IN THE FLORIDA SUPREME COURT

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WILLIE REYNOLDS,

PETITIONER,

-VS-

CASE NO. 75,832

STATE OF FLORIDA,

RESPONDENT.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent is in substantial agreement with petitioner's statement of the case and facts with the following additions and exceptions:

1. The State initially charged petitioner by information with possession of cocaine with intent to sell and possession of less than 20 grams of cannabis. (R 1).

2. Petitioner's statement that, on appeal, "[t]he search was upheld with a finding that the police policy of handcuffing suspected drug dealers was not unreasonable. . . ." (Petitioner's brief at 7) is not quite accurate. The propriety of any general policy of the police department was not at issue. The Court's opinion is addressed only to the case at bar

SUMMARY OF ARGUMENT

Police may properly handcuff a suspect whom they are temporarily detaining if they reasonably believe such action is necessary for their protection. The police here had such a reasonable belief, based on their experience and that of others in other, similar situations. Numerous courts have recognized the propensity for violence inherent in narcotics trafficking investigations. Given this reasonable belief, the police were justified in taking steps to temporarily "immobilize" the situation. Since the action by police was legal and appropriate, the petitioner's subsequent consent to search was voluntary and valid.

The split sentence issue, although not certified by the lower court, is pending before this Court in **Glass v. State**, Case No. 75,600, and will be controlled by the Court's decision in that case. In addition to the arguments advanced in **Glass**, respondent submits that the Florida Legislature has authorized probationary split sentences. This Court so interpreted language in Sec. 948.01(4), Fla.Stat., thirteen years ago and, although the Legislature subsequently amended the statute they have never altered that language.

ARGUMENT

ISSUE I

WHETHER IT IS PROPER FOR POLICE TO HANDCUFF A PERSON WHOM THEY ARE TEMPORARILY DETAINING.

The question as framed by the District Court does not lend itself to a yes or no answer. The line between an investigative stop and an arrest cannot be determined by any per se rule. **United States v. Sharpe,** 470 U.S. 675 (1985). On this much respondent and petitioner are in agreement. Instead, the focus must be on whether the action taken by the police was reasonable. **United States v. Kapperman,** 764 F.2d 786, 790 fn. 4 (11th Cir.1985). In making that assessment,

> it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Terry v. Ohio, 392 U.S. 1, 21-22 (1968). Respondent submits that in view of the known dangers surrounding the detention and arrest of suspected large scale cocaine traffickers, it will frequently be reasonable for officers to handcuff such persons when they have been temporarily detained, even though probable cause for arrest does not yet exist. As the **Terry** Court observed:

> It does not follow that because an officer may lawfully arrest a person

> only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.

Terry, supra, at 26-27.

Petitioner errs in characterizing the district court's opinion in this case as an "announced rule that as a matter of law all drug trafficking suspects can be handcuffed incident to a **Terry** stop." (Brief of Petitioner at 17).[1] In fact, the courts below did no more than find the officers' expressed concern for their safety to be a reasonable one, warranting reasonable protective measures. Just as the **Terry** Court recognized that "American criminals have a long tradition of armed violence. . . ." (**Terry, supra,** at 23) the First District recognized the "high incidence of weapons associated with cocaine trafficking" and the "irrationality" the drug produces. **Reynolds v. State,** 15 F.L.W. D678 (Fla.1st DCA 1990).

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[1] He similarly incorrectly accuses the trial court of "applying a broad rule that handcuffing incident to detention without probable cause was justified simply because petitioner was suspected of cocaine trafficking." (Petitioner's brief at 12).

Such acknowledgment of the dangers associated with suspected large scale drug traffickers is not unique. In **State v. Sayers,** 459 So.2d 352 (Fla.3rd DCA 1984), **rev.den.,** 471 So.2d 44 (Fla.1985), the Court said "it is not necessary that the agents have direct information that a person to be frisked is armed . . . a law enforcement agent may reasonably believe that a person engaged in a transaction prospectively involving a large quantity of narcotics and large sums of money is likely to be armed to protect the drugs, the money, or himself." **Id.,** at 353. In that case the Third District Court of Appeal cited **United States v. Oates,** 560 F.2d 45 (2d Cir.1977). In **Oates,** the Court upheld a protective frisk based on their recognition that to substantial dealers in narcotics, firearms are "tools of the trade." **Id.,** at 62. Indeed, that court pointed out that under **Terry, supra,** "the belief that the subject may be armed can be predicated on the <u>nature</u> of the criminal activity involved." (Emphasis supplied). See also, **State v. Lewis,** 518 So.2d 406, 408, fn. 3 (Fla.3rd DCA 1988) and cases cited therein.

