IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,553

DAVID MICHAEL MCLEOD,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the prosecuting authority in the trial court and the appellant in the First District Court of Appeal, and will be referred to as "the state" in this brief. Respondent was the defendant in the trial court and the appellee in the First District Court of Appeal, and will be referred to as "McLeod" in this brief. The record on appeal will be referred to as "R" followed by the appropriate page number. Petitioner's brief on the merits will be referred to as "PBM" followed by the appropriate page number. Respondent's brief on the merits will be referred to as "RBM" followed by the appropriate page number.

SUMMARY OF ARGUMENT

The state agrees that its right to appeal is grounded on §924.07(1)(e), F.S. (1989) and whether the right to appeal an illegal sentence granted therein includes the right to go behind the facial validity of the sentence to determine its legality. However, in the First District, controlling case law dictates that the legality of a sentence cannot be determined on its face and requires that a full record on appeal be prepared and both parties fully brief the issue.

The result of this holding has been hundred of appeals which clog and overload the already overloaded appellate system. The state thus continues to maintain that the First District cases which require such unnecessary acts are aberrant law and should be disapproved. Should Ford remain controlling, the state is entitled to appeal the legality of a facially legal sentence pursuant to §924.07(1)(e). Proceeding on the assumption that the court will disapprove Ford by holding that the state does not have a right to appeal, the state is entitled to a writ of certiorari. The trial court's ruling departed from the essential requirements of law and is subject to review under a writ of certiorari. The essential requirements for an order granting or denying restitution are found in §775.089(1)(a) and (6), F.S. (1989). The trial court's order in the present case departed from those requirements and in fact

was based upon a factor that the statute does not allow a trial court to consider when deciding on the issue of restitution. The First District in holding that the state has no right to review by writ of certiorari in the instant case relied on a decision of this court that has since been severely limited in its application, and that in fact does not apply to this case. The state thus contends it does have a right to review of the trial court's order in the instant case by writ of certiorari should this Court find no right of appeal.

ARGUMENT

ISSUE I

DOES A STATUTE AUTHORIZING AN APPEAL FROM AN ILLEGAL SENTENCE REFER ONLY TO THE FACIALLY ILLEGALITY OF THE SENTENCE?

Sections 924.06(1)(d) and 924.07(1)(e), Florida Statutes, authorize defendants and the state, respectively, to appeal "illegal" sentences. The state agrees that its right to appeal is grounded entirely on section 924.07(1)(e) and whether the right to appeal an illegal sentence granted therein includes the right to go behind the facial validity of the sentence to determine its legality.

Respondent argues that there is no facial illegality of a denial of restitution because a trial court is authorized to deny restitution in its discretion and an exercise of discretion, even if abused, does not constitute a facially illegal sentence which may be appealed (RBM 24-26). Again, as a principle of law, the State agrees with respondent that the right to appeal an illegal sentence does not establish jurisdiction to appeal a facially valid sentence, i.e., one which is within the statutory maximums and minimums. This sound principle of law is contrary, however, to controlling case law in the First District where this case arose.

In Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), rev. denied, 581 So.2d 1310 (Fla. 1991), Ford pled no contest without expressly reserving the right to appeal and received a sentence which was facially legal. The state moved to

dismiss the appeal for lack of jurisdiction pursuant to section 924.06(3), Robinson v. State, 373 So.2d 898 (Fla. 1979), and Hughes v. State, 565 So.2d 354 (Fla. 1st DCA 1990). Supplemental briefs were ordered by the court and the issue came down to whether there was a right to appeal a facially legal sentence in order to determine its legality. The state argued there was not and Ford argued the contrary.

In a sweeping decision of great importance to the administration of justice, the 1st DCA held that the legality of any sentence was subject to appeal and that such legality could not be determined on its face: that it was necessary to prepare a full record on appeal and to require the parties to fully brief the issue to determine if error had occurred. Because of the great importance of this ruling, the State sought review and a writ of prohibition from this court. State v. District Court of Appeal, First District, petition denied, Case No. 77,099, May 17, 1991 (Fla.). Review and the writ were denied and Ford became the rule of law in the First District.

In its practical application, Ford has resulted in hundreds of appeals which clog and further overload an already overloaded appellate system. See, for example, Walker v. State, 579 So.2d 348 (Fla. 1st DCA 1991) where Walker pled no contest without reservation and received a guidelines sentence pursuant to plea. Nevertheless, Walker filed an appeal seeking to go behind the facially legal

sentence to show that it was illegal. Explaining and relying on Ford, the 1st DCA held that an appellate court always has jurisdiction to consider the legality of a facially legal sentence. In so holding, the court expressly relied on this Court's opinion in Robinson. Moreover, the court explained, even though the facially legal sentence was also legal when examined in detail it nevertheless furnished a jurisdictional basis for review. Thus, the sentence was affirmed not dismissed.

The state continues to maintain, as it did in Ford and its petition for writ of prohibition in this Court, that Ford is aberrant law and should be disapproved. Nevertheless, it is controlling case law which expressly relies on this Court's decision in Robinson. Thus, unless it is disapproved, it controls here. Pursuant to Ford, Walker, and Robinson, the state is entitled to appeal the legality of a facially legal sentence pursuant to section 924.07(1)(e).

ISSUE II

THE TRIAL COURT'S RULING DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW AND WAS SUBJECT TO REVIEW UNDER A WRIT OF CERTIORARI.

The district court below held that the state did not have the right to appeal. The court then relied on Jones v. State, 477 So.2d 566 (Fla. 1985), for the proposition that the right to review by writ of certiorari was not available. In Jones, this Court seemed to hold that review for writ of certiorari was contingent on the right to appeal. This was clearly incorrect because one of the requirements of a writ of certioratri is that there not be a right to appeal; if there were a right to appeal there would be no need for certiorari and the petitioner, for obvious reasons, would be unable to show the absence of another remedy. In State v. Pettis, 520 So.2d 250 (Fla. 1988), this Court recognized and corrected the anomaly by holding that the right to appeal was not a prerequisite to the right to certiorari review.

Clearly, in view of Pettis, the district court below erred in relying on Jones and in refusing to examine the petition for writ of certiorari to determine if there had been a departure from the essential requirements of law. For the reasons set forth in its initial brief, the state maintains that there was a departure from the essential requirements of law and, in view of the district court's

holding that there was no right to appeal, there was no other remedy available to the state and certiorari should issue.

In view of the district court's error in refusing to examine the petition for writ of certiorari, the decision below should be quashed and the district court ordered to either, (1) issue the writ based on the departure from the essential requirements of law, or, (2) perform certiorari review pursuant to Pettis.

CONCLUSION

This Court should disapprove Ford. If it declines to do so, it should hold that the state was entitled to appeal the facially legal sentence pursuant to section 924.07(1)(e).

If the Court disapproves Ford, and holds that the state has no right to appeal, then the state is entitled to either a writ of certiorari or review by the district court to determine if the writ should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Mark King Leban, 2720 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL. 33131-5302, this 25th day of November, 1991.

Charles T. Faircloth, Jr.
Assistant Attorney General