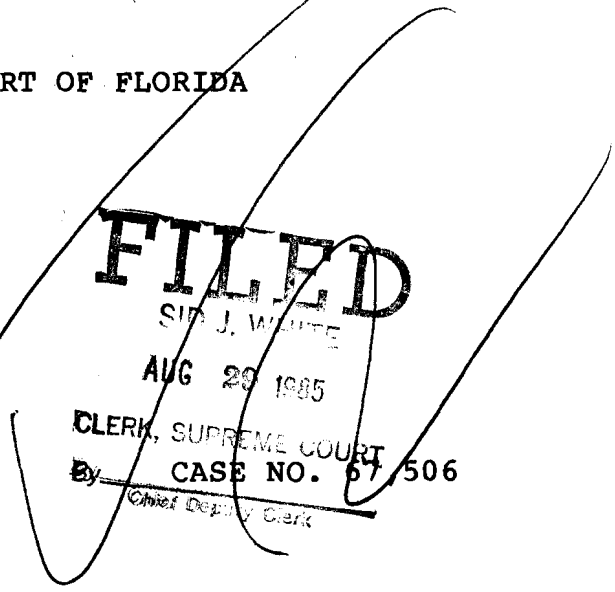
IN THE SUPREME COURT OF FLORIDA



MARTIN FRANCIS McGARRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,506

PETITIONER'S BRIEF ON JURISDICTION

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AUTHORITIES CITED

PRELIMINARY STATEMENT

The petitioner, MARTIN FRANCIS McGARRY, was the defendant in the trial court, and he was the appellant in the Fourth District Court of Appeal. He will be referred to as petitioner and by name in this brief.

This brief is accompanied by an appendix containing conformed copies of those portions of the record deemed necessary to show jurisdiction in this Court. References to the appendix will be by the symbol "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner McGarry was charged in the circuit court of the Fifteenth Judicial Circuit with numerous felony and misdemeanor charges of issuing worthless checks. On October 28, 1983, McGarry, accompanied by counsel, entered pleas of guilty to 16 felony counts and to one misdemeanor count, subject to the following agreement concerning the sentence to be imposed:

If McGarry was able to make full restitution by the time of the sentencing date, set for January 3, 1984, he would receive probation with the condition that he serve a term of 364 days in the county jail, and would be eligible for work release after serving five months.

If McGarry failed to make full restitution by the sentencing date the trial court would impose a sentence of three years imprisonment on the charges, concurrently, and would impose a 364 day concurrent sentence on the misdemeanor count.

If McGarry failed to appear in court on the sentencing date, he would receive consecutive sentences.

McGarry failed to appear on the sentencing date, and at the subsequently held sentencing hearing a sentence of 49 years imprisonment was imposed, consisting of three year consecutive terms for each of the 16 felony counts and a one year consecutive misdemeanor sentence on the misdemeanor count.

McGarry timely took a consolidated appeal to the Fourth District Court of Appeal wherein he argued that the consecutive sentences totaling 49 years were illegal because he was being

punished by a 46 year sentence for failure to appear, which was a subsequent and separate offense from the ones he was being sentenced for having committed. The Fourth District Court of Appeal issued an opinion affirming in which the district court strongly disapproved of the plea arrangement, but affirmed on the premise that the sentence was lawful and had been voluntarily agreed to at the time of the plea entry. A motion for rehearing was timely filed which was denied on July 2, 1985.

Notice of review was timely filed asserting direct and express conflict of decisions on the question whether the sentence in this cause was a lawful sentence.

SUMMARY OF ARGUMENT

The petitioner received a sentence of 49 years, instead of three years, solely because he failed to appear at the sentencing hearing. The Legislature has provided a maximum term of five years for a failure to appear. Thus, the term imposed on petitioner is excessive since the record shows that the failure to appear, and not the bad check crimes, was being punished by the 46 additional years.

The decision below affirming this kind of sentence conflicts with the ruling in Moore v. State, 339 So.2d 228 (Fla. 2d DCA 1976), holding that a sentence conditioned on future conduct should be by way of probation. The decision below also is in direct and express conflict with Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984), holding that a court may not impose a greater sentence because of the court's view that the defendant committed some other crime which has not been charged.

ARGUMENT

WHETHER THE DECISION BELOW AFFIRMING CONSECUTIVE SENTENCES OF 46 YEARS FOR PETITIONER'S FAILURE TO APPEAR AT SENTENCING, DESPITE ITS INCLUSION IN THE PLEA AGREEMENT, CONSTITUTES AN UNLAWFUL SENTENCE BECAUSE IT PUNISHES THE PETITIONER FOR A CRIME FOR WHICH HE HAD NOT BEEN CONVICTED AND WHICH OCCURRED SUBSEQUENT TO THE PLEA ENTRY HEARING?