The circumstances here involve the operations of a special police "Crack Squad" (R 56) which was specifically avoiding "the smaller, one and two-rock people" and looking for larger dealers. (R 59-60). In addition to the judicial recognition of increased potential for danger in such cases already discussed by respondent these officers had personal experience to justify the precaution of handcuffing:

Officer Parsons stated,

> It's a standard operating procedure for us, under circumstances involving crack or these types of felonies, because of the reports of automatic weapons and the heavy shootings that we observe and also hear about or witness, that we just don't take those risks.
>
> And every time we make a stop, they are handcuffed, really, if for no other reason, for safety for them and us.
>
> And that's the first thing that happens. We want control over the situation. And then when it's stabilized, we go from there.
>
> * * *
>
> Well, I was trained that, statistically, the probability of violence from any person towards a police officer rose significantly whenever they were under the influence of any kind of drugs.
>
> Certainly, with cocaine, it's been my experience that we experience on a regular basis very intense, violent resistance many times immediately upon contact in a restraining or apprehension situation.
>
> * * *
>
> To my knowledge, we find more weapons, and in my experience, more weapons and investigate more shootings related to crack, currently, than any other crime I'm aware of, any other circumstance that law enforcement would have contact with suspects, felonies or misdemeanors.

(R 65-55).

Officer McDaris stated:

> <u>Since I've been doing, you know, the Crack Squad and the cocaine stuff, I have seen guns and I've gotten hurt</u>.
>
> In March, I had tried to detain someone that wasn't under arrest yet, and ended up with a dislocated shoulder. He knocked down two police officers and me, and drug me down the street.
>
> With the guns and the knives and the whole aspect of what's been going on with the crack cocaine, it's become procedure with the Crack Squad that when we detain somebody, we handcuff every person that we detain, for our own safety.

(R 83).

Petitioner suggests that the officers' past experience and training is not enough to allow them to reasonably believe what the Courts in **Sayers** and **Oates** took judicial notice of: that an officer about to detain a suspected large scale crack dealer is exposing himself to considerable risk. Petitioner argues that the police must have some further, more "direct" information which indicates that this particular suspect is not simply dangerous, but is in fact armed. He cites three "knock and announce" cases: **Roundtree v. State,** 544 So.2d 1101 (Fla.1st DCA 1989); **King v. State,** 371 So.2d 120 (Fla.1st DCA 1978); **Rodriguez v. State,** 484 So.2d 1297 (Fla.3rd DCA 1986) to support, by analogy, his argument.

The fact that two of the three cases cited came from the very court which upheld the officers' actions in this case is the first indicator that the analogy is inapposite. The two

situations simply cannot be compared. The "knock and announce" statute, Sec. 933.09, Fla.Stat. (1989), speaks to situations where officers are serving warrants. Under such circumstances the police will presumably have some knowledge as to what they are getting into and can prepare themselves accordingly in advance, e.g. through additional backup officers, bullet proof vests, having their guns drawn and at the ready, etc. It makes sense that a belief of danger based on less than direct observation would not be accepted as reasonable by the courts under such circumstances. The officer conducting a stop and frisk does not have the luxury of advance planning. He must be allowed to use the filter of his generalized knowledge, training and experience on the specific facts known to him at that moment to decide whether it is necessary to temporarily "freeze" the situation while he gathers more information.

The notion that police must have some sort of "direct" knowledge of the dangerousness of an individual was rejected in **Oates, supra.**

> We are in full agreement with Judge Friendly's remarks in United States v. Santana, supra at 368, that "[w]hile [a narcotics agent may have] received no specific information that [a narcotics dealer or his companion] was armed, it would not be unreasonable for a policeman to assume that a man believed to be one of the top narcotics violators in [a major metropolitan] area [or his companion] would be carrying arms or would be otherwise violent." As did Judge Friendly in Santana, the Supreme Court in Terry v.

> Ohio indicated that, despite the fact that the police officer has not personally observed a weapon or any physical indication, such as a bulge, that would indicate the presence of a weapon, the belief of the police officer that the suspect may be armed and dangerous can be predicated on the nature of the criminal activity involved. Finally, we believe that inherent in Terry v. Ohio is the notion that the standard of suspicion necessary to allow a frisk for weapons is not a difficult one to satisfy, for even if "'the belief that [the suspect] might be carrying a weapon rested upon fragile grounds' . . . courts should not set the test of sufficient suspicion that the individual is 'armed and presently dangerous' too high when protection of the investigating officer is at stake."

