Petitioner, on April 17, 1989, pled nolo contendere to Aid to Families with Dependent Children (hereafter AFDC) Fraud and Food Stamp Fraud, a third-degree felony carrying a maximum sentence of five years. (R. 1-2; T1. 14); § 409.325, Fla. Stat. (1989). The original order of two years' probation was issued on the same day.

(R. 10). Affidavits for violation of probation were filed against the Petitioner in 1990 (R. 17-18), 1993 (R. 28), 1994 (R. 32), and 1995 (R. 35, 38). The trial court found that the Petitioner had violated her probation at each instance (R. 26-27; R. 4-5; T2. 3-5; T3. 33), respectively. The trial court extended the Petitioner's probationary period for two years for the first violation (R. 26-27), and one year each for the second and third violations (R. 4-5; T2. 3-5), respectively. At the 1995 revocation hearing (T3. 4-33), the trial court found the Petitioner in violation of her probation, which was revoked, imposed adjudication of guilt, and sentenced the Petitioner to ninety (90) days' incarceration. (T3. 33). A criminal order of restitution was imposed on the Petitioner for the remaining unpaid restitution. (T3. 33). The Petitioner, on her direct appeal to the Third District, argued that her probationary period ran in one unbroken sequence from April 17, 1989, to April 17, 1994, and therefore the trial court lacked jurisdiction over her at the 1995 hearing.

The Third District, in Francois v. State, 21 Fla. L. Weekly D1551 (Fla. 3d DCA July 3, 1996)(Appendix B), properly rejected the Petitioner's computation of credit for the time she had served on probation. The Francois opinion held that the Petitioner was

entitled to credit only for time that she satisfactorily completed during her probation. Id. The Third District, in so holding, stated the proper method for computing credit time towards newly-imposed terms of probation:

> As we see it, this means that no credit should be given for the time periods in which the defendant is in violation of the probation order. Thus, credit for time spent on probation would begin with the date of entry of the probation order, but would cease at the date the court found the probation violation occurred, or if that date cannot be ascertained, then the date of the filing of the affidavit of violation of probation.
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> Id.

The revocation order would relate back to the date that the probation violation occurred. Id. The Third District acknowledged that their method of calculating credit towards newly-imposed terms of probation conflicted with decisions of the Fourth and Fifth Districts. See Hughes v. State, 667 So. 2d 910 (Fla. 4th DCA 1996)(credit should be given from the date of imposition of probation to the date of revocation); Gordon v. State, 649 So. 2d 326 (Fla. 5th DCA 1995)(same).

The Francois court drew an analogy between the calculation of the Petitioner's credit time, and the tolling of credit time for

probationers who have absconded from supervision. The First District, in Ware v. State, 474 So. 2d 332 (Fla. 1st DCA 1985), rev. denied 484 So. 2d 10 (Fla. 1986), held that when a probationer absconds from supervision, his probationary period is tolled. Id. at 333. The defendant in Ware began his probationary period on May 7, 1979. Id. The probationary period was scheduled to end on May 6, 1982. Id. However, an affidavit of violation of probation was filed against the defendant on July 23, 1980, alleging, inter alia, that the defendant had "absconded from supervision, and his present whereabouts are unknown to his probation supervisor." Id. The whereabouts of the defendant became known when, on April 6, 1984 (almost two years after his original probation had expired), he pled guilty to second-degree murder in another county. Id. Thereafter, on May 31, 1984, an amended affidavit of violation of probation was filed against the defendant containing the second-degree charge as well as the charge that the defendant had absconded from supervision. Id. A probation revocation hearing was held on July 13, 1984, at which the defendant admitted to all of the allegations in the amended affidavit and was sentenced by the trial court. Id. The defendant appealed his sentence, alleging that the trial court lacked jurisdiction to entertain the May 31, 1984, amended affidavit of violation of probation. Id.

The issue was whether the defendant's probationary period had expired before the amended affidavit was filed. Id. The court stated:

> It is suggested by the state, and we agree, that whenever a probationer absconds from supervision his probationary period is tolled. We have found no Florida case law directly on point. Although this appears to be a question of first impression in Florida, case law of other jurisdictions, as well as simple logic, indicates that where a probationer "absconds from supervision," the probationary period is tolled until he is once more placed under probationary supervision.
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> Id. at 333-334 (citations omitted).

The Fourth and Fifth District Courts have followed the Ware court's holding that a probationary period is tolled when the probationer absconds from supervision. See Kolovrat v. State, 574 So. 2d 294, 297 (Fla. 5th DCA 1991); Gordon v. State, 649 So. 2d 326, 328 (Fla. 5th DCA 1995); Hughes v. State, 667 So. 2d 910, 912 (Fla. 4th DCA 1996). The Francois court expressed their belief that a failure to satisfactorily meet the conditions of probation should toll the probationary period just as absconding from probation tolls the period. Id. at D1552. The Ware court appealed to "simple logic" in coming to their conclusion that a probationer who absconds from supervision should have his probationary period tolled. Ware, 474 So. 2d at 334. Likewise, simple logic dictates that a probationer

should not be awarded credit time towards subsequent probationary periods once a probationer has violated a condition of probation:

> Upon violation of the probation order in a material way -- especially by commission of a new crime, but also if other material violations occur -- it is to our way of thinking unreasonable to continue to grant the defendant credit for time served on probation, when the defendant is not abiding by the probation conditions.
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> Francois, 21 Fla. L. Weekly at D1552.

