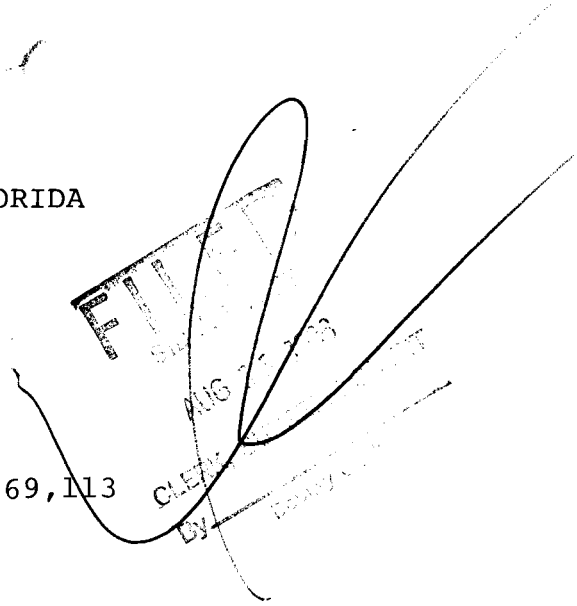
IN THE SUPREME COURT OF FLORIDA

ROBERT LEE McDOWELL,	)	
	)	
Defendant/Petitioner,	)	
	)	
vs.	)	CASE NO. 69,113
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff/Respondent.	)	
	)	



PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

In the decision sought to be reviewed the Fifth District Court of Appeal certified a question to be of great public importance pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v). Discretionary jurisdiction exists for this Court to review the decision. Article V, Section 3(b)(4), Florida Constitution (1976).

Petitioner respectfully submits that jurisdiction also exists for this Court to review the other points of law presented in this brief.

> [O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court.

Savoie v. State, 422 So.2d 308, 310 (Fla. 1982).

STATEMENT OF THE CASE AND FACTS

ROBERT LEE MCDOWELL (hereafter McDowell) hit an acquaintance (hereafter Blankenbeckler) over the head with a bottle (R80-81). McDowell later took money and property worth more than $100.00 from Blankenbeckler (R81-82). McDowell was apprehended when an accomplice attempted to pawn some of the stolen property (R149-152).

McDowell was found guilty of robbery with a weapon, battery, and dealing in stolen property following a jury trial in the Circuit Court for Marion County, the Honorable Hale Stancil presiding (R464-466, Appendix "B"). [1/] He was adjudicated guilty of robbery with a deadly weapon, battery, and dealing in stolen property (R479, Appendix "C").

McDowell appealed his convictions and sentences to the Fifth District Court of Appeal, raising the following errors:

> 1). Incorrect judgment because it fails to conform to verdict returned by jury.
>
> 2). Incorrect sentencing because scoresheet incorrectly recommended wrong cell/sanction due to use of erroneous crime reflected on judgment to compute recommended sanction.
>
> 3). Improper robbery conviction because trial court refused a timely request to charge the jury on (grand) larceny as a necessarily lesser included offense of robbery.

1/ (R) refers to the record on appeal in the instant cause, Fifth DCA Case No. 85-1507, Sup. Ct. Case No.

4). Improper considerations employed by the court in sentencing the defendant.

5). Improper imposition of statutory court costs over objection.

(Initial Brief of Appellant, see Appendix "H").

On July 17, 1986 the Fifth District Court of Appeal rendered a decision and opinion addressing solely the issues of court costs and improper reasons for departure. McDowell v. State, 11 FLW 1572 (Fla. 5th DCA July 17, 1986)(Appendix "A"). In vacating the statutory court costs, the court certified as a question of great public importance the following question pursuant to Fla.R.App.P. 9.030(a)(2)(a)(v), as it had in Yost v. State, 11 FLW 1175 (Fla. 5th DCA May 22, 1986).

> DOES THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTES (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATE THE EX POST FACTO PROVISIONS OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF FLORIDA, OR DOES THE STATUTE MERELY EFFECT A PROCEDURAL CHANGE AS IS PERMITTED UNDER STATE V. JACKSON, 478 So.2d 1054 (Fla. 1985)?