Oates, supra, at 62-63. Respondent submits that knowledge outside the particular circumstances of an arrest can and must have a bearing on whether an officer has a reasonable belief that a suspect presents a danger to his life and limbs. Compare **Wilson v. State,** 547 So.2d 215 (Fla.4th DCA 1989) where the court noted that handcuffing

> was a standard precaution used for the protection of the officers and others when securing an area under these circumstances. The department's experience had shown that under these conditions aggressive behavior and resistance by those at the scene was not uncommon, and that there was a likelihood of firearms being present.

Wilson, supra, at 216 (emphasis supplied). Officers must be permitted to take reasonable measures to assure their safety and should not be expected to "await the glint of steel" before

doing so. **New York v. Allen,** 538 N.E.2d 323 (Ct.App. N.Y. 1989). "Common sense and ordinary human experience" guide the courts in deciding whether an investigative detention is reasonable. **Terry, supra,** at 685. Law enforcement officers must also be permitted to use these resources in making decisions which could cost them their lives.

Once a reasonable belief of danger is established, it is clear that handcuffing, or other displays of force or authority, can be involved in effectuating a temporary detention without turning the detention into an arrest.

In finding that police had the right to display a weapon where necessary to make a stop, the Second District Court of Appeal noted, in **State v. Perera,** 412 So.2d 867, 871 (Fla.2d DCA 1982) "the United States Supreme Court, in defining the concept of a temporary stop, has indicated that it can involve the display of force or authority." **Id.,** citing **Adams v. Williams,** 407 U.S. 143 (1972); **Terry v. Ohio,** 392 U.S. 1, 19 (1968). In **United States v. Bautista,** 684 F.2d 1286 (9th Cir.1982), **cert.den.,** 459 U.S. 1211 (1983), the Court states, "[a] brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a **Terry** stop and does not necessarily convert the stop into an arrest."

In **Bautista, supra,** handcuffing was found reasonable where the two suspects were believed to have robbed a bank, they

appeared extremely nervous, Bautista kept pacing back and forth as if he were thinking of running, the third robber may still have been in the vicinity, and "[t]he handcuffs eliminated the possibility of an assault or escape attempt during the questioning, particularly if an arrest became imminent." The Court also emphasized the nature of the crime in finding the action reasonable.

In **Harper v. State,** 532 So.2d 1091 (Fla.3rd DCA 1988) handcuffing the defendant and forcing him to lie face down on the ground was found to be reasonable and not an arrest. There, Harper was found in a crack house standing near a kitchen counter where cocaine, as well as a butane torch were in plain view.

In **Wilson, supra,** the defendant was simply standing on the front porch of a house which was the subject of a search warrant. The court found the handcuffing reasonable, noting the "chilling" statistics on the number of Florida law enforcement officers shot and killed, or otherwise seriously injured in the line of duty.

In case after case, the courts of Florida, other states and the federal system have found that the use of handcuffs or other force or authority during a brief temporary detention was reasonably supported by officers' fears for their safety. See, **Lewis v. State,** 518 So.2d 406 (Fla.3rd DCA 1988) (Motorist

stopped by officers with guns drawn, at 2:00 a.m. outside a residence where a crack buy had just occurred was not "arrested."); **Ruiz v. State,** 526 So.2d 170 (Fla.3rd DCA 1988) (No "arrest" where officer approached, with gun drawn, a car parked outside home where drug bust was proceeding and ordered driver to exit vehicle and lie face down.); **United States v. Glenna,** 878 F.2d 967 (7th Cir.1989) (Teletype information that suspect was in possession of several armed weapons and an explosive device, plus discovery of a loaded clip in suspect's pocket justified handcuffing suspect to preserve officer's safety. Handcuffing did not turn detention into an arrest.); **Howard v. Alaska,** 664 P.2d 603 (Alaska App. 1983) (Handcuffing of sexual assault suspects not arrest given violent nature of crime, purpose of maintaining the status quo while conducing the investigation, potential of accomplices hiding in nearby woods, information that suspects were armed, brevity of detention and number of suspects compared to officers.); **Washington v. Belieu,** 773 P.2d 46 (Wash.1989) (Police awareness that weapons had been burglarized from homes in the area justified officer in drawing of gun before ordering four burglary suspects out of their vehicle.); **New York v. Allen,** 538 N.E.2d 323 (Ct.App. N.Y. 1989) (Officers justified in handcuffing robbery suspect believed to be armed in dark alley, to *take him to a safer place* to conduct pat down.); **Illinois v. Waddell,** 546 N.E.2d 1068 (Ill.4th DCA 1989) (Police action was reasonable and detention was not elevated to arrest where police had probable cause, based on