When a probationer does not satisfactorily meet the conditions of their probation, the probationer violates a court order. The trial court should be given discretion to award credit time that corresponds with the probationer's compliance or noncompliance with the court's order. Just as a hearing is held to determine whether a probationer's violation was material and substantial, the same hearing should determine the proper credit time based upon satisfactorily completed probation. Credit for time spent on probation would begin with the date of entry of the probation order. Francois, 21 Fla. L. Weekly at D1551; Hughes, 667 So. 2d at 912. If all the conditions of the probation order are satisfactorily completed by the probationer, then the probationary period ends when the probation order expires. However, if the probationer violates a condition of their probation, the

probationary period should be tolled from the date of the violation. Francois, 21 Fla. L. Weekly at 1551. If the trial court cannot ascertain the date on which the probationer violated the conditions of the probation order, then the probationer is given credit for the entire period prior to the filing of the affidavit of violation of probation. Id.

The Petitioner contends that the Francois decision would dissuade probationers from continued compliance with their probation orders. Logic dictates the opposite. The Francois holding would allow trial courts to better pursue the goals of probation. Allowing a probationer credit for time where the rules of probation were not followed certainly does not give the probationer incentive to adhere to the court's order. Calculating credit time under the Francois decision would prevent the Petitioner in the present case from being rewarded for failing to meet the conditions of her probation. The victim in the present case, AFDC, through no fault of their own, would otherwise be forced to seek further legal action to recover the money that was defrauded from them by the Petitioner. The probation system should be "administered so as to create incentives for good behavior and obedience to the conditions of probation." Francois, 21 Fla. L.

Weekly at 1552. Allowing the trial courts to calculate credit time based upon satisfactorily completed probation would serve that end.

Allowing the trial courts to exercise their discretion in computing the amount of credit time a probationer has earned would better serve the goals of probation. The goal of probation in the present case was to ensure that a welfare program recovered money that had been defrauded from them by the Petitioner. The Petitioner was originally given two years to repay AFDC for the defrauded money, but has only repaid approximately one-half of the amount, five years later. (R. 38). The Petitioner now claims that she has satisfactorily met the conditions of her probation, simply because she has managed to "wait out" the five-year statutory maximum for her charge. Additionally, the Petitioner wants some of the restitution money returned to her. (Petitioner's Brief at 14). The Third District's method of computing credit time in Francois would ensure that the Petitioner, as well as any other probationers who are "waiting out" their probation, will satisfactorily complete their probation.

II.

THE PETITIONER IS ESTOPPED FROM CHALLENGING THE LEGALITY OF HER SENTENCE UNDER STATE v. SUMMERS, 642 So. 2d 742 (Fla. 1994) ONCE PETITIONER HAD ACCEPTED THE BENEFITS OF PROBATION AND VIOLATED THE CONDITIONS OF PROBATION.

Assuming that the Third District's method of computing credit time is correct, the Petitioner may not now, for the first time, challenge her sentence under State v. Summers, 642 so. 2d 742 (Fla. 1994). The Third District, in rejecting the Petitioner's contention that Summers applies to her case, analogized the Petitioner's case to this Court's decision in Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107 (Fla. 1980), and the Third District's decision in Whitchard v. State, 459 So. 2d 439 (Fla. 3d DCA 1984).

This Court, in Villery, held that where incarceration was imposed as a condition of probation, the period of incarceration could not exceed one year. Villery, 396 So. 2d at 1111-1112. The Court then addressed the question of how to correct the "illegal" split-sentences that had been imposed prior to Villery. The Court

stated that, at the time of sentencing, "[i]f a condition of probation is found to have been violated, the court may modify or continue the probation and impose any sentence which it might originally have imposed before placing the defendant on probation." Id. at 1112 (citation omitted). The Third District, in a case subsequent to Villery, refused to permit a defendant to accept and enjoy a sentence of probation, and then challenge the sentence as illegal after violating its terms. Whitchard v. State, 459 So. 2d 439 (Fla. 1984).

The defendant in Whitchard was charged in 1978 with manslaughter by operation of a motor vehicle. Id. The defendant was sentenced as part of a negotiated plea bargain to three years of incarceration to be followed by four years probation. Id. This Court's decision in Villery occurred during the defendant's incarceration. Id. The defendant completed the three years incarceration, and was serving his probationary term when he was charged with first-degree murder. Id. The defendant pled guilty to second-degree murder and was sentenced to thirty years imprisonment. Id. The defendant's probation was revoked, and a fifteen-year sentence was imposed to run concurrently with the thirty-year sentence. Id. The defendant appealed, arguing that

his sentence was illegal under this Court's decision in Villery. Id. The Whitchard court found that the defendant had failed to challenge his sentence under the Villery decision while still incarcerated for manslaughter. Id. The court held that the defendant may not accept and enjoy a probationary sentence, and then challenge the sentence after having violated its terms. Id., citing, Preston v. State, 411 So. 2d 297 (Fla. 3d DCA), rev. denied, 418 So. 2d 1280 (Fla. 1982); King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979), cert. denied, 383 So. 2d 1197 (Fla. 1980).

By analogy, the Petitioner in the present case cannot request probation, request additional probation after the Summers case was decided, accept and enjoy probation, and then challenge the legality of her sentence after she violates the terms of her probation. The Petitioner clearly preferred to be sentenced to probation rather than incarceration.[1] The defendant in Whitchard did not raise the Villery case as a defense until he had violated the conditions of his probation. Whitchard, 459 So.2d at 439.

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[1] The Petitioner, at her first hearing on violation of probation, revealed her desire to avoid incarceration: "Yes, sir, whatever it takes that I don't have to go to jail because I don't want to have to go to jail." (T1. 12). Additionally, the Petitioner requested and accepted three extensions of her probationary period. (R. 26-27; R. 4-5; T2. 3-5).

