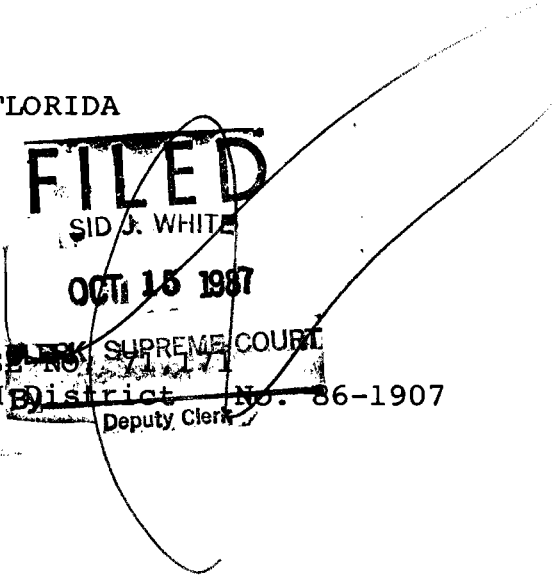
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

JEFFREY R. AVERA,

Respondent.

CASE NO. 71,171
5TH District No. 86-1907

PETITIONER'S INITIAL BRIEF ON THE MERITS

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 PETITIONER

TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The defendant was charged by information with the offense of aggravated battery with a deadly weapon. (R 213) After jury trial he was found and adjudicated guilty of aggravated battery as charged. (R 205, 229) His sentencing guidelines scoresheet recommended a sentence of community control or 12-30 months incarceration in state prison. (R 242-243) The judge did not, however, sentence Avera to prison; instead, the respondent was sentenced to nine months incarceration in the county jail to be followed by 24 months community control and three years probation. (R 244-245)

Avera appealed and his appellate public defender originally filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), noting no basis for reversal. The district court of appeal denied the public defender's motion to withdraw and ordered Avera to submit a supplemental brief addressing the import of the district court's previous decision in Hankey v. State, 505 So.2d 701 (Fla. 5th DCA 1987). After supplemental briefing by the parties the district court of appeal vacated Avera's sentence because it imposed "both community control and imprisonment in contravention of Hankey v. State". On motion for rehearing by the state the district court adhered to its original decision but certified conflict with Francis v. State, 487 So.2d 348 (Fla. 2d DCA), rev. denied, 492 So.2d 1332 (Fla. 1986), and the state then invoked this court's discretionary jurisdiction to review the district court of appeal decision.

SUMMARY OF ARGUMENT

The district court of appeal misconstrued the intent of the sentencing guidelines drafters in limiting the sentencing discretion of the trial court under the second guidelines cell by precluding the "split-sentence" combination of community control and state prison incarceration. The guidelines are not intended to limit sentencing discretion within a sentencing range and trial judges have always been statutorily authorized to combine community control and incarceration such that it should be presumed that such discretion is intended to continue to exist.

Futhermore, the "or" language of the second cell communicates only an intent to allow the sentencer the discretion to utilize alternative sentencing forms not that they necessarily be mutually exclusive.

Finally, the facts of this case demonstrate that no combination of state prison incarceration and community control actually occured such that no violation of the "or" restriction under the second cell (assuming arguendo such a limitation) has been shown. Combination of county jail time (authorized under the first (non-state prison sanction) cell and community control cannot constitute a departure even under the "or" language of the second cell.

ARGUMENT

THE DISTRICT COURT ERRED IN LIMITING A SENTENCING JUDGE'S DISCRETION UNDER THE SECOND SENTENCING GUIDELINES CELL SO AS TO PRECLUDE IN ALL CASES THE COMBINATION OF COMMUNITY CONTROL AND STATE PRISON INCARCERATION WHERE NO SUCH INTENT TO LIMIT SENTENCING DISCRETION OTHERWISE AFFORDED BY THE GUIDELINES IS DEMONSTRATED.

The question to be resolved in this case is one of sentencing discretion and legislative intent. Did the creators of the sentencing guidelines and the legislature which adopted them intend that the community control or 12-30 mos. incarceration language included in the second guidelines cell of each sentencing category under Florida Rule of Criminal Procedure 3.988 make each of the sentencing alternatives under that cell mutually exclusive such that a sentencing judge could not exercise his discretion to combine the two potential penalties?