informant's tip to believe vehicle was transporting cocaine. Police stopped vehicle and handcuffed Waddell who subsequently validly consented to search of automobile.) As noted by Professor LaFave:

> [I]t cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present. <u>The courts have rather consistently upheld such police conduct when the circumstances (e.g., suspicion that the occupants of a car are the persons who just committed an armed robbery) indicated that it was a reasonable precaution for the protection and safety of the investigating officers</u>.
>
> This is not to suggest that in the course of stopping suspects for investigation the police may, as a matter of routine, utilize modes of restraint which might commonly be employed incident to arrest. For example, though it may be unobjectionable to lock an arrest person in a squad car pending arrival of a squadrol [sic] to transport him to the station, it cannot be said that such action would ordinarily be a permissible part of stopping for investigation. Nor can it be said that such action would never be permissible, for there may be unique circumstances in which such confinement is reasonably related to the investigative activity, as illustrated by <u>United States v. Lee</u> [372 F.Supp. 591 (W.D.Pa.1974)]. There, a single officer reported to a bank on a day when large amounts of cash would be in the bank and transported from the bank to meet local payrolls, and learned that for some time two men had been loitering near the bank under highly suspicious circumstances. When the officer

> approached the men, one of them fled, so he seized the remaining suspect and locked him in the back of the police cruiser while he pursued the other man. The court quite correctly concluded that his action was reasonable under the circumstances because it was "reasonably calculated to maintain the status quo" while an effort was made to seize the other suspect. Similarly, handcuffing of the suspect is not ordinarily proper, but yet may be resorted to when necessary to thwart the suspect's attempt to "frustrate further inquiry." [Citing United States v. Purry, 545 F.2d 217 (D.C.Cir.1976)].

3 W. LaFave, Search and Seizure, Sec. 9.2(d), at 30-31 (1978) (emphasis supplied).

The officers here had, based on their training, knowledge and experience a reasonable belief that they could be facing the danger of death or serious injury in effectuating the stop and detention which petitioner admits was valid. They used the least intrusive means possible to render the situation stable while they completed their investigation. The use of handcuffs did not turn the detention below into an unlawful arrest.

ISSUE II

WHETHER A PERSON'S CONSENT TO SEARCH CAN LEGALLY BE VOLUNTARY IF GIVEN WHILE HANDCUFFED DURING TEMPORARY DETAINMENT.

Consent is presumptively rendered involuntary only where it is obtained after illegal activity. **Norman v. State,** 379 So.2d 643, 647 (Fla.1980). Because, as discussed in Issue I, handcuffing a temporarily detained person where safety considerations reasonably require it is lawful police behavior, consent to search while so handcuffed is not rendered involuntary.

However, even were the actions of police in this case considered improper, the consent would still be voluntary.

If illegal custody is established, subsequent consent must be shown by clear and convincing evidence. **Bailey v. State,** 319 So.2d 22 (Fla.1975). That standard was met here.

Officer McDaris testified that appellant was heard to consent. (R 84). Further, Officer Hendry's report clearly states:

> I then asked permission to search his pockets telling him that he had the right to refuse. He said twice that I could search him and "go ahead."

(R 25) (emphasis supplied).

There is no legal requirement to warn a suspect of the right to refuse consent to search, **Wilson v. State,** 470 So.2d 1 (Fla.1st DCA 1984), and clear and convincing evidence of consent had been found even in the absence of such a warning. **Id.** Moreover, as appellant admits, "some cases suggest that warning of the right to refuse consent overcomes the taint of illegal detention. . . . " **Edwards v. State,** 532 So.2d 1311, 1315 (Fla.1st DCA 1988); **Pirri v. State,** 428 So.2d 285, 286 (Fla.1st DCA 1983). This suggests that the warning is an important factor in establishing clear and convincing evidence of consent. Appellee submits that the warning, coupled with appellant's assent as testified to be Officer McDaris and noted in Officer Hendry's report, constitute clear and convincing evidence of appellant's consent to be searched.