Likewise, the Petitioner in the present case did not raise the Summers case as a defense until after she had violated the conditions of her probation and was sentenced to jail. Accordingly, the Petitioner cannot raise the legality of her probationary term after she has enjoyed the benefit of an extended probation, and after she has violated the terms of her probation.

The Petitioner claims that the trial court lost jurisdiction over her on April 17, 1994 (five years after the original sentencing), and hence the affidavits filed subsequent to that date were untimely. (Petitioner's Brief at 14). However, that argument is dependent upon the Petitioner's calculation of credit time, which is in error. (See Section **I.**, supra). The trial court's jurisdiction over a probationer's term of probation should not cease until the probationer has satisfactorily completed the terms of their probation. The Francois decision will not result in ad infinitum probationary terms, but rather will result in satisfactorily completed probationary terms. The Petitioner, because she agreed to and was benefitted by the imposition of further probation in lieu of incarceration, cannot now raise an untimely defense under this Court's decision in Summers.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Respondent respectfully requests that the decision of the Third District Court of Appeal be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was mailed this 10th day of September, 1996, to Suzanne M. Froix, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

STEVEN GROVES
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,540

ANITA FRANCOIS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

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INDEX TO APPENDIX

APPENDIX	DESCRIPTION
Exhibit A	Slip Opinion, Case 95-2419, July 3, 1996
Exhibit B	Francois v. State, 21 Fla. L. Weekly D1551 (Fla. 3d DCA July 3, 1996)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS was mailed this 10th day of September, 1996, to Suzanne M. Froix, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

Steven Groves

STEVEN GROVES
Assistant Attorney General

EXHIBIT A

95-131685 1/2

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1996

ANITA FRANCOIS a/k/a
ANITA FRANCES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 95-2419

LOWER
TRIBUNAL NO. 88-15910

Opinion filed July 3, 1996.

An appeal from the Circuit Court for Dade County, Jennifer D. Bailey and Bernard S. Shapiro, Judges.

Bennett H. Brummer, Public Defender, and Suzanne M. Froix, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Steven Groves, Assistant Attorney General, for appellee.

Before NESBITT, COPE and FLETCHER, JJ.

COPE, J.

Anita Francois appeals an order revoking her probation and sentencing her to incarceration. The principal questions presented are (1) how to calculate credit for time served on probation, and

(2) how to apply State v. Summers, 642 So. 2d 742 (Fla. 1994), to probation orders imposed prior to the date of the Summers decision.

In 1989 defendant-appellant Francois pled nolo contendere to two counts of public assistance fraud under section 409.325, Florida Statutes, a third degree felony. She was initially placed on two years' probation.[1] In 1990, 1993, 1994, and 1995, affidavits of violation of probation were filed. The trial court found the defendant in violation in each instance. In 1990, 1993, and 1994, the court extended the probationary period. The 1994 extension was specifically accomplished by stipulation of the state and the defendant.

Upon hearing the 1995 revocation proceeding, the trial court found the defendant in violation of her probation for failure to make restitution payments, revoked her probation, imposed adjudication of guilt, and sentenced the defendant to ninety days' incarceration.[2] The court also imposed a criminal order of restitution. Defendant has appealed.

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[1] There was a discrepancy between the written probation order and the trial court's oral pronouncement. The state has demonstrated the existence of a transcription error. The written order is correct.

[2] Defendant has completed her 90-day sentence. However, because the trial court had previously withheld adjudication of guilt, and only adjudicated her guilty of the two felony charges at the time of the 1995 revocation, there is still a live controversy.

I.

In State v. Summers, the Florida Supreme Court held "that upon revocation of probation credit must be given for time previously served on probation toward any newly-imposed probationary term for the same offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense."[3] Id. at 744. Defendant states that she is entitled to credit for all time satisfactorily completed on probation. She asserts that time "satisfactorily completed" includes all time from the date that the probation order was entered, through the date of the order revoking probation. She states that in this case, each order of revocation of probation (except the final one) was accompanied by an order extending the probation date. Consequently, she reasons that her probationary period ran in one unbroken sequence beginning with the original probation order entered April 17, 1989. She calculates, therefore, that her probationary term expired on April 17, 1994. Consequently, under defendant's reasoning, the trial court lost jurisdiction over the defendant on April 17, 1994, and had no jurisdiction to entertain the June 1994 or June 1995 affidavits of violation of probation. See Fellman v. State, 21 Fla. L. Weekly D1183 (Fla. 5th DCA May 14, 1996). She contends, therefore, that the 1995 revocation order now under review must be

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[3] We do not interpret Summers as addressing the question of how to calculate time served on probation, and more particularly, the question whether a defendant is entitled to credit for time served after he or she has violated probation.

reversed.

We disagree with the defendant's method of computing time. In our view the defendant is entitled to credit for time satisfactorily completed on probation. As we see it, this means that no credit should be given for the time periods in which the defendant is in violation of the probation order. Thus, credit for time spent on probation would begin with the date of entry of the probation order, but would cease at the date the court found the probation violation occurred, or if that date cannot be ascertained, then the date of the filing of the affidavit of violation of probation. The order revoking probation relates back to the date that the probation violation occurred.[4]

A probation order contains conditions which are properly viewed as imposing "legal constraint" on the defendant--so long as the conditions are obeyed. Upon violation of the probation order in a material way--especially by commission of a new crime, but also if other material violations occur--it is to our way of thinking unreasonable to continue to grant the defendant credit

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[4] By way of analogy, if the processes of the court have been set in motion to revoke probation prior to the expiration of the probationary period, such as by issuance of an arrest warrant or the filing of an affidavit of violation of probation, that is sufficient to vest the court with jurisdiction to adjudicate the violation even though the probationary period expires before the revocation hearing is held. Carroll v. Cochran, 140 So. 2d 300, 301 (Fla. 1962); Fryson v. State, 559 So. 2d 377, 378 (Fla. 1st DCA 1990). Even though the revocation hearing is held after expiration of the probationary period, the order of revocation is in substance deemed to relate back to the date of initiation of the revocation process.

for time served on probation, when the defendant is not abiding by the probation conditions.