Under the district court of appeal decision a trial judge may never determine it appropriate to combine community control and state prison time for whatever punitive and/or rehabilitative purposes and impose such a sentence under the second guidelines cell despite the clear choice afforded by that cell to sentence to community control or incarceration for 12-30 months in state prison. In choosing to read the "or" language restrictively the petitioner submits that the district court has clearly undermined the stated intent of the drafters of the guidelines that they are designed "to aid the judge in the sentencing decision and are not intended to usurp judicial discretion..." Fla. R. Crim. P. 3.701(b)(6) In combining community control and the potential for

state prison time in the same guidelines cell it is obvious that the drafters sought to afford sentencers some measure of discretion to appropriately sentence under the circumstances those defendants whose criminal conduct has necessarily demonstrated the need to punish beyond probation or county jail time as authorized under the first guidelines cell, i.e., "any non-state prison sanction". Indeed, Florida Rule of Criminal Procedure 3.701(d)(8) specifically notes that "a sentence range is provided in order to permit some discretion without the requirement of an explanation for departing from the presumptive sentence".

If in fact the guidelines are not intended to usurp judicial discretion especially within a particular sentence range then why would the creators of the sentencing guidelines limit a sentencer's discretion under the second guidelines cell and require him to impose either community control or 12-30 months state prison time without also allowing him to combine these alternative sentencing forms if appropriate under the circumstances, especially since judges have otherwise been specifically afforded that discretionary sentencing authority legislatively both before and after the enactment of the guidelines? See Section 948.01(8), Florida Statutes (Supp. 1986) What if a sentencer was of the opinion that a defendant whose recommended guidelines sentence fell within the second cell was in need of some limited exposure to state prison (as opposed to mere county jail incarceration) to wake him up to the future that could face him if he did not rehabilitate himself, but felt

that extensive supervision for some period beyond this minimal prison exposure was nevertheless necessary to assure the safety of the public? If the second cell is read to allow alternative but not mutually exclusive use of community control in conjunction with state prison incarceration the judge would be free to combine a short twelve month prison term with a period of community control to reach his sentencing goal. Under the district court's limited interpretation the judge would be forced to impose a lengthier prison term in order to assure the more extensive control over the defendant (not provided by mere probation) necessary in the judge's mind to protect the public. How would this then fit in with another stated purpose of the guidelines to limit utilization of state correctional facilities whose capacities are finite? Fla. R. Crim. P. 3.701(b)(7),

The state submits that the simple use of "or" language within the guidelines matrix could hardly serve as adequate and unequivocal legislative intent to overcome the clear authority of trial courts under Section 948.01(8) to impose "split-sentences" of community control and state prison incarceration or to overcome the at least equal intent of the guidelines to protect judicial sentencing discretion especially within a specific guidelines range, e.g., the second cell. Indeed, at least one other district court has specifically rejected the analysis of the "or" provision utilized by the district court in Hankey v. State, 505 So.2d 701 (Fla. 5th DCA 1987), which decision serves as the basis for vacating the instant otherwise proper split-sentence. The district court determination below clearly

conflicts with the legally and logically well founded determination by the Second District Court of Appeal in Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), rev. denied, 492 So.2d 1332 (Fla. 1986), that community control and state prison incarceration under the second cell are not mutually exclusive.

The Francis Court determined that it would be totally unreasonable to find that the second cell provision was not designed to permit the imposition of either or both sanctions and yet permit such imposition in the other cells of the guidelines. Id. at 349. For example, if the defendant had fallen within the third cell of the guidelines allowing two and one-half to three and one-half years state imprisonment, section 948.01(8) would certainly have authorized the trial court judge to combine community control and state imprisonment in a "split-sentence"; why then should it be assumed that the second cell would not authorize a similar "split-sentence" otherwise clearly authorized by statute? Nothing within the guidelines committee notes suggest such a restrictive intent and there is no logical reason to impose such an either/or limitation on sentencing options especially given the stated intent to protect a sentencing judge's discretion. Indeed, the particular sentence fashioned by the judge in this case adequately demonstrates the need and propriety of such flexibility in sentencing in that it allows the trial court to combine punitive and rehabilitative sentencing schemes upon the defendant and yet maintain protection of the community. In fact, it is the defendant who benefits from allowing combination of community control and incarceration in a

"split-sentence" under the second cell for under the rationale of the district court in Hankey should a trial court determine that some sort of custodial control over the defendant in excess of a 24 month period is necessary he must instead impose incarceration for that full period of time because the community control statute authorizes commitment under that program for only a two year period or less. §948.01(5) Fla. Stat. (Supp. 1986) Is it not more reasonable to view the second cell language as authorizing a combination of community control and state prison incarceration so as to allow sentencing courts flexibility even when they determine that the maximum 30 month term authorized by the second cell is appropriate?