ISSUE III

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

This precise issue is before the Court in another case, **Glass v. State,** Case No. 75,600. Since the Court's ruling in **Glass** will control this issue and would request that this issue not be decided until the Court has rendered its opinion in **Glass.**

In addition to the arguments advanced in **Glass,** respondent would respectfully ask the Court to consider the following:

Section 948.01(4), Florida Statutes (1973) states:

> Whenever punishment by imprisonment in the county jail is prescribed, the court, in its discretion, may at the time of sentencing direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, **the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court.**

(emphasis supplied) After noting a 1974 amendment (deletion of county jail and addition of misdemeanor and felony, excluding a capital felony), this Court in 1976 interpreted the above provision in the following manner:

> We reject the District Court's interpretation of Section 948.01(4) which requires the trial judge at the initial sentencing proceeding to impose a total sentence immediately followed by the withholding of a part thereof for use in the event probation is violated. This interpretation is inconsistent with the procedure for straight probation as authorized by Section 948.01(3), Florida Statutes, and in conflict with Section 948.06, Florida Statutes. The latter authorizes the trial judge, upon a finding that probation has been violated, to impose any sentence he might have originally imposed. Section 948.01(3), Florida Statutes, pertaining to placing a defendant on straight probation, requires the court to stay and withhold the imposition of sentence. The only difference in the wording of Section 948.01(4), Florida Statutes, is the addition of the qualifying word "remainder" in the phrase "withhold the imposition of the remainder of sentence." We read this provision of the statute to mean that the time spent in jail must be within any maximum jail sentence which could be imposed. **We find no legislative intent to require an initial imposition of the total sentence.**

State v. Jones, 327 So.2d 18, 25 (Fla. 1976) (emphasis supplied). If any doubt ever existed as to what the Florida Supreme Court meant by the above passage, it was dissipated with the decision in **Hults v. State,** 327 So.2d 210 (Fla. 1976), which was decided about one month after **Jones.** In that case, the Second District Court of Appeal had held that the defendant's sentence of eighteen months imprisonment followed by three years probation was illegal and void because of the trial court's failure to stay any portion of the prison term. **Hults v. State,** 307 So.2d 489 (Fla. 2d DCA 1975). On review by the Florida Supreme Court, this decision was quashed because of its conflict with Jones.

As this Court has recently stated, "[I]t is a function of the judiciary to declare what the law is." **State v. Smith,** 547 So.2d 613, 616 (Fla. 1989). Therefore, notwithstanding any express language in the statute to the contrary, section 948.01(4), Florida Statutes (1973), as interpreted by the Florida Supreme Court, authorizes the trial court to impose a prison sentence followed by probation without suspending part of the prison sentence. Although not expressly labeled by the court at that time, this sentencing structure is what has come to be known as the "probationary split sentence."

In **State v. Holmes,** 360 So.2d 380, 382 (Fla. 1978), the Florida Supreme Court acknowledged that "[s]ection 948.01(4) authorizes the imposition of a sentence popularly known as a 'split sentence,' that is, a sentence imposing a specified period of incarceration followed by a specified period of probation." Although not relevant to the issue here, the court in **Holmes** overruled that portion of **Jones** holding "that a trial judge may sentence a defendant to a combined period of incarceration and probation in excess of the maximum period provided by statute for the offense charged." 360 So.2d at 382.

Three years later, in **Villery v. Florida Parole & Probation Com'n,** 396 So.2d 1107, 1109-1110 (Fla. 1981), the Florida Supreme Court further receded from **Jones.** It overruled that portion of **Jones** holding "the trial court may place a defendant on probation and include as a condition, incarceration for a specific period of time within the maximum sentence allowed." The **Villery** court

held that "the maximum period of incarceration which may be imposed as a condition of probation is up to, but not included, one year." **Id.** at 1110. The **Villery** court elaborated on its holding as follows, which elaboration is relevant to the issue now before this court:

> [I]ncarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid. This applies to incarceration as a condition of probation as well as to incarceration followed by a specified period of probation.

Id., 396 So.2d at 1111.

Two years later, section 948.01(4) was amended as follows:

> (8) ~~(4)~~ Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, direct the defendant to be placed on probation or, with respect to any such felony, into community control, upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of probation shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

s. 13, ch. 83-131, Laws of Florida. (The struck-through word indicates a deletion, and the underlined words indicate additions.) This Court subsequently interpreted the last sentence of the above amendment to mean that the Legislature had "reenacted the split sentence authorization which [the Court] had

limited in **Villery.**" **Van Tassel v. Coffman,** 486 So.2d 528, 529 (Fla. 1986).