Petitioner premises his argument that the decision below directly and expressly conflicts with other appellate court decisions on the following established points of law. A plea agreement cannot validly contemplate punishment beyond the lawful limits set by the legislature for the offenses being punished. Prunty v. State, 360 So.2d 147 (Fla. 1st DCA 1978); Smith v. State, 358 So.2d 1164 (Fla. 2d DCA 1978), and Robbins v. State, 413 So.2d 840 (Fla. 3d DCA 1982).

It is also established that a violation of Section 843.15, Florida Statutes (1981), failure to appear at a court hearing, constitutes a single offense regardless of the number of separate cases set for hearing when the failure to appear is at a single court hearing. Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982), and McGee v. State, 438 So.2d 127 (Fla. 1st DCA 1983). Thus, the petitioner's failure to appear at the single sentencing hearing for the consolidated counts constituted a single violation of Section 843.15, Florida Statutes, which carries a maximum term of imprisonment of five years.

Based upon the above established precedents, McGarry submits that the decision below directly and expressly conflicts with the

decision of the Second District Court of Appeal in Moore v. State, 339 So.2d 228 (Fla. 2d DCA 1976), which held that when a trial court takes a plea premised in part on future conduct that the appropriate procedure is to put the defendant on probation and, upon a violation of the condition, to revoke the probation for a proven violation thereof.

In the present case the district court of appeal approved a procedure at odds with the express holding in Moore. Although the petitioner agreed to the potential imposition of a term of 46 years imprisonment for a single failure to appear, such sentence based exclusively on the fact of the failure to appear constitutes an excessive sentence because the maximum term for the failure to appear is a sentence of five years. Secondly, the trial court conditioned the eventual sentence on the future conduct of the petitioner and, without either the imposition of probation or a proper revocation thereof, imposed a greater penalty for petitioner's failure to comply with the condition.

Thus it is shown that the decision below directly and expressly conflicts with the decision in Moore, thus giving this Court jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution because the decision below expressly and directly conflicts with the decision of another district court of appeal on the same question of law.

Since the record as shown in the appendix to this brief reflects that the sentence in this case which exceeds three years was imposed solely and exclusively for the failure to appear, and

not for the crimes for which McGarry was being sentenced, the sentence includes a valid portion and an invalid portion. When a sentence contains both valid and invalid portions, the valid portion is not subject to modification but the invalid portion is required to be vacated. Pahud v. State, 370 So.2d 66 (Fla. 4th DCA 1979). A sentence which is in whole or in part invalid constitutes a fundamental error. Noble v. State, 353 So.2d 819 (Fla. 1977). Moreover, when a sentence even within lawful limits contains a defined portion imposed for valid reasons and a defined portion which is imposed for invalid reasons, the invalid portion is severable. See Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983).

In light of the above, this Court should exercise its discretionary review jurisdiction to resolve the conflict between the Second and Fourth District Courts of Appeal concerning the procedure and remedy to be used when a sentence such as the one in this case has been imposed, resting in part on a valid premise and in part on an invalid premise. The portion of petitioner's sentence which exceeds three years is invalid because it was imposed solely and exclusively as a result of petitioner's failure to comply with a post plea condition and under the ruling in Moore is an improper method to condition a sentence. Secondly, the portion of the sentence which exceeds eight years is illegal because it exceeds the maximum allowed by the Legislature, of five years imprisonment, for failure to appear when the record of this case shows that the sentence exceeding three years

was imposed for no reason other than petitioner's failure to appear at a single hearing. Accordingly, the district court of appeal erred in affirming the sentence on the basis of petitioner's agreement at the plea hearing to said sentence because, as shown by the cases cited above, a sentence must be within the lawful limits set by the Legislature even when a plea agreement is involved.

The decision below also conflicts with Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984), which held that it was erroneous for a court to sentence a defendant to a greater sentence because the trial court believed he suborned perjury at his trial by inducing witnesses to falsely testify. Since he had not been charged, tried or convicted of such a crime, the trial court was in error in punishing him by a harsher sentence of imprisonment for the crime the court supposed he committed but for which he had not been convicted.

CONCLUSION

Wherefore, the decision below directly and expressly conflicts with the decision in Moore v. State, supra and Hubler v. State, supra, giving this Court review jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to LEE ROSENTHAL, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 28th day of August, 1985.

LOUIS G. CARRES
Assistant Public Defender