IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN M. McKENDRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,477

****

ON DISCRETIONARY REVIEW FROM THE STATE OF FLORIDA,
FOURTH DISTRICT COURT OF APPEAL

****

PETITIONER'S REPLY BRIEF ON THE MERITS

WAXLER & SMITH
73 S.W. Flagler Avenue
Post Office Box 111
Stuart, Florida 34995-0111
(407) 286-4446

RONALD B. SMITH
Florida Bar #235555

Counsel for Petitioner

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and the Appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the Appellant below. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" will denote Record on Appeal.

"PA" will be used to refer to Petitioner's Appendices.

All emphasis is added.

STATEMENT OF THE CASE AND FACTS

The Petitioner will rely upon the Statement of the Case and Facts set forth in his Initial Brief on the merits.

SUMMARY OF THE ARGUMENT

This Court should exercise its discretion, granted by Article V, Section 3(b)(4) of the Florida Constitution, in favor of answering the certified question presented here in the affirmative. The decision of the Fourth District Court of Appeal should be quashed.

While Section 790.221(2), Fla. Stat. (1989) calls for a mandatory minimum five year sentence, the trial court was within the authority granted to it by the legislature when it employed Section 948.01, Fla. Stat. (1989) to implement its decision to suspend the balance of Petitioner's five year sentence and place him on community control. This sentence was consistent with the sentence called for by the sentencing guidelines and was not a departure sentence.

When Section 790.221(2), Fla. Stat. (1989) is examined and compared with other mandatory minimum statutes, and when the rules of statutory construction are applied in conjunction with Section 775.021(1), Fla. Stat. (1989), the sentence of the trial court must be upheld.

ARGUMENT

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN IMPOSING A FIVE YEAR PRISON SENTENCE AS REQUIRED BY STATUTE AND THEN SUSPENDING SAID SENTENCE AND PLACING PETITIONER ON COMMUNITY CONTROL.

Respondent maintains that the trial court relied upon §948.01(3), Fla. Stat. (1989), in suspending a five year prison sentence that was imposed on Petitioner and then placing Petitioner on community control. Upon examination of the record, it is clear that the operative subsection relied upon by the trial court was §948.01(4), Fla. Stat. (1989). (R. 38). (PA. 8).

In 1989, subsection (3) of §948.01, dealt with situations where the trial judge could withhold the imposition of sentence and place a defendant on probation. Subsection (4) dealt with situations where the trial judge had imposed sentence upon a defendant and could use his discretion to then suspend the sentence and place a defendant on community control. (PA. 10).

Although the Fourth District cites §948.01(3), Fla. Stat. (1989), the type of sentence imposed by the trial court in this case is not addressed in that subsection. The type of sentence imposed upon the Petitioner is, however, addressed in subsection (4). [1]

Therefore, the operative subsection relied upon by the trial judge provided in pertinent part, in subsection (4):

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[1] §948.01, Fla. Stat. (1989), was amended effective October 1, 1991. Ch. 91-280, Laws of Fla. A portion of this amendment renumbered subsection (4) to subsection (3) and subsection (3) to subsection (2). (PA. 12,13).

> If, after considering the provisions of subsection (3) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to imprisonment, the court may place the offender in a community control program. Or, in a case of prior disposition of a felony commitment, upon motion of the offender or the department or upon its own motion, the court may, within the period of its retained jurisdiction following commitment, suspend the further execution of the disposition and place the offender in a community control program upon such terms as the court may require.

Regardless of which subsection was addressed by the Fourth District, the court held that no subsection of §948.01 may be invoked unless the sentencing guidelines provide for a range of sentencing that includes probation or where appropriate reasons exist to deviate from the guidelines and that "the only way that section 948.01 can be reconciled with the sentencing guidelines is to limit its application to those situations where the guidelines themselves permit a suspended sentence." (PA. 7). The Petitioner is unaware of any situation where the sentencing guidelines specifically permit a suspended sentence. Under this reasoning it would appear that suspended sentences are a thing of the past.

Contrary to Respondent's contention, Petitioner did not ignore Fla.R.Crim.P. 3.701(d)(9), which states that if the recommended guidelines sentence is less than the mandatory penalty, then the mandatory sentence takes precedence. As this court held in Scates v. State, 603 So.2d 504 (Fla. 1992), this concept may not always hold true. Just as in Scates, the problem in this case involves reconciling conflicting provisions and constructions of two

criminal statutes.