The same year that section 948.01(4) was amended, the Florida Legislature created section 921.187, which states in pertinent part:

> (1) The following alternatives for the disposition of criminal cases shall be used in a manner which will best serve the needs of society, which will punish criminal offenders, and which will provide the opportunity for rehabilitation. 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.

(emphasis supplied) s. 6, ch. 83-131, Laws of Florida. Except for the language addressing the **Villery** holding, this provision in substance is no different from section 948.01(8), which repeatedly has been characterized as authorizing split sentences. This becomes even more apparent with the 1985 amendment to section 948.01(8), discussed infra.

The Fifth District Court of Appeal has interpreted the above two provisions (sections 948.01(8) and 921.187(1)(g)) as a legislative abrogation of the holding in **Villery. Brown v. State,** 460 So.2d 427 (Fla. 5th DCA 1984). The Second District Court of Appeal has likewise interpreted section 921.187(1)(g) as a legislative override of **Villery. Anderson v. State,** 462 So.2d 18 (Fla. 2d DCA 1984).

In 1985, section 948.01(8) was further amended as follows:

> Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, impose a split sentence whereby ~~direct~~ the defendant is to be placed on probation or, with respect to any such felony, into community control, upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

s. 14, ch. 85-288, *Laws of Florida*. When sections 948.01(8) and 921.187(1)(g) are read in *pari materia* and in view of the legislative changes and judicial interpretations of the former section, it appears that the latest amendment to section 948.01(8) was effected simply to harmonize the two sections, without making any substantive changes. This is so because throughout all of these changes, the Legislature has never made any effort to alter the Florida Supreme Court's interpretation in **Jones** that the Legislature did not intend to require an initial imposition of the total sentence. The following language, which the **Jones** court interpreted, has in substance remained unchanged throughout all of the judicial interpretations and legislative changes:

> In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon

> probation <u>or into community control</u> after serving such period as may be imposed by the court.

The only change to this part of the statute is reflected by the above underlined words. If the Legislature had disapproved of the Florida Supreme Court's initial interpretation in **Jones,** it surely would have reflected its disapproval in one of its subsequent amendments. Therefore, based upon this somewhat lengthy analysis, the state respectfully submits that the Legislature has indeed authorized, at least by judicial interpretation of long-standing, probationary split sentences.

True, this Court, in **Poore v. State,** 531 So.2d 161 (Fla.1988) did not mention Section 921.187(1)(g), Florida Statutes. However, the exact language contained in section 921.187(1)(g) is also contained in the 1985 amendment to section 948.01(8). The court clearly had that provision before it because the District Court of Appeal in **Wayne v. State,** 513 So.2d 689 (Fla. 5th DCA 1987) had cited and discussed it. Nevertheless, the **Poore** court expressly disapproved of the decision in **Wayne** and subsequently quashed it. **State v. Wayne,** 531 So.2d 160 (Fla. 1988).

CONCLUSION

Wherefore, in light of the arguments and authorities cited herein, respondent respectfully asks this Honorable Court to affirm the decision of the District Court.

Respectfully submitted,

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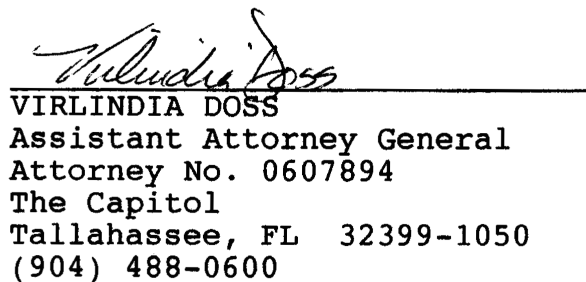

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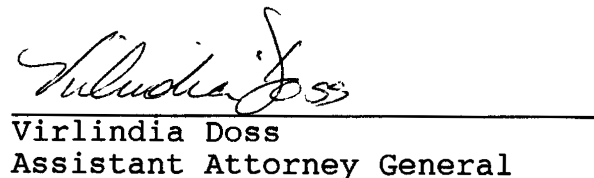
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been forwarded to Michael Minerva, Assistant Public Defender, Fourth Floor North, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301, via U. S. Mail, this 1st day of June 1990.



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