IN THE SUPREME COURT OF FLORIDA

MICHAEL GLASS,

Petitioner,

v. CASE NO. 75,600

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner Michael Glass, defendant below, will be referred to as such. Respondent, the State of Florida, will be referred to as the State. References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is acceptable to the State for purposes of disposition of this case on appeal.

SUMMARY OF ARGUMENT

Probationary split sentences of themselves do not violate double jeopardy. Petitioner's probationary split sentence is legal and recognized as lawful by both Poore and Franklin. Poore recognized statutory authority for probationary split sentences; the legislature (in the intervening 1989 session) has not modified Poore by statute. To find statutory authorization for a "true" split sentence, but not a "probationary" split sentence is to read the statute in a manner reaching an absurd result. Probationary split sentences are authorized by §921.187(1)(g), Florida Statutes.

ARGUMENT

ISSUE

WHETHER §921.187(1)(g), FLORIDA STATUTES, AUTHORIZES A "PROBATIONARY" SPLIT SENTENCE.

The State suggests that this court decline to answer again the question certified in this case. The double jeopardy issue does not present a new question, despite its certification as such.

Preliminarily, a probationary split sentence of itself does not violate double jeopardy. State v. Wayne, 531 So.2d 160, 161 (Fla. 1988) ("In Poore v. State, 531 So.2d 161 (Fla. 1988), ... [we] held that when the original sentence is a [probationary split sentence] ... resentencing to a greater prison term upon violation of probation does not violate double jeopardy or other constitutional provisions."); citing Poore, supra at 163-5, and accord North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (other citations omitted).

The issue narrows to whether the sentencing statute pertaining to split sentences [i.e., §921.187(1)(g) (1987)][1] authorizes both "true" and "probationary" split sentences. Although not expressly citing the statute, this Court has

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[1] Section 921.187(1)(g), Fla. Stat. was enacted as §921.187(7) by §6, ch. 83-131, Laws of Fla.; and amended to become §921.187(1)(g) by §6, ch. 84-363, Laws of Fla. It has not changed since, and therefore clearly predates the forgery offenses committed by Appellant in early January 1988 (R 6) and mid-December 1987 (R 8).

twice found probationary split sentences to be authorized at law. In Franklin v. State, 545 So.2d 851, 852 (Fla. 1989),[2] this Court said:

> In the recent opinion of Poore v. State, . . . [we] held that Florida law recognizes two forms of "split sentences." ...The second, a "probationary split sentence," occurs when the judge sentences a defendant to a period of incarceration followed by a period of probation or any form of community control. (e.s.)

The term "law" is deliberate. The Court did not say that split sentences were recognized by court rules, in contrast to Petitioner's contention that court rules do not cure constitutional defects. (initial brief, p.9-10).

The only statutes providing disposition and sentencing alternatives are the subject statute and §948.01(8) (1987). Neither Poore nor Franklin limit their holding to the latter. The only reasonable inference is that this court, implicitly construing the statutes together, found sufficient authority at law to satisfy double jeopardy considerations. Here, the question certified by the First District effectively asks this Court to revisit an already-decided issue. This Court should not encourage unnecessary certified questions by doing so.

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[2] Franklin was decided on June 15, 1989, or about 7½ months before the opinion below in this case.

Significantly the 1989 Legislature did not overrule the Poore decision's recognition of probationary split sentences.[3] To date then, the Legislature has implicitly approved the Court's interpretation of §921.187(1)(g). In contrast, the 1988 Legislature overruled the Carawan interpretation of the rule of lenity. See §7, ch. 88-131, Laws of Florida; State v. Smith, 547 So.2d 613 (Fla. 1989). Similarly, the Legislature overruled several decisions when it established that guideline sentence departure reasons need be proven only by a preponderance of evidence. See §2, ch. 87-110, Laws of Florida; Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 522 So.2d 374, 375 (Fla. 1988) ("In chapter 87-110, Laws of Florida, the legislature changed the standard for evaluating the sufficiency of reasons for departure from recommended ranges."). The only reasonable inference is that the Legislature tacitly agrees with this Court's interpretation of Florida law as to split sentences.

