IN THE SUPREME COURT OF FLORIDA

JAMES ALEXANDER CLARK,

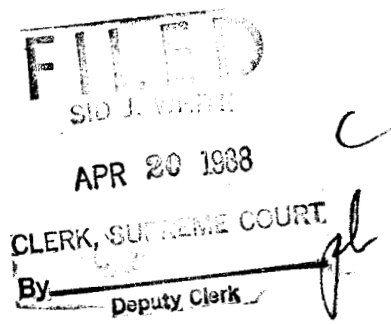
Petitioner,

vs. CASE NO. 72,075

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

A. E. POOSER, IV
ASSISTANT ATTORNEY GENERAL
FLA. BAR #183336

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont'd)

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RESPONDENT'S BRIEF ON THE MERITS

This case consists of two separate cases which were consolidated by the Florida First District Court of Appeal for purposes of resolving the appellate issues. The record in the first, case no. BR-7 (circuit court case no. 86-1126), will be referred to in this brief as "7R", followed by the appropriate page number. The record in the second, case no. BR-8 (circuit court case no. 86-1685), will be referred to herein as "8R", followed by the appropriate page number.

Petitioner's brief will be referred to by the symbol "PB".

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as generally supported by the record. Additional facts deemed relevant to the resolution of the issue herein will be incorporated within the argument part of this responsive brief.

SUMMARY OF ARGUMENT

Petitioner was charged in two separate informations in Alachua County for offenses occurring some five months apart. Both cases were assigned to different trial judges in the same circuit, and both were completed at different times, albeit in the same week. The second case was not pending for sentencing at the time the first case was concluded, and vice versa. Therefore, each trial judge properly used a separate sentencing scoresheet; and, the second sentencing judge was within his statutory authorization to impose a sentence consecutive to that imposed by the first judge.

ARGUMENT

ISSUE

THE QUESTION CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE NEGATIVE.

The District Court has certified the following question pursuant to Fla.R.App.P. 9.030(2)(A)(v):

> Whether it is the trial court's duty to assure that all of a defendant's cases pending in a particular county at the time of that defendant's first sentencing hearing are disposed of using one scoresheet, including deferral of sentencing until all of the pending cases have been adjudicated unless this would cause unreasonable delay or would unduly burden the court or prejudice the defendant?

The question should be answered in the negative upon the facts presented in the record for the following reasons:

First, there is no authorization either by Constitution, statute or rule that requires or permits a trial court to "defer sentencing until all of the pending cases" of a particular criminal defendant have been adjudicated. Indeed, such a defendant is entitled to a prompt pronouncement of sentence. To do otherwise would pervert and emasculate Fla.R.Crim.P. 3.720 which provides in pertinent part that

> As soon as practicable after the determination of guilt and after the examination of any presentence reports the sentencing court shall order a sentencing hearing.

Such a sweeping change in the rules, as would result in an affirmative response to the certified question, must, as stated by this Court in State v. Van Kooten, 13 F.L.W. 238 (Fla. March 31, 1988),

> occur through appropriate legislative and court rule action, rather than by judicial construction.

Secondly, an affirmative response will create more questions than solutions. For how long would the first court have to "defer" sentencing? Here, Petitioner was tried under two separate informations before two different judges during the same week. Suppose the first trial had been held a month earlier! Six months earlier! A year earlier! Would the defendant have to wait until the second case was tried and be found guilty before he could have the benefit of certainty by knowing what sentence would be imposed in the first case? What brightline or litmus test will be promulgated to determine when such "deferral" becomes an "unreasonable delay or would unduly burden the court . . . ?"

Such a test could not be developed, nor does one need to be. Fla.R.Crim.P. 3.701(d)(1) provides in pertinent part that

> [o]ne guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing.