We acknowledge that the Fourth and Fifth Districts follow a contrary rule. As stated in Hughes v. State, 667 So. 2d 910 (Fla. 4th DCA 1996), "[i]n calculating the amount of credit, the court must consider the time served from the date probation was imposed to the date of revocation." Id. at 912 (citation omitted); see also Fellman v. State, 21 Fla. L. Weekly at D1183; Marchessault v. State, 659 So. 2d 1315 (Fla. 4th DCA 1995); Gordon v. State, 649 So. 2d 326, 328 (Fla. 5th DCA 1995). However, no credit will be given if the probationer absconds from supervision. Hughes v. State, 667 So. 2d at 912; Gordon v. State, 649 So. 2d at 328 & n.3; Kolovrat v. State, 574 So. 2d 294, 297 (Fla. 5th DCA 1991). The logic of the Fourth and Fifth District rule appears to be that the defendant remains obliged (at least in theory) to obey the probation order until such time as it has been revoked or the probationary term has expired. To our way of thinking, the fact that the probation order remains outstanding is not a reason to grant the defendant credit if the defendant is not obeying the order. Likewise, we fail to see why one type of violation--absconding from supervision--would cause credit for time served on probation to cease, while allowing probationers guilty of other violations--including commission of new law violations--to continue

to receive credit for probation time served.[5] We certify direct conflict with the Fourth and Fifth District cases just cited.

In sum, we think that probation must be administered so as to create incentives for good behavior and obedience to the conditions of probation. Credit should be withheld for the time period subsequent to the date of violation.[6]

II.

The state contends that regardless of how the time is calculated, the defendant cannot accept the benefits of a probation order and then challenge the legality of the probation order after violation of probation. We agree.

Under the probation statute, upon violation of probation the trial court may revoke probation and impose any sentence allowed by law. § 948.06(1), Fla. Stat. Prior to the decision of Summers in September 1994, it was thought that if the trial court decided to impose a new term of probation, the court could impose any term of probation within the legal maximum, without giving credit for time previously served on probation. See State v. Holmes, 360 So. 2d

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[5] Where a defendant is incarcerated, it makes sense to grant credit for each day of time served unless the defendant has absconded, because there is a substantial deprivation of liberty for each day that the defendant is in custody. The analogy does not hold when applied to the very different circumstances of probation.

[6] Were it not for the analysis in Part II of this opinion, we would remand for calculation of credit for time served. However, for the reasons stated in Part II of this opinion a remand is unnecessary in this case.

380, 383 (Fla. 1978); see also State v. Summers, 642 So. 2d at 743.

In the present case the trial court in 1993 and 1994 entered orders extending the probationary period for an additional year on each occasion. Each one-year extension was less than the five year statutory maximum. Defendant did not appeal the 1993 and 1994 probation orders, and in fact, in 1994 stipulated to the one-year extension.

After the defendant's 1993 and 1994 probation orders were entered, the Florida Supreme Court announced State v. Summers. Defendant did not move to modify her probation order based on Summers. In June, 1995, an affidavit of violation of probation was filed. Defendant again argued for an extension of her probationary period, but the trial court found the defendant to be in violation and imposed ninety days incarceration. After incarceration had been imposed, defendant for the first time raised her argument under State v. Summers that her term of probation should be treated as having expired prior to the filing of the affidavit of violation.

The question presented is how State v. Summers should be applied to otherwise lawful probation orders which were entered prior to September 22, 1994, the date that Summers was decided. We find instructive the approach taken by the Florida Supreme Court in dealing with a comparable issue in Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107 (Fla. 1980). In Villery, the court interpreted another portion of chapter 948, the probation

statute, which authorized trial courts to impose split sentences of incarceration followed by probation. Under Villery-type split sentences, the term of incarceration was imposed as a condition of probation. Often the period of incarceration the defendant was required to serve would last for a number of years.

In Villery, the Florida Supreme Court concluded that where incarceration was imposed as a condition of probation, the incarceration term could not exceed one year. 396 So. 2d at 1111-12. The court held that "incarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid." Id. at 1111. This ruling was held to be retroactive. Id.

The question was then presented about how to deal with Villery-type split sentences which had already been imposed. The court took the position that where the incarceration portion of the split sentence exceeded one year, the sentence was voidable. Forbert v. State, 437 So. 2d 1079, 1080-81 (Fla. 1983); Brod v. State, 437 So. 2d 152, 153 (Fla. 1983); Beech v. State, 436 So. 2d 82, 83-84 (Fla. 1983). Thus, "one who has been given a split sentence probation contrary to the mandate of this [Villery] decision is entitled upon application to have the illegal order corrected." Villery, 396 So. 2d at 1111-12. The Villery decision described in some detail the various resentencing alternatives

which were available to the trial court. Id. at 1112.[7] Insofar as pertinent here, Villery stated that at the time of resentencing, "[i]f a condition of probation is found to have been violated, the court may modify or continue the probation or may revoke the probation and impose any sentence which it might originally have imposed before placing the defendant on probation." Villery, 396 So. 2d at 1112 (citation omitted).

