IN THE SUPREME COURT OF FLORIDA

DANIEL EDWARD SCHESNY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 76,442
DCA NO. 89-1304

INITIAL BRIEF OF PETITIONER ON THE MERITS

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

IN THE SUPREME COURT OF FLORIDA

DANIEL EDWARD SCHESNY,

Petitioner,

v.

CASE NO.
DCA NO. 89-1304

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

I. PRELIMINARY STATEMENT

Daniel Edward Schesny was the defendant in the trial court and will be referred to in this brief as "petitioner", "defendant," or by his proper name. Reference to the record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing a copy of the opinion issued in petitioner's case by the district court in Schesny v. State, No. 89-1304 (Fla. 1st DCA Aug. 2, 1990). Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

As the Statement of the Case and Facts, petitioner relies upon the facts and procedural history contained in the opinion issued August 2, 1990, by the lower tribunal in Schesny v. State, supra (A-1-2). In Schesny, the district court affirmed petitioner's concurrent sentences of six years in prison, to be followed by five years probation (A-1). Although affirming, the lower court certified to this Court the following issue as one of great public importance:

> 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?

Notice to invoke the discretionary jurisdiction of the Court has been timely filed. This initial brief of petitioner on the merits follows.

III. SUMMARY OF ARGUMENT

The concurrent sentences of six years incarceration followed by five years probation violated double jeopardy. The legislature has the exclusive authority to determine punishment for categories of crime. The courts do not. The double jeopardy clauses of the state and federal constitutions prohibit the courts from imposing more punishment than the legislature authorizes. The legislature did not authorize the probationary split sentence and therefore the imposition of both incarceration and probation as a probationary split sentence violated double jeopardy.

IV. ARGUMENT

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

Petitioner contends the certified question should be answered in the affirmative.

Petitioner was sentenced to both incarceration and probation on the same count, and the judge did not withhold a portion of the incarceration when doing so. Specifically, the trial judge, for each conviction of lewd assault, sentenced petitioner to six years in prison to be followed by five years probation (R-171-174). That is not a disposition which the legislature has authorized.

The Fifth Amendment to the United States Constitution states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."

Article I, Section 9 of the Florida Constitution says that no person shall be "twice put in jeopardy for the same offense."

One of the protections afforded by the Double Jeopardy Clauses of both constitutions is against "multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969;) Jones v. Thomas, __ U.S. __, 105 L.Ed.2d 322 (1989); Carawan v. State, 515 So.2d 161, 163-164 (Fla. 1987). This Court has recognized that with respect to cumulative sentences in a single trial the Double Jeopardy Clause prevents "the sentencing court from prescribing greater punishment than

the legislature intended." State v. Smith, 547 So.2d 613 (Fla. 1989), quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983).

The power to establish penalties for crimes rests exclusively with the legislature. Smith v. State, 537 So.2d 982 (Fla. 1989); Beynard v. Wainwright, 322 So.2d 473 (Fla. 1975); State v. Garcia, 229 So.2d 236, 238 (Fla. 1969); Wilson v. State, 225 So.2d 321 (Fla. 1969); Brown v. State, 13 So.2d 458 (Fla. 1943). Conversely, the courts have no power to determine the extent of punishment for a category of offense; the task of courts is to apply the sentencing statutes prescribed by the legislature. Smith v. State, supra, 537 So.2d at 986 (ruling invalid the original version of the sentencing guidelines because they limited the length of sentences and therefore were substantive law which the Supreme Court cannot enact.)

These principles apply to the probationary period imposed by the trial judge. In Section 921.187, Florida Statutes (1987) the legislature has authorized courts to impose combinations of punitive sanctions in these ways:

> (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:
>
> (a) Place an offender on probation with or without an adjudication of guilt pursuant to s. 948.01.
>
> (b) Impose a fine and probation pursuant to s. 948.011...
>
> (c) Place a felony offender into community control...pursuant to chapter 948.
>
> (d) Impose, as a condition of probation or community control, a period of treatment which shall be restricted to either a county facility, a Department of

> Corrections probation and restitution center, or a community residential or nonresidential facility ... Placement in such a facility may not exceed 364 days.
>
> (e) Sentence an offender pursuant to s. 922.051 to imprisonment in a county jail ... [for] not more than 364 days.
>
> (f) Sentence an offender who is to be punished by imprisonment in a county jail to a jail in another county if there is no jail within the county suitable ... pursuant to s. 950.01.
>
> (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 Added.)
>
> * * *
>
> (k) Sentence an offender to imprisonment in a state correctional institution.

Paragraph (g) defines a true split sentence, which is also defined in Section 948.01(8), Florida Statutes (1987):

> 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 the defendant is to be placed on probation ... 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 ... (Emphasis Added)

No statute authorizes what was imposed here, a sentence of incarceration followed by probation with none of the incarceration withheld.

A simple comparison of the statute and the sentence/probation ordered in this case reveals petitioner was given two separate punishments when the legislature authorized only one. That is, the legislature allowed the courts to impose prison,

or probation, or jail as a condition of probation, or a combination of prison and probation when a specific portion of the incarceration term is withheld. It did not, however, authorize both straight incarceration and probation in the same case.

In Poore v. State, 531 So.2d 161 (Fla. 1988), the Court set out five sentencing alternatives:

> 1) a period of confinement;
>
> 2) a "true split sentence" consisting 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" consisting of a period of confinement, none of which is suspended, followed by a period of probation;
>
> 4) a Villery sentence, consisting of period of probation preceded by period of confinement imposed as a special condition;
>
> 5) straight probation.