Any ambiguity in the above-stated portion of the rule was resolved in Gallagher v. State, 476 So.2d 754 (Fla. 5th DCA 1985) where the court defined "pending . . . for sentencing" to mean where a

guilty plea, nolo plea, or guilty verdict has been obtained. Accord, Clark v. State, 519 So.2d 1095 (Fla. 1st DCA 1988); Nelson v. State, 498 So.2d 553 (Fla. 4th DCA 1986). Here, the court below in Clark, supra, agreed with the State's contentions that since Petitioner's trial in BR-7 was still in process at the time his sentencing hearing was held in BR-8, then BR-7 was not "pending" and, therefore, a single guidelines scoresheet could not be used for each case. 519 So.2d at 1097.

What troubles the First District Court of Appeal is the fact that the two cases, though before different trial judges, were tried and sentences imposed during the same week. Had the two been tried a year apart, or even a month, this question would not now be before this Court. The mere fact that the two were heard in the same week is a distinction without a difference.

Thirdly, Petitioner urges this Court to approve the result reached in Render v. State, 576 So.2d 1085 (Fla. 2d DCA 1987). There, the defendant was tried on offenses committed while she was on probation. During jury deliberation, the trial court held a probation-revocation hearing, revoked her probation, and sentenced her within the guidelines on the underlying offenses. When the jury returned a guilty verdict on the new charges, the trial judge then imposed a sentence to run consecutive to the one imposed earlier. Although Gallagher had been decided two years prior, the court in Render did not attempt to distinguish or even cite it in the opinion, and remanded the case for resentencing. The decision in Render is wrong! It concerns itself with what it

perceives to be "the spirit of the rule" rather than what the rule itself says. Id., at 1087.

In the alternative, this Court can find that no conflict exists between Render and the case sub judice. The distinguishing feature being that in Render, the Second District Court of Appeal found that the separate sentences were imposed "in combined proceedings." Id., at 1087. Here, the sentences were entirely separate proceedings. The mere fact that the two occurred in the same week was sheer happenstance.

Fourthly, Petitioner did not raise the issue presently before this Court in his direct appeal to the District Court of Appeal, because, obviously, he knew it had not been preserved for review. He did not timely move to consolidate the two informations, thus waiving the right to do so. Fla.R.Crim.P. 3.151(b). Furthermore, during the sentencing proceeding following the first trial, e.g., case no. BR-8 (circuit case no. 86-1685), Petitioner, rather than requesting that Judge Yawn defer sentencing until after the conclusion of the second trial, e.g., case no. BR-7 (circuit case no. 86-1126), instead, advised the court, "And there is no legal basis for not being sentenced at this time." (8R 191)

Then, during the sentencing proceedings in the second case, Petitioner advised Judge Beauchamp that ". . . there's no legal reason or basis that James Clark should not now be sentenced . . ." (7R 142-143). Petitioner did request that Judge Beauchamp, in exercising his discretion, to impose a concurrent sentence to

the one imposed by Judge Yawn (7R 145-146). This was denied, and Judge Beauchamp, pursuant to §921.16, Fla. Stat. (1985), imposed a sentence to run consecutive to the one imposed by Judge Yawn (7R 38-40, 147-148).

While Petitioner was absolutely correct in his statements to both trial courts that there was "no legal basis" for not imposing separate sentences, he, nevertheless, not only failed to object to separate sentencing, he acquiesced in and invited the court to do what he now claims the two trial courts should not have done. As stated in Francois v. Wainwright, 741 F.2d 1275, 1282 (11th Cir. 1984)

> The doctrine of invited error, under which a party cannot complain on appeal of error for which he is responsible, is well established in the Florida courts . . . (and) most clearly applies when appellant affirmatively requests the error, acquiesces therein, or fails to object thereto . . . .

Ergo, even assuming error, Petitioner was responsible for it and cannot now be heard to complain. Spain v. State, 475 So.2d 944, 946 (Fla. 1985); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

Fifthly, the unfortunate choice of the word "manipulate" as used by both Petitioner (PB 6) and the First District Court of Appeal (Clark, 519 So.2d at 1097), cannot go unchallenged.