In a post-Villery case analogous to the present one, a defendant completed his incarceration term and violated his post-incarceration probation. Whitchard v. State, 459 So. 2d 439 (Fla. 1984). After being sentenced to incarceration the defendant contended on appeal that his underlying split sentence was illegal in violation of Villery. This court noted that the challenge to the legality of the probation was not raised until after defendant had violated probation. "In similar cases we have held consistently that a guilty defendant may not accept and enjoy a probation, then challenge it as illegal after violating its terms." Id., citing Preston v. State, 411 So. 2d 297 (Fla. 3d DCA), rev. denied, 418 So. 2d 1280 (Fla. 1982); King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979), cert. denied, 383 So. 2d 1197 (Fla. 1980). See

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[7] Essentially the trial court was given the discretion to reduce the probationary term, or resentence the defendant to any lawful sentence subject to certain limitations. Id. In some cases this resulted in the defendant being resentenced to a longer period of incarceration than the term originally imposed. See Forbert v. State, 437 So. 2d at 1080; Brod v. State, 437 So. 2d at 153; Beech v. State, 436 So. 2d at 83.

also Warrington v. State, 660 So. 2d 385 (Fla. 5th DCA 1995); Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991).

We therefore conclude that defendant's challenge to the legality of the probationary term came too late, as it was not raised until after she had enjoyed the benefit of the extended probationary term, and after she had violated probation. Even if she had timely raised the issue of the legality of the probationary term, she only would have been entitled to a resentencing, not to outright discharge.

For the reasons stated, the convictions and sentences are affirmed.

Affirmed; direct conflict certified.

EXHIBIT B

investigation . . . . at the city's zoning department at the suggestion of [the defendant] and he did not rely on her representations.

Dillon-Malik, 151 Ariz. at 454, 728 P.2d at 673.

[7] [E]ven if, arguendo, we assume a fraudulent misrepresentation on the part of the vendor, the undertaking by the Fireisons through their attorney to examine the title and describe the property in the deed defeats their claim that they were deceived to their injury.

Fireison, 520 A.2d at 1051-52.

[8] "If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, * * * and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. * * * The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports, or professes to commence an investigation."

Coyle testified that the trade was under way from September to November, 1925; that he did not have the property surveyed until February following; that he had seen the property two or three times before consummating the purchase; and that he accepted a deed and a title insurance policy in both of which the property is described without specific dimensions—which would strongly favor the defendant's contention that Coyle bought mainly on his own knowledge and information. See 18 C. J. 285; 9 C. J. 226, 227. It could hardly be maintained that this purchase should be rescinded because of any surprise, mistake, misrepresentation, want of freedom, undue influence, falsehood, or suppression of the truth. See Hirschman v. Hodges, O'Hara & Russell Co., supra; Citizens' State Bank v. Jones (Fla.) 131 So. 369.

Hancoy, 101 Fla. at 135-36, 133 So. at 634.

[9] [A]lthough a purchaser of land has a right to rely upon a representation made to him by the seller or his agents, as to the boundaries, without being required to conduct an independent investigation of the land records, once the purchaser assumes the burden of an examination he cannot say that he was deceived to his injury where such examination discloses the correct information.

Ryan, 34 Md. App. at 55, 366 A.2d at 753.

[10] Whether so or not, and whether the appellees knew of the encroachment or not (it not being shown that they had such knowledge) we find that the appellant failed to use the required measure of precaution for the safeguarding of her interest, and that rescission was properly denied. The appellant had before her the opinion of able counsel of her own choosing. The opinion contained a statement of the necessity for a survey in order to determine how the existence of the right of way would affect the property she proposed to purchase.

Lo Frese, 240 F.2d at 282.

[11] French's own agent told him the property was sound and did not mention any frustration of inspection by defendants. This testimony belies plaintiff's allegations of fraud. Defendants do not bear responsibility for Pretzer's alleged failure to notify French that the steel beam's source of support had not been identified. It was Pretzer's responsibility to tell French whether the inspection was satisfactorily completed, not Isham's or Corbin's.

French, 801 F. Supp. at 923.

[12] What [the independent realtor and Nelson's friends] did or did not tell him is of little consequence here. It is the fact that he consulted with them and made a personal examination that removes the credence that otherwise might be given to his allegations of reliance on defendant's representations. (citation omitted)

"If it is established that the representee relied on his own judgment and not on the representor's statements, he cannot recover, even though he was genuinely deceived by the representations and his investigation was of an incomplete or ineffectual nature." 37 C.J.S. Fraud § 37 (1943).

Cook, 844 F. Supp. at 1412-13.

[13] In this case, the buyer had the car inspected and had ample opportunity to discover the defect . . . . "a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence.

David, 656 So. 2d at 953.

* * *

Criminal law—Sentencing—Probation revocation—Credit for time served on probation—Where probation was initially imposed, and probationary period was extended three times upon violations of probation, probationer was not entitled to credit for all time spent on probation upon revocation of probation and sentence of incarceration after fourth violation—Probationer is entitled to credit for time satisfactorily completed on probation—No credit should be given for time periods in which probationer was in violation of probation order—Credit for time spent should begin with date of entry of probation order, but should cease at date court found probation violation occurred, or if that date cannot be ascertained, then the date of filing of affidavit of violation of probation—Conflict certified—Defendant cannot accept benefits of a probation order and then challenge the legality of the probation order after violation of probation

ANITA FRANCOIS a/k/a ANITA FRANCES, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2419. L.T. Case No. 88-15910. Opinion filed July 3, 1996. An appeal from the Circuit Court for Dade County, Jennifer D. Bailey and Bernard S. Shapiro, Judges. Counsel: Bennett H. Brummer, Public Defender, and Suzanne M. Froix, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Steven Groves, Assistant Attorney General, for appellee.

(Before NESBITT, COPE and FLETCHER, JJ.)

(COPE, J.) Anita Francois appeals an order revoking her probation and sentencing her to incarceration. The principal questions presented are (1) how to calculate credit for time served on probation, and (2) how to apply *State v. Summers*, 642 So. 2d 742 (Fla. 1994), to probation orders imposed prior to the date of the *Summers* decision.

