IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,841

THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES MILES, a/k/a ERROL BROWN,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The respondent, James Miles, was the appellant in the District Court of Appeal of Florida, Third District, and the defendant in the trial court. The petitioner, the State of Florida, was the appellee in the District Court of Appeal and the prosecution in the trial court. The parties will be referred to in this brief as they stand before this Court.

The symbol "A" will be utilized to designate the appendix to this brief, which is comprised of the decision of the court below. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's Statement of the Case and Facts.

OUESTION PRESENTED

Respondent restates petitioner's issue presented as follows:

> WHETHER A CONFLICT OF DECISIONS EXISTS ON THE QUESTION WHETHER SECTION 958.14, FLORIDA STATUTES (1987), LIMITS YOUTHFUL-OFFENDER SENTENCES IMPOSED FOLLOWING A REVOCATION OF PROBATION OR COMMUNITY CONTROL TO SIX YEARS OF IMPRISONMENT.

SUMMARY OF ARGUMENT

While, contrary to petitioner's argument, the decision of the court below is not in conflict with this Court's decision in ***Poore v. State,*** 531 So.2d 161 (Fla. 1988), there is presently a conflict of decisions between those cases which, like the decision below, have held that Section 958.14, Florida Statutes (1987), limits youthful-offender sentences on revocation of probation or community control to six years of imprisonment and the decision in ***Franklin v. State,*** 526 So.2d 1259 (Fla. 5th DCA 1988) (en banc), which is currently pending before this Court. Disposition of the present application for review in this case should be withheld pending a final decision in ***Franklin.***

ARGUMENT

> A CONFLICT OF DECISIONS EXISTS ON THE QUESTION WHETHER SECTION 958.14, FLORIDA STATUTES (1987), LIMITS YOUTHFUL-OFFENDER SENTENCES IMPOSED FOLLOWING A REVOCATION OF PROBATION OR COMMUNITY CONTROL TO SIX YEARS OF IMPRISONMENT.

The issue presented in this case is currently pending on a grant of discretionary review in ***Franklin*** v. ***State,*** Case No. 72,488, in which the propriety of the decision of the District Court of Appeal of Florida, Fifth District, in ***Franklin*** v. ***State,***

526 So.2d 159 (Fla. 5th DCA 1988), is before this Court.[1] The challenge to the term of imprisonment imposed by the trial court in the present case upon revocation of respondent's community-control term was that Section 958.14, Florida Statutes (1987), as amended in 1985, Ch. 85-288, § 4, Laws of Fla., limits youthful-offender sentences imposed upon a revocation of community control to six years of imprisonment. This argument was accepted by the court below (A. 1-2), as it had been by the First and Second Districts. ***Buckle*** v. *State*, 528 So.2d 1285 (Fla. 2d DCA 1988); *Reams* v. *State*, 528 So.2d 558 (Fla. 1st DCA 1988).

Petitioner argues that this decision is in conflict with this Court's decision in ***Poore*** v. *State*, 531 So.2d 161 (Fla. 1988). Brief of Petitioner at 8. The defendant in *Poore* was classified as a youthful offender and sentenced to a total of four and one-half years in the custody of the Department of Corrections, with the trial court directing that he be confined for two and one-half years, and the remainder of the sentence suspended and a term of probation imposed for that period of time. ***Poore*** v. *State*, 531 So.2d at 162-63. Upon a subsequent revocation of probation, the court imposed a total of four and one-half years of imprisonment, with credit for time served. Id. at 163. The question before this Court was *only* whether double jeopardy considerations barred the imposition of a new sentence on revocation of probation, *i.e.*, whether the trial court was constitu-

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[1] In addition, as noted in petitioner's brief at page 7, there is at least one other petition for discretionary review pending before this Court on this issue.

tionally limited on revocation to ordering the defendant to serve the remainder of the original term. *Ibid.* There was *no* issue raised before this Court as to the applicability or meaning of Section **958.14.** [2]

This Court in *Poore* first delineated five sentencing alternatives available to trial judges in Florida:

> (1) a period of confinement; (2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion; (3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation: **(4)** a *Villery* **[*v. Florida Parole & Probation Commission*, 396** So.2d **1107** (Fla. 1981)] sentence, consisting of period of probation preceded by a period of confinement imposed as a special condition; and **(5)** straight probation.

