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INARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Martin County, Florida, and Appellant in the Fourth District Court of Appeals. Petitioner was the prosecution in the trial court and Appellee in the District Court of Appeal.

Jurisdiction of this Court is predicated on a question certified to be of great public importance by the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in the State's brief.

SUMMARY OF ARGUMENT

The Florida Statutes establish community control and probation as mutually exclusive alternative forms of disposition. Nowhere do the statutes authorize them to be imposed in tandem. A recently-enacted Committee Note to the Florida Rules of Criminal Procedure, however, purports to authorize tandem imposition. The Committee Note is ineffective because it is a substantive enactment which only the Legislature could properly adopt and because it is in irreconcilable conflict with the Legislature's statutorily-expressed intent.

ARGUMENT

A SENTENCE OF COMMUNITY CONTROL MAY NOT BE
FOLLOWED BY PROBATION.

The true issue in this case is whether the Committee Notes to the Florida Rules of Criminal Procedure governing the sentencing guidelines may override the Florida Statutes governing sentencing. Respondent concedes that if the 1985 amendment to the Committee Note to Rule 3.701(d)(13), Florida Rules of Criminal Procedure, is valid, then community control may be followed by probation. The Committee Note authorizes such a sentence in so many words.

The Committee Note, however, is in direct conflict with the Florida Statutes regulating sentencing, community control, and probation, and with District Court of Appeal decisions interpreting the statutes. In particular, the First District has held that the statutes prohibit probation on top of community control. Williams v. State, 464 So.2d 1218 (Fla. 1st DCA 1984); Denson v. State, 14 F.L.W. 2053 (Fla. 1st DCA Sept. 1, 1989).¹ In Denson, the court plainly stated that the Committee Note cannot alter the statutory scheme. Id. at 2054. The decision of the Fourth District in the instant case follows Williams. See also Chessler v. State, 467 So.2d 1102 (Fla. 4th DCA 1985).

The statutes do not permit imposition of both community control and probation. As stated by the First District in Williams and Denson, the Legislature through the statutes has established

¹ Review of Denson is pending in this Court. The Second District's contrary position is also pending review by this Court in Skeens v. State, 542 So.2d 436 (Fla. 2d DCA 1989).

community control and probation as mutually exclusive alternative forms of disposition which may not be imposed in tandem. Williams, 464 So.2d at 1219; Denson, 14 F.L.W. at 2054. The legislative intent in adopting the concept of community control in the Correctional Reform Act of 1983, Chapter 83-131, Laws of Florida, was to provide an alternative to probation and incarceration. The Act created Section 921.187, Florida Statutes, which states in subsection (1) that the dispositions listed for criminal cases are alternatives: The alternatives of probation and community control are listed separately in subsections (1)(a) and (1)(c).²

Additionally, new provisions added by the Act to Section 948.01 of the statutes placed community control and probation at odds with one another. The new subsection (4) provides that community control may be imposed where probation is found to be unsuitable. Further, where the offender has completed the sanctions imposed in community control, the court may grant an early discharge or transfer the defendant to probation. Section 948.01(7). On the other hand, where a probationer has violated his probation, the court may, instead of revoking probation, place him in community control. Section 948.06(1).

Finally, probation following community control does not qualify as a split sentence. Section 921.187(1)(g) authorizes probation after completion of any specified period of incarceration. Section 948.01(8) provides only that community

² The numbering is from the 1987 version of the statute, which is somewhat different from the 1985 version cited in Williams.

control may be substituted for probation following incarceration. Nowhere do the statutes authorize probation following community control.

May the Committee Note override the statutes which do not permit community control and probation to be imposed in tandem? The answer is to be found in this Court's decision in Smith v. State, 537 So.2d 984 (Fla. 1989). In Smith, this Court held that the sentencing guidelines, insofar as they determine the length of sentences to be imposed, are substantive in nature, and that therefore only the Legislature may enact or amend them by statute. The Committee Note at issue in the instant case was not enacted by statute by the Legislature and is therefore ineffective to override the statutes discussed above in this brief.

While it is true that the revision of the guidelines in which the Committee Note first appeared was subsequently adopted by the Legislature, Chapter 86-273, Laws of Florida, and that this Court has declared the Committee Notes to be part of the rules, The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311, 312 (Fla. 1985), nonetheless the Committee Notes themselves have not been adopted or enacted by the Legislature. The statutes remain the stated expression of the Legislature's intent. Where the language of a penal statute is clear, plain and without ambiguity, it must be given effect accordingly. Graham v. State, 472 So.2d 464, 465 (Fla. 1985).

Even if the Committee Note had been adopted by the Legislature, however, it could not be given effect as written because it would be irreconcilably in conflict with the various statutory provisions discussed above and with the entire statutory


scheme they comprise. See Denson, supra, 14 F.L.W. at 2054. The Committee Note must be revoked or amended to conform with the statutes. See Benvard v. Wainwright, 322 So.2d 473, 476 (Fla. 1975). Unless and until the Legislature alters the statutory scheme and expressly authorizes community control followed by probation, Florida law does not permit it.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Appellant respectfully requests this Court to affirm the decision of the District Court of Appeal.

Respectfully Submitted,

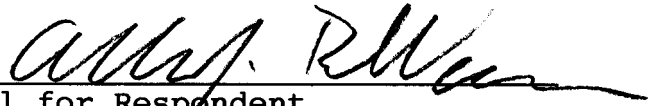
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Lynn Waxman, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 **this** 26th day of October, 1989.



Counsel for Respondent