The trial judge had the problem of reconciling the requirement of section 790.221(2), Fla. Stat. (1989), to impose a five year sentence, with the duty imposed upon him to examine the defendant's criminal history, social history, present condition and the circumstances of the offense along with the discretion afforded him by section 948.01, Fla. Stat. (1989).

As this court did with the two conflicting statutes in Scates, in construing these two criminal statutes that are susceptible to differing constructions, they must be construed in favor of the accused. 775.021, Fla. Stat. (1989); Lambert v. State, 545 So.2d 838, 841 (Fla. 1989).

Respondent states that all of the other minimum mandatory sentences called for in other statutes and subsections of Chapter 790 that Petitioner provided in his brief were "interesting but do little more than highlight the difficulties in maintaining consistent language throughout statutory provisions enacted in different years or different circumstances."

Petitioner submits that the fact that §790.221(2) does not preclude trial judges from exercising their discretion by utilizing §948.01, is more than "interesting." As this court held in Scates, at page 506,

> The omission of this language implies that the legislature intended a different construction, allowing trial judges greater discretion in sentencing decisions . . . .

The use of different terms in different statutes on the same subject matter is strong evidence that different meanings were

intended by the legislature. Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984).

Respondent is correct in maintaining that where the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary effect and that the rules of statutory construction favor according statutes their plain and obvious meaning, and one must assume that the legislature knew the plain and ordinary meanings of words when it chose to include them in a statute. In this case the trial judge found that the language of §790.221(2) was clear and unambiguous when he sentenced the Petitioner to five years in prison.

Respondent is also correct in stating that it is a general rule of statutory construction that a more specific statute covering a particular subject is controlling over one covering the same subject in general terms. There is no question that the trial judge could not have simply disregarded the clear language of §790.221(2) and withheld the imposition of the five year sentence. Respondent is incorrect however, in citing Department of Professional Regulation v. Durrani, 455 So.2d 515, 518-19 (Fla. 1st DCA 1984), for the proposition that "a statute must be interpreted to avoid an unreasonable result where it is open to another interpretation." Durrani involved administrative law and procedure, not criminal law and procedure, and it actually held that "a statute must be interpreted to avoid so unreasonable a result where . . . it is open to another interpretation." This is

a criminal case and where criminal statutes are susceptible of different interpretations, they must be interpreted in favor of the accused. Lambert, supra. See also §775.021(1), Fla. Stat. (1989).

Respondent maintains that because §790.221 is the later promulgated statute it must control here. This is also one of the same arguments that Respondent presented before this court in Scates. These statutes are not in direct conflict. The purpose of §790.221 is to make sure that anyone convicted of possessing a short barrelled rifle, shotgun or machine gun will have a sentence imposed of at least five years. The purpose of §948.01(4) is to allow a trial judge discretion to examine all the facts and circumstances surrounding a conviction and sentence that has already been imposed and, if he is not precluded by the legislature, to suspend further execution of a sentence if the ends of justice so dictate.

There is a presumption that the legislature passes statutes with knowledge of other existing statutes. State v. Dunmann, 427 So.2d 166 (Fla. 1983). There is no doubt that the legislature has been well aware of §948.01 since it began enacting criminal statutes carrying minimum mandatory penalties. See e.g. §775.087(2)(a), Fla. Stat. (1981); §893.135, Fla. Stat. (1989); §775.0823, Fla. Stat. (1989). Further, the legislature has been well aware of §948.01 when enacting statutes within Chapter 790. Section 790.165, Fla. Stat. (1989), was enacted in 1987. Ch. 87-243, Laws of Fla. It provides that:

> "Any person violating the provisions of this subsection shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of §948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld."

When the legislature amended §790.221(2), in 1989, to include the mandatory sentencing language, the legislature knew, as it is presumed to have known, about §948.01 and certainly about §790.165. Thus, the last expression of legislative will is that upon conviction of §790.221(2), a defendant must be sentenced to at least five years in prison, however the legislature did not intend to preclude the application of §948.01 as evidenced by the intentional omission of the preclusive language it had used so many times before. St. George Island Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989).

Based upon the foregoing and the argument set forth in the Petitioner's Initial Brief on the Merits, the certified question should be answered in the affirmative and the decision of the Fourth District Court of Appeal should be quashed.