Id. at 164. This Court held that, unless "alternative (2) is used as the original sentence," a trial court, upon revocation of probation, may "impose any sentence it originally might have imposed, with credit for time served and subject to the guidelines recommendation." *Ibid.* It is only when the sentencing court chooses to impose a "true split sentence" that "the sentencing judge in no instance may order new incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence." *Ibid.*

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[2] Presumably, this was because the sentence imposed by the trial court in *Poore* -- four and one-half years of imprisonment -- was *within* the six-year limitation dictated by Section **958.14.** This Court thus would have had no occasion to reach the statutory question presented by this case; this fact alone illustrates the lack of merit to petitioner's argument that the decision below somehow conflicts with *Poore.*

Leaving aside for the moment the constitutional implications of ***Poore*** on respondent's sentence, it is plain that this Court did not address the statutory issue presented by this case. To be sure, the ***Franklin*** decision was cited with approval in Poore, but only to the extent that this Court "agree[d] with the court in ***Franklin*** that double jeopardy does not forbid the imposition of a longer period of incarceration when a [defendant] violates probation in a probationary split sentence." *Poore* ***v. State,*** 531 So.2d at 163. This Court nowhere discussed the youthful-offender statutes, much less Section 958.14, nor did it touch upon that aspect of ***Franklin.***

Franklin itself is, for the most part, also a double jeopardy case. ***Franklin v. State,*** 526 So.2d at 160-63. After holding that the defendant in that case, who had been sentenced to a "probationary split sentence," ***i.e.,*** three years of youthful-offender incarceration followed by three years of community control, id. at 160, was not entitled to invoke double jeopardy principles to bar imposition of a new sentence upon revocation of the community-control term, id. at 162-63, the court rather summarily disposed of the six-year limitation of Section 958.14 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. Accordingly, [S]ection 948.06 [Fla. Stat. (1987)] may still be applied when the court determines that the defendant should no longer be classified as a youthful offender, allowing the

> court to sentence a defendant after revocation to any term which could have been originally imposed without reference to the act.

Id. at 163 (citation omitted). Since, as previously noted, the sentence in ***Poore*** was lawful under Section **958.14** as interpreted by the court below in this case, see n.2, ***supra,*** this Court in ***Poore*** had no occasion to address this aspect of ***Franklin*** and, indeed, did not do so. It is frivolous for petitioner to suggest otherwise.

There is only the question of the conflict between ***Franklin*** and the line of decisions which culminated in the decision below. The Fifth District's construction of Section **958.14** in that case appears to rest upon the tacit assumption that the legislature used "youthful offender" to mean one thing in the first sentence of the statute, and quite another in the second sentence, ***i.e.,*** that the "youthful offender" who purportedly is subject to any possible sentence upon revocation of community control or probation (in the first sentence) is the person initially sentenced as a youthful offender, while the "youthful offender" whose sentence is limited to six years of incarceration (in the second sentence) is only the person who is "reclassified" as a youthful offender upon revocation. However, the word "reclassify" appears nowhere in Section **958.14,** and, indeed, nowhere in the entire youthful offender chapter. If the legislature had intended what the Fifth District intuited it did, it easily could and would have provided that the six-year sentence limitation applied only to "reclassified" youthful offenders. But the legislature did not do so, and the courts cannot add words to the statute. *E.g.,* ***Metropolitan***

Dade ***County v. Bridges,*** 402 So.2d 411, 414 (Fla. 1981). This is precisely what the Fifth District did in ***Franklin.*** However, as noted at the outset of this brief, the continuing viability of ***Franklin*** is now before this Court.

CONCLUSION

Based on the foregoing, respondent requests this Court to withhold disposition of this cause pending resolution of the issue presented here in the ***Franklin*** case, or, in the alternative, to grant review and approve the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to ROBERT A. BUTTERWORTH, Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33125 this 2nd day of March, 1989.

ELLIOT H. SCHERKER
Assistant Public Defender