In 1989 defendant-appellant Francois pled nolo contendere to two counts of public assistance fraud under section 409.325, Florida Statutes, a third degree felony. She was initially placed on two years' probation.[1] In 1990, 1993, 1994, and 1995, affidavits of violation of probation were filed. The trial court found the defendant in violation in each instance. In 1990, 1993, and 1994, the court extended the probationary period. The 1994 extension was specifically accomplished by stipulation of the state and the defendant.

Upon hearing the 1995 revocation proceeding, the trial court found the defendant in violation of her probation for failure to make restitution payments, revoked her probation, imposed adjudication of guilt, and sentenced the defendant to ninety days' incarceration.[2] The court also imposed a criminal order of restitution. Defendant has appealed.

I.

In *State v. Summers*, the Florida Supreme Court held "that upon revocation of probation credit must be given for time previously served on probation toward any newly-imposed probationary term for the same offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense."[3] *Id.* at 744. Defendant states that she is entitled to credit for all time satisfactorily completed on probation. She asserts that time "satisfactorily completed" includes all time from the date that the probation order was entered, through the date of the order revoking probation. She states that in this case, each order of revocation of probation (except the final one) was accompanied by an order extending the probation date. Consequently, she reasons that her probationary period ran in one unbroken sequence beginning with the original probation order entered April 17, 1989. She calculates, therefore, that her probationary term expired on April 17, 1994. Consequently, under defendant's reasoning, the trial court lost jurisdiction over the defendant on April 17, 1994, and had no jurisdiction to entertain the June 1994 or June 1995 affidavits of violation of probation. *See Fellman v. State*, 21 Fla. L. Weekly D1183 (Fla. 5th DCA May 14, 1996). She contends, therefore, that the 1995 revocation order now under review must be reversed.

We disagree with the defendant's method of computing time. In our view the defendant is entitled to credit for time satisfactorily completed on probation. As we see it, this means that no credit should be given for the time periods in which the defendant is in violation of the probation order. Thus, credit for time spent on probation would begin with the date of entry of the probation order, but would cease at the date the court found the probation violation occurred, or if that date cannot be ascertained, then the date of the filing of the affidavit of violation of probation. The order revoking probation relates back to the date that the probation violation occurred.[4]

A probation order contains conditions which are properly viewed as imposing "legal constraint" on the defendant—so long

as the conditions are obeyed. Upon violation of the probation order in a material way—especially by commission of a new crime, but also if other material violations occur—it is to our way of thinking unreasonable to continue to grant the defendant credit for time served on probation, when the defendant is not abiding by the probation conditions.

We acknowledge that the Fourth and Fifth Districts follow a contrary rule. As stated in *Hughes v. State*, 667 So. 2d 910 (Fla. 4th DCA 1996), "[i]n calculating the amount of credit, the court must consider the time served from the date probation was imposed to the date of revocation." *Id.* at 912 (citation omitted); *see also Fellman v. State*, 21 Fla. L. Weekly at D1183; *Marchessault v. State*, 659 So. 2d 1315 (Fla. 4th DCA 1995); *Gordon v. State*, 649 So. 2d 326, 328 (Fla. 5th DCA 1995). However, no credit will be given if the probationer absconds from supervision. *Hughes v. State*, 667 So. 2d at 912; *Gordon v. State*, 649 So. 2d at 328 & n.3; *Kolovrat v. State*, 574 So. 2d 294, 297 (Fla. 5th DCA 1991). The logic of the Fourth and Fifth District rule appears to be that the defendant remains obliged (at least in theory) to obey the probation order until such time as it has been revoked or the probationary term has expired. To our way of thinking, the fact that the probation order remains outstanding is not a reason to grant the defendant credit if the defendant is not obeying the order. Likewise, we fail to see why one type of violation—absconding from supervision—would cause credit for time served on probation to cease, while allowing probationers guilty of other violations—including commission of new law violations—to continue to receive credit for probation time served.[5] We certify direct conflict with the Fourth and Fifth District cases just cited.

In sum, we think that probation must be administered so as to create incentives for good behavior and obedience to the conditions of probation. Credit should be withheld for the time period subsequent to the date of violation.[6]

II.

The state contends that regardless of how the time is calculated, the defendant cannot accept the benefits of a probation order and then challenge the legality of the probation order after violation of probation. We agree.

Under the probation statute, upon violation of probation the trial court may revoke probation and impose any sentence allowed by law. § 948.06(1), Fla. Stat. Prior to the decision of *Summers* in September 1994, it was thought that if the trial court decided to impose a new term of probation, the court could impose any term of probation within the legal maximum, without giving credit for time previously served on probation. *See State v. Holmes*, 360 So. 2d 380, 383 (Fla. 1978); *see also State v. Summers*, 642 So. 2d at 743.

In the present case the trial court in 1993 and 1994 entered orders extending the probationary period for an additional year on each occasion. Each one-year extension was less than the five year statutory maximum. Defendant did not appeal the 1993 and 1994 probation orders, and in fact, in 1994 stipulated to the one-year extension.

After the defendant's 1993 and 1994 probation orders were entered, the Florida Supreme Court announced *State v. Summers*. Defendant did not move to modify her probation order based on *Summers*. In June, 1995, an affidavit of violation of probation was filed. Defendant again argued for an extension of her probationary period, but the trial court found the defendant to be in violation and imposed ninety days incarceration. After incarceration had been imposed, defendant for the first time raised her argument under *State v. Summers* that her term of probation should be treated as having expired prior to the filing of the affidavit of violation.