It is obvious that community control as a punishment is far less restrictive than state prison incarceration. While community control is not the equivalent of mere probation so as to include it under the first cell "non-state prison sanction" under the guidelines, see, State v. Mestas, 507 So.2d 587, 588 (Fla. 1987); it is also clearly not the equivalent of state prison incarceration and is in comparison much more akin to probation. To hold that community control and state prison incarceration cannot be combined under the second cell necessarily renders that the only cell under the guidelines where no such combination is authorized, a distinction for which the petitioner can discern no legal or logical reason. In addition, it appears clear that the different sentencing ranges under each guidelines matrix (after the first guidelines cell which concerns itself with non-state prison sanctions) are differentiated by

incarceration periods and not by potential sentencing alternatives. Thus, from the second cell on it is clear that the major distinguishing factor is the potential sentencing period - 12-30 months incarceration; two and one-half to three and one-half years incarceration; three and one-half to four and one-half years incarceration; etc., such that the distinction between community control and state prison incarceration was never intended by the guideline drafters to limit combinations of the two penalty forms.

Alternatively, the state notes that although the use of the word "or" in a statute or rule is typically judicially construed in the disjunctive that is not necessarily so where it is necessary in order to conform to clear legislative intent to construe it otherwise. It is the legislative intent that is the determining factor and when employed between two terms which describe different subjects of power the word "or" usually implies discretion when it occurs in a directory provision, and a choice between alternatives when it occurs in a permissive provision. Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927) Certainly, the use of "or" in the limited space of each guidelines matrix was intended to communicate to sentencing judges the availability of these two sentencing alternatives; however, that simple conjunction does not communicate mutual exclusivity, i.e., that only one or the other may be utilized. To the contrary, that meaning is typically and easily communicated through the use of "either ...or..." language which Webster's Third New International Dictionary defines as "an

unavoidable choice or exclusive division between only two alternatives." 1986 edition at page 728. No such language appears in the guidelines to demonstrate an intent to create mutual exclusivity and to thereby usurp judicial sentencing discretion otherwise afforded trial courts and ostensibly protected by the guidelines. Here, the state submits that the "or" language was intended to describe the availability of two sentencing alternatives and not to otherwise limit a sentencing judge in his utilization of either or both of those alternatives as otherwise clearly authorized by statute.

Furthermore, this case is clearly factually distinguishable from Hankey and for that reason, along with those also presented, reversal is required. Here, unlike Hankey, the incarcerative portion of the sentence imposed did not involve state imprisonment for more than twelve months but instead ordered only nine months incarceration in the Orange County Jail. (R 242-243, 244-245) In Hankey the defendant was sentenced to thirty months state prison incarceration followed by three years community control followed by five years probation such that it was clear that the incarcerative portion of the sentence which called for state prison time, fell within the second cell of the guidelines and therefore, under the district court rationale, ran afoul of the "or" provision of that cell. Here, however, the nine month county jail term would in actuality follow within the first cell of the guidelines, i.e., the "any non-state prison sanction". (R 243) As specifically noted by the committee notes to Florida Rule of Criminal Procedure 3.701(b)(8) county jail terms fall

within the first guidelines cell and the "presumptive sentences in the succeeding grids referred to commitments to state prison." Thus, even if the erroneous rationale of Hankey were applied to this case reversal was inappropriate since the incarcerative and probationary portions of the sentence were properly imposed even within the first cell in the guidelines and the addition of the community control provision - clearly proper under the second cell - did not create any guidelines departure. See, Petras v. State, 486 So.2d 45 (Fla. 5th DCA 1986); Burrell v. State, 483 So.2d 479 (Fla. 2d DCA 1986).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectuflly prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

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 PETITIIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above initial brief on the merits has been furnished, by delivery, to James R. Wulchak, Assistant Public Defender, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 13th day of October, 1987.

Sean Daly
Of Counsel