This Court need go no further to decline the certified question and affirm the opinion below. However, to prevent any appearance of abandonment, the State sets forth its argument as presented below, with some additions.

After Petitioner violated probation, the trial court permissibly sentenced him to 30 months' incarceration to be

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[3] Poore was decided on September 22, 1988, or about 6 months before the 1989 session began.

followed by probation. This sentence is legal and fully authorized by both Poore v. State, 531 So.2d 161 (Fla. 1988) and Franklin v. State, 545 So.2d 851 (Fla. 1989).

The Poore court recognized five types of sentences: (1) a period of confinement; (2) a "true split sentence," which consists 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," which consists of a period of confinement, none of which is suspended, followed by a period of probation; (4) a Villery[4] sentence, which consists of a period of probation preceded by a period of confinement imposed by a special condition; and (5) straight probation. 531 So.2d at 164.

Curiously, Poore does not cite §921.187 expressly. However, this statute is the only exhaustive listing of disposition alternatives that embraces the five types listed above. In contrast, §948.01(6), Florida Statutes (1987), address split sentences only. Section 948.06, explicitly discussed in Poore, involves violations of probation or community control only, and cannot be said to include the first type of sentence. Therefore, the Poore decision implicitly contemplates §921.187(1) as a source of authority for sentencing.

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[4] Villery v. Florida Parole & Probation Commission, 396 So.2d 1107 (Fla. 1981).

While the Poore Court observed that the true split sentence was authorized under Florida law, it did not conclude that such a sentence was the only type of split sentence so authorized:

> Such a conclusion would render meaningless the alternative split sentence provision in Florida Rule of Criminal Procedure 3.986. Rather, we agree with the Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988) [approved, 545 So.2d 851 (Fla. 1989)] court's analysis, which recognized that:
>
> > Rule 3.986, rather than being an error, was in fact a clarification of the two separate split sentence alternatives available to the courts. While a judge may clearly withhold a portion of a term of imprisonment and place a defendant on probation for the withheld portion with the understanding that upon revocation of probation, the withheld portion of the sentence will reactivate, this is not the only possible sentencing alternative. In such circumstances, a judge is limited to merely recommitting the defendant to the balance of the preset term of incarceration upon a violation of probation. However, 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.

531 So.2d at 164 (quoting Franklin, at 526 So.2d at 162-163).

Section 921.187(1)(g) authorizes split sentences generally:

> (1) . . . A court may:
>
> * * * * *
>
> (g) Impose a split sentence whereby the offender is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of years or less.

Consequently the statute also authorizes both true and probationary split sentences, as it does not specify that a portion of incarceration must be suspended or that incarceration must be followed by probation. If the legislature had intended for this provision to authorize only true split sentences,[5] it could have limited the statute clearly and unequivocally. Likewise, if the legislature had intended to prohibit, or not to authorize probationary split sentences, it could have specifically excluded them. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952).

Reading all of subsection 921.187(1) together reveals sufficient statutory authority. Section 921.187(1)(k) authorizes a sentence of imprisonment only (the first type noted in Poore); §921.187(1)(a) authorizes a sentence of probation only (the fifth type noted in Poore); and §921.187(1)(g) authorizes split sentences generally, with

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[5] Fla. Statute Section 948.01(8) (1987) specifically authorizes a true split sentence.

probation to follow upon completion of a "specified period of such sentence, which may include a term of years or less." Construing those closely related provisions together, the unavoidable conclusion is that probationary sentences are proper, if nothing more than a combination of alternatives authorized by subsections (1)(a) and (k). To insist upon the occurrence of the word "probationary" and "true" before the extant term "split sentence", in order to avoid double jeopardy, is an absurd interpretation of the statute. It is long and well established that courts are not to interpret statutes in an absurd manner. City of St. Petersburg v. Siebold, 49 So.2d 291, 294 (Fla. 1950) (en banc) ("The courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred.").