The question presented is how *State v. Summers* should be applied to otherwise lawful probation orders which were entered prior to September 22, 1994, the date that *Summers* was decided. We find instructive the approach taken by the Florida Supreme Court in dealing with a comparable issue in *Villery v. Florida Parole and Probation Commission*, 396 So. 2d 1107 (Fla. 1980). In *Villery*, the court interpreted another portion of chapter 948, the probation statute, which authorized trial courts to impose split sentences of incarceration followed by probation. Under *Villery*-type split sentences, the term of incarceration was imposed as a condition of probation. Often the period of incarceration the defendant was required to serve would last for a number of years.

In *Villery*, the Florida Supreme Court concluded that where incarceration was imposed as a condition of probation, the incarceration term could not exceed one year. 396 So. 2d at 1111-12. The court held that "incarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid." *Id.* at 1111. This ruling was held to be retroactive. *Id.*

The question was then presented about how to deal with *Villery*-type split sentences which had already been imposed. The court took the position that where the incarceration portion of the split sentence exceeded one year, the sentence was voidable. *Forbert v. State*, 437 So. 2d 1079, 1080-81 (Fla. 1983); *Brod v. State*, 437 So. 2d 152, 153 (Fla. 1983); *Beech v. State*, 436 So. 2d 82, 83-84 (Fla. 1983). Thus, "one who has been given a split sentence probation contrary to the mandate of this [*Villery*] decision is entitled upon application to have the illegal order corrected." *Villery*, 396 So. 2d at 1111-12. The *Villery* decision described in some detail the various resentencing alternatives which were available to the trial court. *Id.* at 1112.[7] Insofar as pertinent here, *Villery* stated that at the time of resentencing, "[i]f a condition of probation is found to have been violated, the court may modify or continue the probation or may revoke the probation and impose any sentence which it might originally have imposed before placing the defendant on probation." *Villery*, 396 So. 2d at 1112 (citation omitted).

In a post-*Villery* case analogous to the present one, a defendant completed his incarceration term and violated his post-incarceration probation. *Whitchard v. State*, 459 So. 2d 439 (Fla. 1984). After being sentenced to incarceration the defendant contended on appeal that his underlying split sentence was illegal in violation of *Villery*. This court noted that the challenge to the legality of the probation was not raised until after defendant had violated probation. "In similar cases we have held consistently that a guilty defendant may not accept and enjoy a probation, then challenge it as illegal after violating its terms." *Id.*, citing *Preston v. State*, 411 So. 2d 297 (Fla. 3d DCA), *rev. denied*, 418 So. 2d 1280 (Fla. 1982); *King v. State*, 373 So. 2d 78 (Fla. 3d DCA 1979), *cert. denied*, 383 So. 2d 1197 (Fla. 1980). *See also Warrington v. State*, 660 So. 2d 385 (Fla. 5th DCA 1995); *Bashlor v. State*, 586 So. 2d 488 (Fla. 1st DCA 1991).

We therefore conclude that defendant's challenge to the legality of the probationary term came too late, as it was not raised until after she had enjoyed the benefit of the extended probationary term, and after she had violated probation. Even if she had timely raised the issue of the legality of the probationary term, she only would have been entitled to a resentencing, not to outright discharge.

For the reasons stated, the convictions and sentences are affirmed.

Affirmed; direct conflict certified.

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[1]There was a discrepancy between the written probation order and the trial court's oral pronouncement. The state has demonstrated the existence of a transcription error. The written order is correct.

[2]Defendant has completed her 90-day sentence. However, because the trial court had previously withheld adjudication of guilt, and only adjudicated her guilty of the two felony charges at the time of the 1995 revocation, there is still a live controversy.

[3]We do not interpret *Summers* as addressing the question of how to calculate time served on probation, and more particularly, the question whether a defendant is entitled to credit for time served after he or she has violated probation.

[4]By way of analogy, if the processes of the court have been set in motion to revoke probation prior to the expiration of the probationary period, such as by

issuance of an arrest warrant or the filing of an affidavit of violation of probation, that is sufficient to vest the court with jurisdiction to adjudicate the violation even though the probationary period expires before the revocation hearing is held. *Carroll v. Cochran*, 140 So. 2d 300, 301 (Fla. 1962); *Fryson v. State*, 559 So. 2d 377, 378 (Fla. 1st DCA 1990). Even though the revocation hearing is held after expiration of the probationary period, the order of revocation is in substance deemed to relate back to the date of initiation of the revocation process.

[5]Where a defendant is incarcerated, it makes sense to grant credit for each day of time served unless the defendant has absconded, because there is a substantial deprivation of liberty for each day that the defendant is in custody. The analogy does not hold when applied to the very different circumstances of probation.

[6]Were it not for the analysis in Part II of this opinion, we would remand for calculation of credit for time served. However, for the reasons stated in Part II of this opinion a remand is unnecessary in this case.

[7]Essentially the trial court was given the discretion to reduce the probationary term, or resentence the defendant to any lawful sentence subject to certain limitations. *Id.* In some cases this resulted in the defendant being resentenced to a longer period of incarceration than the term originally imposed. *See Forbert v. State*, 437 So. 2d at 1080; *Brod v. State*, 437 So. 2d at 153; *Beech v. State*, 436 So. 2d at 83.

* * *

Criminal law—Jurors—Challenge—No error in disallowance of black defendant's challenge of Hispanic juror—No error in allowance of prosecution challenge of black juror who had previously been arrested and jailed

CALVIN BARR, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2520. L.T. Case No. 95-862. Opinion filed July 3, 1996. An Appeal from the Circuit Court for Dade County, Michael Genden, Judge. Counsel: Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General and Consuelo Maingot, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., and GODERICH and FLETCHER, JJ.)