Id. at 164.

Admittedly, the disposition here is authorized in Poore under alternative (3), the "probationary split sentence." One searches the statutes in vain, however, for legislative authorization to impose the separate sanctions of straight prison followed by straight probation. There being no legislative grant of authority to dispose of a single case with both of those sanctions, the imposition of prison and probation in this case violated double jeopardy under the United States Constitution. This is a fundamental error that can be raised for the

first time on appeal. State v. Johnson, 483 So.2d 420 (Fla. 1986).

In Poore, the Court cited only the judgment and sentence form, Form 3.986, Florida Rules of Criminal Procedure, as authority for the probationary split sentence. Disagreeing with Judge Cowart that only one kind of split sentence existed in Florida, the Court quoted with approval from Franklin v. State, 526 So.2d 159, 162-163 (Fla. 5th DCA 1988)(en banc), approved, 545 So.2d 851 (Fla. 1989).

> 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.

Poore, 531 So.2d at 164.

Rule 3.986 does not cure the constitutional defect. The Court itself created the judgment and sentence form relied on in Poore when it enacted Rule 3.986 in 1981. In Re Florida Rules of Criminal Procedure, 408 So.2d 207 (Fla. 1981). It cannot bootstrap the probationary split sentence into legitimacy by relying on a rule it had no power to enact in the first

place. See, Smith v. State, supra, 537 So.2d 982 (guidelines rule unconstitutional because it was substantive in nature).

Prior to its enactment by the Court via a mere form, the probationary split sentence existed, if at all, by virtue of the Court's opinion in State v. Jones, 327 So.2d 18 (Fla. 1976). Ironically a portion of Jones allowing the court to impose any sentence it could have originally after violation of the probationary portion of a true split sentence was overruled sub silencio in Poore and Franklin, supra, after the court had expressly overruled another portion of Jones in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981). Given its history, Jones is dubious authority for anything at this point.

The double jeopardy problems of the probationary split sentence are substantial. Imposing both a sentence and probation when only one disposition is approved is no different than imposing both imprisonment and a fine when the legislature made them alternative punishments. Dual punishments in those circumstances violate double jeopardy under the United States Constitution. Ex Parte Lange, 18 Wall. 163 (1874); In re Bradley, 318 U.S. 50 (1943).

Applying the same principles, this Court ruled in Ex Parte Bosso, 41 So.2d 322 (Fla. 1949) that when the legislature specified the punishment to be either a fine or imprisonment, the court lacked the authority to impose a fine and probation because "it is unlawful for a court to inflict two punishments for the same offense...." Id. at 323.

These authorities are inconsistent with that portion of Poore approving the probationary split sentence alternative. The Court apparently overlooked the double jeopardy implications of its decision.[1]

In separate concurring opinions in Carter v. State, 552 So.2d 203 (Fla. 1st DCA 1989) approved, 553 So.2d 169 (Fla. 1989), Judges Barfield and Zehmer accurately identify some problems with the "probationary split sentence" alternative approved by Poore. The concurrences also accurately identify the genesis of these problems, which is that the probationary split sentence is not an approved sentencing alternative under any applicable statute. See Sec. 921.187, Fla. Stat.

Because Poore is binding on the district court, Judge Zehmer pointed out that "we are not free to find any double jeopardy problems with the imposition of sentence in this case." Carter, 552 So.2d at 205. Nevertheless, he says:

> As Judge Barfield has pointed out in his concurring opinion, section 921.187, Florida Statutes, sets forth the statutory authority for the disposition and sentencing alternatives available in criminal cases, yet the supreme court's opinion in Poore makes no mention of this statute in characterizing the five sentencing alternatives available to the courts.

---

[1]In Poore the court had enough to concern itself with already. The court faced the intertwined nightmares of resentencing a youthful offender following violation of the probationary portion of a split sentence, on which was superimposed the issue of electing to be resentenced under the guidelines, enacted between the original and subsequent sentencing proceedings.

Ibid. Judge Zehmer continues:

> Nothing in section 921.187 authorizes the court to sentence an offender to imprisonment for a specified term and, after completing service of the full term of imprisonment, to serve an additional period of probation. The only statutorily authorized
>
> basis for imposing a so-called "split sentence" is set forth in subsection 921.187(1)(g), which specifies a "true split sentence" as defined in category 2 of the Poore decision ("consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion").

Ibid. Finally, the judge concludes:

> Therefore, like Judge Barfield, I question the validity of appellant's original sentence under the statute in view of the failure of the opinion in Poore even to mention this important section of the statute. Perhaps the supreme court can more fully explicate the statutory authority for the category 3 "probationary split sentence" alternative described in Poore when properly afforded the opportunity for doing so in an appropriate case.

Id. at 1376-77.

Based on the constitutional principles previously asserted this Court should find that petitioner's sentence violates the double jeopardy provisions of the Fifth Amendment, thus answering the certified question in the affirmative.

V. CONCLUSION

For the reasons asserted here petitioner requests the Court to vacate the sentences and probationary orders appealed from and remand the cause to the trial court with directions to resentence petitioner.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner on the Merits, has been furnished by hand-delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Daniel E. Schesny, #116358, Holmes Correctional Institution, Post Office Box 190, Bonifay, Florida, 32425, on this 8th day of August, 1990.

CARL S. McGINNES