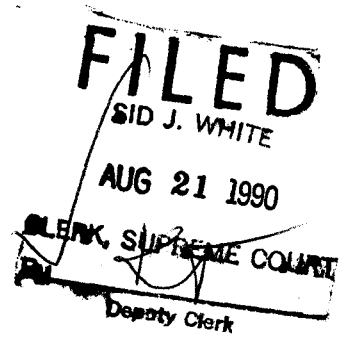
IN THE SUPREME COURT OF FLORIDA



DANIEL EDWARD SCHESNY,

Petitioner,

v. CASE NO. 76,442

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Daniel Edward Schesny, defendant/Appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as either "the State" or "Respondent."

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 review.

SUMMARY OF ARGUMENT

Probationary split sentences per se do not violate double jeopardy. Appellant'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. By analogy to former §948.01(4), Florida Statutes (1973), probationary split sentences are contemplated by current law. Probationary split sentences are authorized by §921.187(1)(g), Florida Statutes.

ARGUMENT

ISSUE

DOES A DOUBLE JEOPARDY VIOLATION RESULT FROM THE IMPOSITION OF A PROBATIONARY SPLIT SENTENCE WHEN THE LEGISLATURE HAS NOT EXPLICITLY AUTHORIZED THAT DISPOSITION IN THE SENTENCING ALTERNATIVES OF SECTION 921.187, FLORIDA STATUTES?

Petitioner was convicted of two counts of lewd and lascivious assault stemming from sexual activity with his two daughters aged 11 and 12. He was sentenced to a term of six years in prison followed by five years probation, to run concurrently on both counts.

Petitioner appealed on the ground that his sentence violated his constitutional protection against double jeopardy. The First District Court of Appeal affirmed the probationary split sentence on the authority of this Court's pronouncement in Poore v. State, 531 So.2d 161 (Fla. 1988). Schesny v. State, ___ So.2d ___, 15 F.L.W. D2001 (Fla. 1st DCA, August 2, 1990). The court, however, certified the above question as one of great public importance.

Petitioner contends that his sentence violates double jeopardy because the probationary split sentence is not authorized by the Florida Legislature and is a judicially manufactured product.

A split sentence including probation 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)] authorizes both "true" and "probationary" split sentences. Although not expressly citing the statute, this Court has twice found probationary split sentences to be authorized at law. In Franklin v. State, 545 So.2d 851, 852 (Fla. 1989), 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.

The term "law" is deliberate. This 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. 8).

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.

Significantly, the 1989 legislature did not overrule the Poore decision's recognition of probationary split sentences.[1] 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.

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

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[2] 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.

Poore does not cite §921.187 expressly. However, this statute is the only exhaustive listing of dispositional alternatives. It embraces the five types of sentences listed above. 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 as a source of authority for sentencing, and implies that probationary sentences are authorized by that statute.

While the Poore court observed that the true split sentence was authorized under Florida law, it did not

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

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,[3] 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 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

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

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's reliance (initial brief, p. 10-11) on Judge Zehmer's concurrence in Carter v. State, 552 So.2d 203 (Fla. 1st DCA), approved, 553 So.2d 169 (Fla. 1989), is misplaced. The Carter opinion was issued nine days before the Florida Supreme Court's decision in Franklin. Second, the concurrence is not this Court's opinion; Poore is the controlling precedent.

Petitioner's argument is further eroded by analogy to former §948.01(4), Florida Statutes (1973). That statute provides:

> 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.

In 1976 this Court interpreted the above provision:

> 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. [e.s.]

State v. Jones, 327 So.2d 18, 25 (Fla. 1976). If any doubt remained, it was dissipated one month later. In Hults v. State, 307 So.2d 489 (Fla. 2d DCA 1975), quashed, 327 So.2d 210 (Fla. 1976), the Second District held that Hults' 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. On review, this decision was quashed because of its conflict with Jones.

The sentence structure approved in Jones became known as a "probationary" split sentence.[4] In 1983, §948.01(4) was amended to become §948.01(8);[5] and §921.187 was enacted. In 1985, §948.01(8) was again amended to harmonize it with §921.187.[6]

When read together,[7] §921.187(1)(g) and §948.01(8) present no obstacle to probationary split sentences. The

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[4] 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."

[5] In response to Villery, supra, the legislature amended "new" §948.01(8) and thereby reenacted split sentence authorization. See §13, ch. 83-131, Laws of Florida; Van Tassel v. Coffman, 486 So.2d 528, 529 (Fla. 1986).

[6] See §14, ch. 85-288, Laws of Florida. Section 948.01(8) has not changed through 1989.

[7] See Brown v. State, 460 So.2d 427 (Fla. 5th DCA 1984), reading these statutes together to conclude the legislature had overridden Villery.

legislature, through the fifteen sessions since, has not altered Jones. It specifically has not required initial imposition of total sentences (followed by withholding of part and placement on probation). If the legislature did not agree with Jones, it has had ample opportunity to express its disagreement. As discussed earlier, the legislature has not overruled Poore.

Further, Petitioner asserts that the legislature "...did not, however, authorize both straight incarceration and probation in the same case." (initial brief, p. 7). Unfortunately for Petitioner, the authority is there. 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 v. State, 519 So.2d 1154 (Fla. 5th DCA 1988). 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. This conclusion is supported by analogy to the interpretation of former §948.01(4) in the Jones decision. Together with the cases of Glass v. State, Case No. 75,600, and Reynolds v.

State, Case No. 75,832, pending before this Court on the same question, Respondent urges this Honorable Court to answer the certified question in the negative.

CONCLUSION

Since imposition of a probationary split sentence is statutorily authorized and does not violate double jeopardy. Petitioner's sentence must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief on the merits has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day of August, 1990.

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