IN THE SUPREME COURT OF FLORIDA

LONNIE E. POORE,

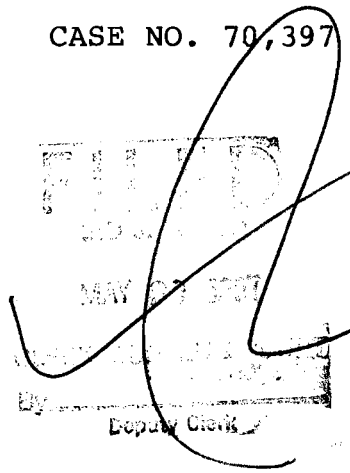
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,397



ANSWER BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

The district court's novel decision that no "resentencing" is required or authorized upon revocation of community control/probation in the youthful offender context does not expressly and directly conflict with any of the decisions cited by the petitioner. Indeed, as specifically noted by the district court majority many of the alleged conflict decisions cited by the petitioner concern themselves only with the applicability of the four and six year limitations formerly contained in Section 958.05(2), Florida Statutes (1983) following revocation of the community control program and did not specifically address the requirement for or propriety of "resentencing" after revocation because counsel in those cases never brought that matter to the attention of those courts and that issue was accordingly never specifically addressed by the appellate tribunals. Similarly, there is no express and direct conflict between the analysis of the district court majority and the sentencing guidelines decisions cited by petitioner because none of those cases address the legal authority or need to "resentence" in the youthful offender/split sentence context.

Obviously, conflict necessarily requires consideration of the same legal question by two different appellate courts resulting in two different determinations. Thus the novel district court decision in this case advancing for the first time the proposition that under the statutes as written "resentencing" is precluded in the true split sentence situation (such as that

provided by the youthful offender case at issue) because once sentence is imposed the trial court has no authority to impose a new second sentence for the same offense conflicts with no other decisional law.

ARGUMENT

THE DISTRICT COURT DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE VARIOUS DECISIONS CITED BY PETITIONER IN THAT THE DETERMINATION AT ISSUE PRESENTS A TOTALLY NOVEL ANALYSIS OF A TRIAL COURT'S LACK OF AUTHORITY TO "RESENTENCE" IN YOUTHFUL OFFENDER AND OTHER TRUE SPLIT SENTENCING SITUATIONS; ALTERNATIVELY, RESPONDENT SUBMITS THAT THIS COURT SHOULD REFUSE TO EXERCISE ITS DISCRETIONARY DETERMINATION IN THAT THIS CASE HAS ALREADY BEEN RENDERED MOOT BY PETITIONER'S SERVICE OF THE ENTIRE SENTENCE ORIGINALLY IMPOSED IN THIS CASE.

The district court majority opinion basically determines that in the context of this youthful offender case and in all true "split sentence" situations, under the statutory language provided, a trial court is without authority to "resentence" a defendant after a violation of probation or community control; rather, under the district court analysis the revocation procedure serves not to resentence the defendant but simply to recommit him to incarceration for the remainder of that part of his original split sentence assigned to community control or probation. Thus, in the context of the youthful offender violation in this case where the sentence provided for two and one half years imprisonment to be followed by two years probation, the petitioner upon revocation of probation could be required to serve only the balance of that sentence (i.e..the probationary portion) as further incarceration. Poore v. State, 503 So.2d 1282,1285 (Fla. 5th DCA 1987). Furthermore, the district court determined that because the defendant had no right

to be sentenced a second time at all he likewise had no right to elect to be sentenced or resentenced under the sentencing guidelines upon a youthful offender sentence first imposed on September 9, 1982. Id.

The petitioner argues that the majority decision expressly and directly conflicts with a line of cases including this Court's decision in Brooks v. State, 478 So.2d 1052 (Fla. 1985), that address the applicability of the four and six year limitations formerly contained in Section 958.05(2), Florida Statutes (1983), following revocation of a community control program.[1] However, as specifcally noted by the district court majority none of those cases address the legal argument raised by the district court majority because it was clear that none of the parties in those cases called to the attention of each particular appellate court the legal analysis utilized by the majority in this case and in turn no ruling upon that issue one way or the other has ever been made by any other appellate court. Poore v. State, supra at 1285-1286. Accordingly, since no other appellate court has apparently ever considered the particular legal reasoning or rejected the ultimate conclusion of the district court majority no express and direct conflict with the decision of any other district court of appeal or with any decision of this court has in fact been demonstrated.

