IN THE SUPREME COURT OF FLORIDA

MICHAEL GLASS,

Petitioner,

v.

CASE NO. 75,600

STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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Petitioner,	:	
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REPLY BRIEF OF PETITIONER ON THE MERITS

ARGUMENT

ISSUE PRESENTED

WHETHER A PROBATIONARY SPLIT SENTENCE VIOLATES DOUBLE JEOPARDY BY ALLOWING COURTS TO IMPOSE A DISPOSITIONAL ALTERNATIVE NOT AUTHORIZED BY THE LEGISLATURE.

The main question is: What is the legislative authority for a "probationary split sentence"? The state responded obliquely by suggesting that (1) probationary split sentences do not per se violate double jeopardy; (2) probationary split sentences are authorized by [case] law; (3) the legislature did not expressly prohibit the probationary split sentence or overrule Poore v. State, 531 So.2d 161 (Fla. 1988); (4) the court may combine the alternative dispositions in Section 921.187, Florida Statutes.

None of those suggestions are good enough to overcome the fundamental flaw which is that the legislature did not

authorize both prison and probation in the same case without some portion of the prison sentence being suspended.

Petitioner argued originally that double jeopardy is violated if courts impose more punishment than the legislature authorizes. The court's task in that context is to ascertain legislative intent. State v. Smith, 547 So.2d 613 (Fla. 1989).

Two traditional concepts of statutory construction apply to defeat the state's argument that authority for a probationary split sentence can be inferred from the statutes. First, penal statutes must be strictly construed and not extended further than their terms reasonably justify. Snowden v. Brown, 60 Fla. 212, 53 So. 548 (1910); Negron v. State, 306 So.2d 104 (Fla. 1975). Second, the express mention of one provision in a statute is an implied exclusion of other similar or inconsistent provisions (expressio unius est exclusio alterius). Dobbs v. Sea Island Hotel, 56 So.2d 341 (Fla. 1952); Thayer v. State, 335 So.2d 815 (Fla. 1976).

The spotlight of those principles exposes vulnerabilities of the probationary split sentence. The legislature made a list of alternative dispositions. Included in the list were probation, prison, jail as a condition of probation, or imprisonment with a portion suspended and probation during the suspended portion. The legislature did not say that more than one alternative could be imposed for any single crime. Furthermore, when describing prison and probation in tandum, the legislature explicitly directed how that would be done, and put

those directions in two different statutes, Sections 921.187 and 948.01(8), Florida Statutes (1987). Any other combination of prison and probation except the statutory split sentence is unauthorized and hence illegal.

On the other hand, the authoritative source of the probationary split sentence seems to be this Court's criminal procedural rule 3.988, adopting probationary split sentences in a sentencing form. By now it is irrefutable that the court does not have the authority to enact a substantive change in the sentencing laws by adopting a rule of procedure. Smith v. State, 537 So.2d 982 (Fla. 1989); Beynard v. Wainwright, 322 So.2d 473 (Fla. 1975). Thus the probationary split sentence, derived from a procedural rule, is not a disposition authorized by the legislature. It was, instead, authorized only by the court.[1]

The Court should revise its decision in Poore by deleting its approval of probationary split sentences.

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[1]The history of the probationary split sentence reveals serious constitutional flaws which were rejected by the majority of this Court but which remain formidable nonetheless. E.g., State v. Jones, 327 So.2d 18, 25-27 (Fla. 1976) (Boyd, J., dissenting) ("I find no Florida Statute which permits such action as is approved by the majority opinion. The deprivation of personal liberty by courts for violating criminal statutes must never exceed the punishment authorized by the legislature.") Wayne v. State, 513 So.2d 689, 640 (Fla. 5th DCA 1987) (Cowart, J.) quashed State v. Wayne, 531 So.2d 160 (Fla. 1988). (The defendant, having already been sentenced once, cannot constitutionally be sentenced a second time for the same offense merely because he has violated the probation appended to the lawful sentence of confinement.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Michael Glass, 2407 North Palo Alto, Panama City, Florida, 32405, this 1st day of May, 1990.

MICHAEL J. MINERVA