A timely Notice to Invoke Discretionary Review was filed by McDowell on July 28, 1986.

SUMMARY OF ARGUMENTS

POINT I: The imposition of $200.00 court cost or a term of community service in lieu thereof constitutes ex post facto legislation when the provision is assessed for crimes occurring prior to the effective date of the legislation, because the legislation is being applied retrospectively and it disadvantages the offender.

POINT II: The judgment is facially incorrect because it reflects that the defendant was convicted of a crime different and more severe than was determined by the jury. This Court should address the error that was neglected by the district court of appeal because the unlawful Judgment otherwise arguably becomes the law of the case.

POINT III: Defense counsel here timely requested an instruction on theft as a necessarily lesser included offense of robbery. Caselaw from this Court clearly establishes that under the facts of this case per se reversible error has occurred as a matter of "fundamental trial fairness." This Court should reverse the robbery conviction and remand for retrial in the sound exercise of its discretionary jurisdiction, and clarify this issue for the edification of the district courts of appeal.

POINT IV: The defendant was sentenced to the least possible term of imprisonment that could be imposed in conformity with the recommended guideline sanction. Because the recommended sanction

was one cell too high, the sentence imposed in reliance thereon was improper. The defendant was prejudiced because to have received less imprisonment than that recommended by the guidelines a downward departure would have been necessary. The Fifth District Court of Appeal is confused when it allows an improper sanction to obtain "because it could have been imposed" had the correct recommended sanction been reflected. This Court, in the sound exercise of its discretionary jurisdiction, should disapprove of the rationale of the Fifth District Court of Appeal and require resentencing with a correct scoresheet.

ISSUE I

WHETHER SECTION 27.3455 FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED?

In pertinent part, §27.3455(1) Fla.Stat. (1985) provides:

> When any person pleads guilty or nolo contendere to, or is found guilty of, any felony, misdemeanor, or criminal traffic offense under the laws of this state or the violation of any municipal or county ordinance which adopts by reference any misdemeanor under state law, there shall be imposed as a cost in the case, in addition to any other cost required to be imposed by law, a sum in accordance with the following schedule:
>
> (a) Felonies.....$200.
> (b) Misdemeanors.....$ 50.
> (c) Criminal traffic offense...$ 50.
>
> * * * All applicable fees and court costs shall be paid in full prior to the granting of any gain-time accrued. However, the court shall sentence those persons whom it determines to be indigent to a term of community service in lieu of the cost prescribed in this section, and such indigent persons shall be eligible to accrue gain-time and shall serve the term of community service at the termination of incarceration. Each hour of community service shall be credited against the additional cost imposed by the court at a rate equivalent to the minimum wage. The governing body of a county shall supervise the community service program. The court shall retain jurisdiction for the purpose of determining, upon motion, whether a person is indigent for the purpose of this section. . . .

§27.3455 Fla.Stat. (1985)(emphasis added).

Application of the provisions of this statute to the defendant in this case constitutes a violation of Article 1,

Section 9 of the United States Constitution. "The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposed a punishment for an act which was not punishable at the time it was committed; or imposed additional punishment to that then prescribed.' (citations omitted)." Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17, 22 (1981)(footnote omitted).

> [T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

IBID at 29, 67 L.Ed.2d at 23.

In this case, §27.3455 Fla.Stat. (1985) is being applied retrospectively, that is, it is applied to an offense that occurred February 8, 1985, prior to the enactment of the statute [July 1, 1985]. This statute disadvantages the offender by requiring that he pay in full a "court cost", the amount of which is determined by the nature of the offense, "prior to the granting of any gain time accrued."

The granting of statutory gain time is otherwise mandatory pursuant to §944.275 Fla.Stat. (1983). "As a means of encouraging satisfactory behavior, the department shall grant basic gain time at the rate of 10 days for each month of each sentence imposed on a prisoner[.]" §944.275(4)(a) Fla.Stat.