The Florida Supreme Court has recognized since 1981 that the probationary split sentence exists under Florida law. See In re Florida Rules of Criminal Procedure, 408 So.2d 207, 209 (Fla. 1981). In 1988, the Poore Court simply reaffirmed that two separate split sentence alternatives were available to the trial courts. In 1989, the Franklin Court again acknowledged and validated such a sentencing scheme.

Petitioner attempts to raise a sentencing guidelines issue. (initial brief, p.12). In addition to being irrelevant to the double jeopardy issue, this point has been

resolved by Lambert v. State, 545 So.2d 838 (Fla. 1989), and Poore, supra at 165. The effect of the guidelines upon resentencing for probation violations, if relevant to double jeopardy, is to reduce the possibility of a constitutional problem. By limiting the duration of the original sentence, and limiting departure to one cell upon resentencing, the guidelines have greatly reduced the likelihood that resentencing would exceed the statutory maximum on imprisonment for the original offense. As Petitioner aptly notes (initial brief, p.12), resolution of the certified question may be no more than an "academic discourse."

Not finding satisfaction in his guidelines discussion, Petitioner resorts to an irrelevant hypothetical:[6] the possibility that persons sentenced as habitual offenders will receive lengthier imprisonment upon resentencing for parole or probation violations than those resentenced under the guidelines (and thus subject to the one-cell bump limitation in Lambert). Petitioner overlooks the fact that split sentences are authorized for non-guideline sentences, and that the statutory caps on imprisonment are still present. In a transparent maneuver, he would challenge the statute on the grounds that it could be applied unconstitutionally to others. Moreover, the difference in treatment of habitual and non-habitual felons has nothing to

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[6] Petitioner was sentenced under the guidelines (R 25), but was not sentenced as a habitual felon. See his sentence forms (R 40,44) in which the box indicating habitual offender sentencing is not checked off.

do with double jeopardy - the issue before this Court - but is, at best, speculative error.

Petitioner's next belief is that probationary split sentences would allow a "never ending treadmill of prison followed by probation, followed by violation, followed by prison again," etc. (initial brief, p.14). Somehow Petitioner overlooks the fact that a felon, out of jail but on probation, is responsible for his or her actions and is not compelled to violate probation. Petitioner ignores all other constitutional protections, such as due process. He also ignores statutory caps on imprisonment for original offenses. See State v. Jones, 327 So.2d 18 (Fla. 1976) (imprisonment upon revoking of probation limited to that maximum which could have been imposed originally). See also McKinley v. State, 519 So.2d 1154 (Fla. 5th DCA 1988) (statutory maximum operates as cap on combined length of imprisonment and probation).

Finally, Petitioner declares that "courts cannot add straight probation to a term of incarceration for a single crime." This is wrong. A person may be sentenced to a specified term of imprisonment followed by probation, so long as the combined terms do not exceed the statutory maximum for imprisonment. McKinley, supra at 1154. When the term of imprisonment is within the guidelines range, the addition of probation is not even deemed a departure. Id.

Probationary split sentences - as this court has previously held - are authorized by Florida law, and do not violate constitutional provisions against double jeopardy. Any reasonable reading of §921.187(1)(g), in conjunction with other provisions of §921.187(1), unavoidably finds sufficient statutory authority for such sentences.

CONCLUSION

This court should decline to answer the certified question, noting that the issue has been decided. Should this Court reach the question on the merits, it is clear that imposition of a probationary split sentence is statutorily authorized and therefore does not violate double jeopardy. Petitioner's sentences must be affirmed.

Respectfully submitted,

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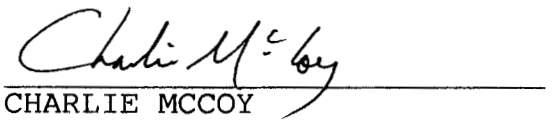

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Michael J. Minerva, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 9th day of April, 1990.

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