(PER CURIAM.) We find no error in the trial court's disallowance of the black defendant's challenge to a Hispanic juror, *Jackson v. State*, __ So. 2d __ (Fla. 3d DCA Case no. 95-1382, opinion filed, June 26, 1996), or its allowance of a prosecution challenge to a black juror who had previously been arrested and jailed. *Martinez v. State*, 664 So. 2d 1034 (Fla. 4th DCA 1995); *Wilkins v. State*, 659 So. 2d 1273 (Fla. 4th DCA 1995); *Miller v. State*, 605 So. 2d 492 (Fla. 3d DCA 1992), *review denied*, 613 So. 2d 7 (Fla. 1993); *Knight v. State*, 559 So. 2d 327 (Fla. 1st DCA 1990), *review denied*, 574 So. 2d 141 (Fla. 1990).

Affirmed.

* * *

Torts—Legal malpractice—Error to grant defendants' motion for summary judgment and to deny plaintiffs' motion for rehearing where defendants failed to meet burden of showing absence of any genuine issue of material fact

JOSEPH C. ROMANS, individually and as Personal Representative of the ESTATE OF NORA M. SAMPERA ROMANS, Deceased, on behalf of the said Estate and the SURVIVORS of Nora M. Sampera Romans, Deceased, to wit: JOSEPH C. ROMANS and JOSEPH C. ROMANS, JR., Appellants, v. KEITH HAYMES, WILLIAM RANDALL JONES, III and CARROLL, HALBERG, KLITZNER & JONES, P.A., Appellees. 3rd District. Case No. 95-2083. L.T. Case No. 92-26715. Opinion filed July 3, 1996. An Appeal from the Circuit Court of Dade County, Philip Bloom and Margarita Esquiroz, Judges. Counsel: Peter Ticktin (Boca Raton), for appellants. Bush & Derr, Kenneth L. Baker and K. Stuart Goldberg (Orlando); De La Cruz & Cutler, for appellees.

(Before SCHWARTZ, C.J., GODERICH and FLETCHER, JJ.)

(PER CURIAM.) In the underlying suit for legal malpractice, we find that the trial court erred by granting the defendants' motion for summary judgment and by denying the plaintiffs' motion for rehearing where the defendants, as the movants on the motion for summary judgment, failed to meet their burden of showing the absence of any genuine issue of material fact. Fla. R. Civ. P. 1.510(c); *Morgan v. Growers Mktg. Serv., Inc.*, 370 So. 3d 74 (Fla. 3d DCA 1979). A review of the record shows that a genuine issue of material fact remained as to whether Dr. Pullias, one of the physicians that fell below the standard of care, was employed by HIP Network of Florida, Inc. thereby creating the possibility of liability under the doctrine of respondeat superior.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

* * *

ALEX QUILES, etc., Appellant, v. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, etc., Appellee. 3rd District. Case No. 95-2697. L.T. Case No. 94-15826. Opinion filed July 3, 1996. An appeal from the Circuit Court of Dade County, D. Bruce Levy, Judge. Counsel: Alex Quiles, in proper person. Robin H. Greene, for appellee.

(Before SCHWARTZ, C.J., GODERICH, and FLETCHER, JJ.)

(PER CURIAM.) Affirmed. The decision appealed is summarily affirmed pursuant to Rule 9.315(a), Florida Rules of Appellate Procedure. *See Jimenez v. Department of Health & Rehabilitative Servs.*, 669 So. 2d 340 (Fla. 3d DCA 1996).

* * *

Criminal law—Sentencing—Error to impose habitual offender sentence on conviction for possession of cocaine

LIONEL PEREZ, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-3229. L.T. Case No. 95-9737. Opinion filed July 3, 1996. An appeal from the Circuit Court of Dade County, Lauren L. Miller, Judge. Counsel: Bennett H. Brummer, Public Defender, and Kenneth P. Speiller, Special Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., and GODERICH and FLETCHER, JJ.)

(PER CURIAM.) Defendant Lionel Perez appeals his convictions for sale of cocaine and possession of cocaine, as well as his sentencing as an habitual offender on the possession conviction. We affirm the convictions on both charges but reverse the sentence on the possession conviction as section 775.084(1)(a)(3), Florida Statutes (1995), does not permit habitualization therefor (as conceded by the State). *Perez v. State*, 647 So. 2d 1007 (Fla. 3d DCA 1994).

The habitual offender sentence for possession is reversed and remanded for resentencing thereon within the sentencing guidelines. The convictions, and the habitual offender sentence for sale of cocaine, shall remain undisturbed.

* * *

Real property—Quiet title—Trial court order to be clarified to indicate that seller is required to pursue quiet title action in good faith, and to indicate that if seller does not prevail in action to quiet title, buyer then has option of either receiving return of deposit or accepting title to property subject to easement

ENRIQUE CASTILLO, Appellant, v. VITOR WEINMAN, Appellee. 3rd District. Case No. 95-3232. L.T. Case No. 93-1352. Opinion filed July 3, 1996. An Appeal from the Circuit Court for Dade County, Arthur Rothenberg, Judge. Counsel: A.J. Barranco & Associates, Sam Daniels and Robert F. Kohlman, for appellant. Stickney & Sutter, Timothy P. Stickney and Howard T. Sutter; Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, Eugene E. Stearns and Bradford Swing, for appellee.

(Before SCHWARTZ, C.J., GODERICH and FLETCHER, JJ.)

(PER CURIAM.) We affirm the order under review, but remand for clarification. Specifically, the trial court's order should clearly indicate that the seller is required to pursue the action to quiet title in good faith. The order should also indicate that if the seller does not prevail in the action to quiet title, the buyer then has the option of either receiving a return of his deposit or accepting title to the property subject to the easement.

Affirmed and remanded with directions.

* * *