If a defendant is indigent, §27.3455 requires the imposition of a term of community service "in lieu of" the costs. The same ex post facto considerations that forbid assessment of monetary cost apply to assessment of community service on

indigents in that retrospective application of a penal statute disadvantages the offender. As applied to indigents, the automatic conversion of the payment of cost to a term of community service violates equal protection and due process requirements. Tate v. Short, 401 U.S. 395, 91 S.Ct. 668,28 L.Ed.2d 130 (1971); Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); Jenkins v. State, 444 So.2d 947, 950 (Fla. 1984). While the state is entitled to recoupment, it cannot rely on mandatory provisions which strip from indigent defendants the array of protections afforded civil judgment debtors. Compare James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) to Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

It is respectfully submitted that application of this statute to the defendant constitutes ex post facto legislature. Accordingly, this Court is asked to affirm the decision of the Fifth District Court of Appeal in this case.

ISSUE II

WHETHER THE JUDGMENT REQUIRES CORRECTION TO CONFORM TO THE VERDICT RENDERED BY THE JURY?

The jury found McDowell to be guilty of robbery with a weapon (R464-466, Appendix "C"). The judgment reflects that McDowell was adjudicated guilty of robbery with a DEADLY weapon, a violation of Section 812.13(2)(a), Florida Statutes (R479, Appendix "D"). The non-conformity between the verdict and the adjudication was raised as the first issue on appeal. Both in the Answer Brief of Appellee and at oral argument the state agreed that the Judgment must conform to the verdict.

The Fifth District Court of Appeal did not address the impropriety of the Judgment in this case (Appendix "A"). The court held "the judgment for costs is reversed and we remand for entry of an order of probation. In all other respects, the judgment is affirmed." McDowell v. State, 11 FLW 1572 (Fla. 5th DCA July 17, 1986)(emphasis added). The erroneous Judgment requires correction, and the directions to the trial court must include a provision to that effect. Diggs v. State, 11 FLW 1545 (Fla. 1st DCA July 15, 1986).

Since this issue was expressly raised on appeal, the erroneous decision and instructions of the Fifth District Court of Appeal become the law of the case unless this Honorable Court, in a conscientious use of its discretion, directs that the erroneous Judgment be modified to conform to the jury verdict.

ISSUE III

WHETHER REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT REFUSED A TIMELY, SPECIFIC REQUEST TO INSTRUCT ON SECOND DEGREE GRAND THEFT AS A NECESSARILY LESSER INCLUDED OFFENSE OF ROBBERY?

At the charge conference defense counsel requested an instruction on grand theft as a necessarily lesser included offense of robbery (R312-315, Appendix "F"). The Information alleged in the robbery count that the property taken was worth in excess of $100.00 (R441, Appendix "B"). The testimony was that in excess of $300 in cash was taken, (R82) as well as camera equipment worth "almost a thousand dollars" (R84)(Appendix "G").

In State v. Abreau, 363 So.2d 1063 (Fla. 1978) this Court stated:

> . . . only the failure to instruct on the next immediate lesser-included offense (one-step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed, [DeLaine v. State, 262 So.2d 655 (Fla. 1972)] continues to have vitality, and reviewing courts may properly find such error to be harmless.

Abreau, supra at 1064 (emphasis added).

In Bruns v. State, 408 So.2d 228 (Fla. 4th DCA 1982) the defendant was convicted of robbery of property having a value of less than $100.00. "[T]here was neither charge nor evidence of property having a value of $100.00 or more. Consequently, petit larceny was the next immediate lesser included offense and the trial court committed reversible error when it failed to instruct on said crime." Bruns, supra at 228. The State sought

review, and this Court approved the decision of the Fourth District Court of Appeal stating:

> Whether the evidence is susceptible of inference by the jury that the defendant is guilty of a lesser offense than that charged is a critical evidentiary matter exclusively within the province of the jury. (Citations omitted). Fundamental trial fairness requires that a defendant being tried for robbery should be permitted to have an instruction on a lesser included offense upon timely request. (citations omitted). Larceny is necessarily included in the crime of robbery. (citation omitted). It is legally impossible to prove robbery without proving larceny, the difference being that robbery has the added element of "force, violence or putting in fear."

State v. Bruns, 429 So.2d 307, 310-311 (Fla. 1983).

