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IN THE SUPREME COURT OF FLORIDA

DAVID LEE HUFF,

Petitioner,

v. CASE NO. 76,668

STATE OF FLORIDA,

Respondent.

_______________________/

BRIEF OF RESPONDENT 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.

SUMMARY OF ARGUMENT

The probationary split sentence is authorized by statute and this Court has previously recognized the legality of such sentences. This issue is already pending before this Court in Glass v. State, Case No. 75,600, and will be controlled by the Court's decision in that case.

ARGUMENT

ISSUE I

> 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 Respondent 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 points out that only last December this Court said that a probationary split sentence was valid pursuant to Poore v. State, 531 So.2d 161 (Fla. 1988). State v. Carter, 553 So.2d 169, 170 fn. 1 (Fla. 1989). Respondent would also 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), this 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 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 similarly 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 or into community control 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 view of the foregoing argument and citation to authority, Respondent respectfully asks this Honorable Court to affirm the judgment and sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded via U. S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 30th day of October, 1990.

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