In Jenkins v. State, 385 So.2d 1356 (Fla. 1980) this Court

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[1] See also, Hill v. State, 486 So.2d 1372 (Fla. 1st DCA 1986); Lynch v. State, 491 So.2d 1169 (Fla. 4th DCA 1986); Crosby v. State, 487 So.2d 416 (Fla. 2d DCA 1986).

noted that the constitutional provision[2] authorizing supreme court review of a district court decision that expressly and directly conflicts with the opinion of another district court or the supreme court on the same question of law was intended to make more stringent the standard for "conflict" review so as to properly implement and assure the district court's role as the final appellate court in most instances. No longer will "implied" conflict serve as a basis for the exercise of discretionary jurisdiction; instead, conflict must appear solely from the "four corners" of the majority decision at issue and without reference to a review of the record or the facts presented in a dissenting opinion. Department of Health and Rehabilitative Sevices v. National Adoption Counselling Service, Inc., 498 So.2d 888 (Fla. 1986); Reaves v. State, 485 So.2d 829 (Fla. 1986). The addition of this express conflict requirement was intended to limit this Court's exercise of discretionary jurisdiction to true decisional conflict apparent on the face of the opinions allegedly in disagreement. Here, the novel nature of the district court majority decision and the proper notation by that majority that this particular and specific legal rationale had never been presented to any other state appellate court or utilized as a basis for a decision necessarily serves to preclude a finding of "express and direct" conflict between this decision and any other state appellate court determination on this particular issue of law until it is in fact considered and

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[2]Article V, Section 3(b)(3), Fla. Const..

rejected by another state appellate tribunal.

Similarly, the petitioner's claim that the instant decision expressly and directly conflicts with the sentencing guidelines as adopted by this Court in its rulemaking authority and with the decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), is clearly baseless. Neither of the rules at issue (even if somehow considered decisional law upon which conflict jurisdiction could be based-an assertion with which the state must disagree) do not address either specifically or even tangentially the particular legal conclusion reached by the district court in this case based upon particular statutory language and its applicability to split sentencing in a pre-guideline youthful offender context. Nor does the Jackson decision in any way address the question of a trial court's jurisdictional authority to "resentence" under the constitutional or statutory analysis performed by the district court majority in this case.

Finally, the alleged conflict between the instant decision and that of this Court in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981) is certainly misplaced inasmuch as that case likewise did not address the authority of the trial court to "resentence" raised and determined in this case. Villery concerned itself only with statutory construction vis-a-vis the propriety of utilizing the split sentence alternatives found in Sections 948.01(4) and 948.03(2), Florida Statutes (1979), in light of the parole eligibility constraints of Section 947.16(1), Florida Statutes (1979). Obviously, the Villery Court was not focused into the issue raised in this case

so as to justify a determination of express and direct conflict sufficient to exercise discretionary jurisdiction. This Court's determination that the applicable statutory scheme reflects a legislative intent to maintain the integrity of parole and probation is of no consequence in evaluating the propriety of the district court decision at issue and necessarily provides no conflict jurisdiction.

In summary, none of the decisions raised by the petitioner demonstrates actual express and direct conflict in this case since none in fact even consider, let alone decide, the basic legal issue evaluated and determined by the district court majority. To compare the instant decision to those cited for conflict purposes by the petitioner is like comparing an apple to a number of oranges. Apples and oranges are alike in that they are fruits but they are in many ways different aside from that basic general similarity. Here too, the cases are alike in that they all involve sentencing in some form or another; however, they are also very different and involve various dissimilar sentencing concerns.

Finally, the respondent notes, as did the petitioner below, that the instant cause is in fact moot in that Poore has served his original youth offender sentence as well as the improper "resentence" imposed such that this cause has in fact been rendered moot. Upon that basis the respondent repectfully submits that it would be improvident, aside from the obvious lack of express and direct conflict, to grant discretionary review in this case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this Honorable Court decline to exercise discretionary jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing answer brief on jurisdiction has been furnished by delivery to Brynn Newton, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 18th day of May, 1987.

Sean Daly
COUNSEL FOR RESPONDENT