Precedent establishes that where the evidence supports an instruction only of petit theft, that is, the property alleged to have been stolen was valued at less than $100.00, the next lesser-included offense of robbery is petit theft. Bruns, supra; Brown v. State, 206 So.2d 377 (Fla. 1968); Jackson v. State, 449 So.2d 411 (Fla. 2d DCA 1984); Hammer v. State, 343 So.2d 856 (Fla. 1st DCA 1976); Miles v. State, 258 So.2d 333 (Fla. 3d DCA 1972)[all of these cases involved robberies with deadly weapons or firearms...that fact makes no distinction to the definition of robbery. See Royal v. State, 11 FLW 274 (Fla. June 26, 1986); Section 812.13, Florida Statutes (1985)]. Conversely, when the only proof is that the property taken was worth in excess of $100.00, the correct instruction is for grand theft. State v. Hudson, 373 So.2d 666 (Fla. 1979). The failure to give an

instruction on larceny as a lesser included offense of robbery, after timely request, is per se reversible error. Bruns, supra.

The allegata and probata in this case overwhelmingly supported an instruction on second degree grand theft. Fundamental trial fairness required that the jury be afforded the opportunity of finding McDowell guilty of the offense most supported by the evidence. Reversible error has occurred in this case, notwithstanding the failure of the District Court of Appeal to address this issue. In light of the apparent confusion of the District Court of Appeal on an issue involving "fundamental trial fairness", this Court is respectfully requested to exercise jurisdiction and to address this issue.

ISSUE IV

WHETHER RESENTENCING IS REQUIRED WHEN A GUIDELINE SENTENCE IS IMPOSED IN CONFORMITY WITH AN INCORRECT RECOMMENDED SANCTION THAT IS ERRONEOUSLY TOO HIGH?

The opinion of the Fifth District Court of Appeal states "Here the correct guideline sentence range was three and one-half to four and one-half years and the sentence imposed was four and one-half years plus fifteen years probation." McDowell, supra at 1572 (emphasis added). The opinion omits that when McDowell was sentenced the recommended sanction reflected on the scoresheet was incorrectly calculated to be one cell too high (R485, Appendix "E").

Had this uncontroverted fact been disclosed in the opinion, the decision would have expressly and directly conflicted with the many cases holding that resentencing is required where ". . . a scoresheet error result[s] in the trial court being misinformed about the guidelines range." Parker v. State, 478 So.2d 823, 824 (Fla. 2d DCA 1985).

When an erroneous sanction is recommended, resentencing is required even where the trial court departs upward. Holder v. State, 470 So.2d 88 (Fla. 1st DCA 1985); Myrick v. State, 461 So.2d 1359 (Fla. 2d DCA 1984). Where, as here, the court imposes the least term of imprisonment that can be imposed in accordance with an erroneously recommended sanction it is impossible to tell if the court would have imposed even less imprisonment had he not erroneously believed that a downward departure would then have been necessary.

In a nutshell, when Judge Stancil sentenced McDowell to 4½ years imprisonment the recommended sanction appeared to be a range of between 4½ to 5½ years imprisonment. The range should have been between 3½ years to 4½ years imprisonment. McDowell is prejudiced because Judge Stancil would have had to have departed downward to sentence McDowell to less than 4½ years imprisonment. The rules require that written reasons be given for a departure, and that departures are to be avoided. Fla.R.Crim.P. 3.701(d)(11). There were no apparent "clear and convincing" reasons to depart downward in this case, and accordingly McDowell could not have been sentenced to less imprisonment than he received. This is not to say, however, that the same sentence would have been imposed had less imprisonment been available without downward departure from the recommended sanction.

The sentences must be vacated and the matter remanded for resentencing, and this Court is respectfully requested to exercise its authority in this case to correct a clear injustice.

CONCLUSION

This Court is respectfully requested to affirm the holding that §27.3455 Fla.Stat. is unconstitutional, and further asked to reverse the robbery conviction for retrial, or, if not, to at least correct the facially incorrect judgment, and to vacate all sentences and to remand the matter for resentencing with a correct guideline scoresheet.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal and mailed to Mr. Robert Lee McDowell, #099530, P.O. Box 699, Sneads, Florida 32460 on this 6th day of August 1986.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER