THE SUPREME COURT OF FLORIDA

CASE NO. 73,841

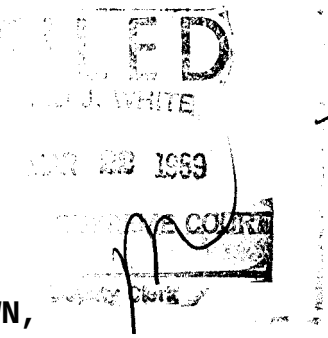
THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES MILES, a/k/a ERROL BROWN,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA,** was the Appellee in the Third District Court of Appeal of Florida and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Respondent, **JAMES MILES, a/k/a ERROL BROWN,** was the Appellant in the Third District Court of Appeal and the defendant in the trial court. The parties will be referred to as they stand before this Court. The symbol **"A"** will be used to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, **JAMES MILES, a/k/a ERROL BROWN,** was sentenced as a youthful offender in the trial court below (A. 1-2). While serving the community control portion of his sentence, Respondent's community control was revoked and the trial court imposed a sentence which exceeded the six-year limitation of Section 958.14, Florida Statutes (1987) (A. 1-2).

On appeal to the Third District, Respondent challenged his sentence and argued that the maximum sentence a court could impose after revocation of a youthful-offender's probation or community control is the six-year limitation

period set forth in the Florida Youthful Offender Act. §958.14, Fla. Stat. (1987). Following a review of this cause, the Third District rendered an opinion in which it agreed with Respondent's position (A. 1-2). In its opinion, the Third District stated the following:

> We align ourselves with the second district, Buckle v. State, 528 So.2d 1285 (Fla. 2d DCA 1988); Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986), and the first district, Watson v. State. 528 So.2d 101 (Fla. 1st DCA 1988); Reams v. State, 528 So.2d 558 (Fla. 1st DCA 1988), in holding that the maximum sentence a court may impose after revocation of a youthful-offender's probation or community control is the six-year limitation period of the statute. §958.14, Fla. Stat. (1987).

In addition, the Third District held that the Respondent was entitled to credit for all time served in incarceration prior to the revocation of community control (A. 2). Thus, the Third District reversed and remanded this case for resentencing in accordance with its holdings (A. 2).

On November 23, 1988, Petitioner filed a Motion for Rehearing with the Third District. On December 27, 1988, Respondent served his Response. On February 7, 1989, the Third District denied Petitioner's Motion for Rehearing.[1]

[1] Petitioner's motion to recall and stay the mandate below is currently pending before the Third District.

On March 8, 1989, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction and this Petition follows.

ISSUE PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION RENDERED BY THIS COURT IN POORE V. STATE, 531 SO.2D 161 (FLA. 1988) AND THE DECISION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN FRANKLIN V. STATE, 526 SO.2D 159 (FLA. 5TH DCA 1988).

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal in the case sub judice directly and expressly conflicts with the decision of this Court in Poore and the decision of the Fifth District Court of Appeal in Franklin. Specifically, the Third District has required a sentencing remedy different from that provided by this Court and the Fifth District in cases where a youthful offender has violated his probation or community control. Therefore, in order to resolve this conflict, discretionary review of this cause should be granted.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION RENDERED BY THIS COURT IN POORE V. STATE, 531 SO.2D 161 (FLA. 1988) AND THE DECISION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN FRANKLIN V. STATE, 526 SO.2D 159 (FLA. 5TH DCA 1988).

Pursuant to Florida law, the discretionary jurisdiction of this Court may be sought to review a decision of a district court of appeal that expressly and directly conflicts with a rule of law previously announced in a decision of another district court of appeal or in a decision of this Court. See Fla. R. App. P. 9.030(a)(2)(A)(iv); Combs v. State, 436 So.2d 93, **94** (Fla. 1983); Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). In the case sub judice, the opinion of the Third District conflicts with this Court's decision in Poore v. State, 531 So.2d 161 (Fla. 1988), and the decision of the Fifth District Court of Appeal in Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988), on the same question of law. Specifically, the Third District's opinion below requires a sentencing remedy different from that provided in Poore and Franklin with respect to youthful offenders who have violated their probation or community control. In view of this conflict, discretionary jurisdiction should be accepted by this Court so that a

uniform sentencing remedy may be pronounced and implemented throughout this State.2

On May 24, 1988, the Fifth District Court of Appeal rendered its opinion in Franklin v. State, 526 So.2d 159 (Fla. 1988). In Franklin, 526 So.2d at 163, the Fifth District held that "in sentencing a defendant to incarceration followed by probation the court is limited only by the guidelines and the statutory maximum in punishing a defendant after a violation of probation." In addition, the Franklin court concluded as follows:

> Although the Youthful Offender Act was amended in 1985 to provide that no youthful offender shall be committed to the department upon a violation of probation for a period longer than six years or the statutory maximum, whichever is less, the amendment does not require a court to reclassify a defendant as a youthful offender after a violation.

Id. In Franklin, 526 So.2d at 163-64, the Fifth District made clear that "a defendant may be sentenced to a term of incarceration to be followed by a period of probation and if the probation is violated after the term of incarceration has been completed, the defendant may nevertheless be resentenced to any term which could have originally been imposed without violating the double jeopardy clause since the resentencing is the result of [the] defendant's subsequent actions."

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2 Respondent notes that this case presents the same issue raised in State v. Johnson, Case No. 86-718 (Fla. 3d DCA Nov. 29, 1988), which is currently pending before this Court.

Approximately six months later, on November 29, 1988, this Court rendered its opinion in Poore which affirmed the rationale utilized in Franklin. Moreover, in Poore, 531 So.2d at 164, this Court identified the five (5) sentencing alternatives utilized by Florida courts in sentencing defendants. With respect to youthful offenders, this Court indicated that the sentence to be imposed after a youthful-offender's probation or community control has been violated depends on the category under which the defendant was sentenced. Id. If a youthful offender was given a "probationary split sentence"[3] (as in the instant case) and violated his probation, the sentencing judge could then "impose any sentence it originally might have imposed, with credit for time served and subject to the guidelines recommendation." Id. Thus, the Poore analysis focuses upon the substance of a youthful offender's initial sentence while the Third District's analysis below exalts the form of the sentence. Under the Third District's rationale in the instant case, if a defendant was originally sentenced as a youthful offender, the defendant shall continue to be treated as a youthful offender and the six-year sentencing cap is automatically invoked.

Given that the decision of the Third District in the instant case conflicts with decisions from this Court and the

[3] As defined in Poore, 531 So.2d at 164, a probationary split sentence consists of a period of confinement, none of which is suspended, followed by a period of probation.

Fifth District on the same issue of law pertaining to the sentencing of youthful offenders, discretionary review of this cause is warranted. If permitted to stand, the Third District's decision below would be out of harmony with this Court's prior decision in Poore, and the Fifth District's prior decision in Franklin, thereby generating confusion and instability among the precedents. See Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to grant discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **PETITIONER ON JURISDICTION** was furnished by mail to **ELLIOTT SCHEMER,** Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 20th day of March, 1989.

DEBORA J. TURNER
Assistant Attorney General

DJT/dap