Regardless of one's reference source, the definitions of

"manipulate" and "manipulation" as used in this case is somewhat less than flattering.[1] There is absolutely no evidence in the record that would even hint that the two trial courts actively participated in or permitted "manipulating the trial and sentencing calendars" so as to prejudice Petitioner. There is no basis for such accusation! Petitioner's trial counsel stated it best, there was "no legal basis" not to impose separate sentences (8R 191; 7R 142-143).

Sixthly, in his supplemental brief to the First District Court, Petitioner, without citing any authority, argued that

> the term "court", as used in Florida Rule of Criminal Procedure 3.701(d)(1), means the trial court, no matter which judge is sitting . . . .

Clark, 519 So.2d at 1096 (footnote omitted). This is wrong! While Respondent agrees that the term "court" as used in the rule means the "trial court," it also means the "trial judge." The terms "trial court" and "trial judge" are interchangeable and mean the same. Indeed, various Justices of this Court have used the terms interchangeably and in the same sentence in no less

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[1] manipulate: "To manage or influence shrewdly or deviously; to falsify or tamper with (financial records) for personal gain." Webster's II, Riverside University Dictionary (1984).

"to control or play upon by artful, unfair, or insidious means, esp. to serve one's own advantage; to change by artful or unfair means so as to serve one's own purpose." Webster's 7th New Collegiate Dictionary (1971).

than five published criminal opinions so far this year.[2] Thus, when the rule uses the term "court", it is referring to the trial judge/trial court before whom a defendant stands for sentencing. Under the rule, then, one guidelines scoresheet is utilized covering all offenses pending before that trial court/trial judge. Here, the only case against Petitioner before Judge Yawn was BR-8; ergo, BR-7, which was before Judge Beauchamp, could not have been "pending" before Judge Yawn regardless of when BR-7 was disposed of. Consequently, even answering the question in the affirmative would not change the result in this case.

_____/

[2] See, e.g., this Court's per curiam opinion in Remeta v. State, 13 F.L.W. 245, 246 (Fla. March 31, 1988), "the trial judge, following the jury's recommendation . . . the trial court also found . . . ."

Justice Kogan's dissent, Justice Barkett concurring, in Ford v. State, 13 F.L.W. 150, 151 (Fla. February 18, 1988), "The majority declares that the trial court's erroneous instructions to the jury were harmless error because the trial judge must have considered . . . ."

Justice Shaw's concurring-in-part and dissenting-in-part opinion in Burch v. State, 13 F.L.W. 152, 153 (Fla. February 18, 1988), "It is not the function of this court to substitute its sentencing judgment for that of the trial judge and, . . . is within the trial court's function."

Justice Erlich's opinion in Jackson v. State, 13 F.L.W. 146, 149 (Fla. February 18, 1988), "Jackson next contends the trial court erred in giving the standard jury instructions concerning the respective roles of the trial judge . . . ."

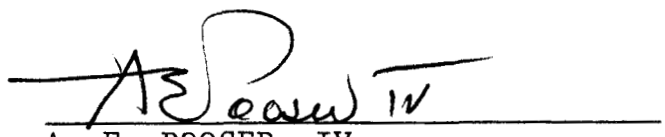
Justice Grimes' opinion in State v. Pettis, 520 So.2d 250, 255 (Fla. 1988, ". . . the trial court dismissed charges on double jeopardy grounds resulting from a prior mistrial where the trial judge had excused himself . . ."

CONCLUSION

Based upon the facts, citations of authority and foregoing argument, Respondent respectfully urges this Court to answer the question certified by the First District Court of Appeal in this cause in the negative and that the sentences imposed in the two separate cases be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



A. E. POOSER, IV
Assistant Attorney General

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David P. Gauldin, Special Assistant Public Defender, Post Office Box 142, Tallahassee, Florida, 32302, on this 20th day of April, 1988.

A. E. POOSER, IV