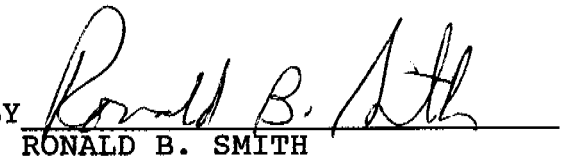
CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court quash the decision of the Fourth District Court of Appeal and affirm the trial court below.

DATED this 25th day of May, 1993.

Respectfully submitted,

WAXLER & SMITH
Attorneys for Petitioner

BY 

RONALD B. SMITH
Florida Bar #235555
73 S.W. Flagler Avenue
Post Office Box 111
Stuart, Florida 34995-0111
(407) 286-4446

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PETITIONER'S APPENDICES

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APPENDIX A

Opinion of the Fourth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 91-3308.
	)	
JOHN MCKENDRY,	)	L.T. CASE NO. 90-2991-CF.
	)	
Appellee.	)	
	)	

Opinion filed February 17, 1993

Appeal from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Melvina Racey Flaherty, Assistant Attorney General, West Palm Beach, for appellant.

Ronald B. Smith of Waxler & Smith, Stuart, for appellee.

ANSTEAD, J.

In this appeal the state asserts error by the trial court in not imposing the five year minimum mandatory sentence for possession of a short-barreled shotgun as provided in section 790.221(2), Florida Statutes (1989). We agree and reverse.

FACTS

John McKendry was tried and convicted of possession of a short-barreled shotgun. The recommended guidelines sentence provided for community control or 12 to 30 months incarceration. However, section 790.221(2) prescribes a five year mandatory

minimum term of imprisonment for possession of a short-barreled shotgun.

At sentencing, McKendry's counsel maintained that section 948.01, Florida Statutes (1989), concerning the trial court's discretion to suspend a sentence, authorized a sentence less than the mandatory minimum. The trial court, agreeing that McKendry's record and the facts of the case did not justify five years of imprisonment, and acting under section 948.01(3), sentenced McKendry to five years, but suspended the sentence with credit for time served, and ordered that McKendry be placed on community control for one year followed by three years probation.

LAW

Section 790.221(2), Florida Statutes (1989), as amended in 1989, prescribes the penalty upon conviction for possession of a short-barreled shotgun:

> A person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Upon conviction thereof he shall be sentenced to a mandatory minimum term of imprisonment of 5 years.

Pre-amendment, the statute stated:

> Any person convicted of violating this section is guilty of a felony and upon conviction thereof shall be punished by imprisonment ... not to exceed 5 years.

By its action in 1989, the legislature apparently concluded that the offense of carrying a short-barreled firearm was more serious than perceived pre-amendment, and directed that the previous maximum sentence now be the minimum sentence. It also made the sentence mandatory, thereby removing the sentencing court's discretion.

Rule 3.701(d)(9), Florida Rules of Criminal Procedure (1989), of the sentencing guidelines,[1] provides:

> Mandatory Sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

(Emphasis supplied).

In contrast with these sentencing provisions, section 948.01(3), Florida Statutes (1989), states:

> If it appears to the court ... that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation.

Section 948.01(3), in some form or other, has been on the books since 1941.

SCATES

Initially, the state relies heavily on State v. Scates, 585 So. 2d 385 (Fla. 4th DCA 1991), and State v. Lane, 582 So. 2d 77 (Fla. 4th DCA 1991), which required imposition of a mandatory minimum sentence despite other statutory provisions granting trial judges discretion to withhold such a sentence.

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[1] The sentencing guidelines as adopted by the legislature are in Chapter 921, Florida Statutes (1989), and as adopted by the Florida Supreme Court in part XIV (Rules 3.700-3.800), Florida Rules of Criminal Procedure (1989).

However, both opinions were quashed by the supreme court in Scates v. State, 603 So. 2d 504 (Fla. 1992) and Lane v. State, 603 So. 2d 510 (Fla. 1992). In both cases, the supreme court held that the trial court could depart from the minimum mandatory sentencing provisions of section 893.13(1), Florida Statutes (1989), pursuant to the discretionary provisions of section 397.12, Florida Statutes (1989). Section 397.12 states:

> When any person ... has been charged with or convicted of a violation of any provision of chapter 893 or of a violation of any law committed under the influence of a controlled substance, the court ... may in its discretion require the person ... to participate in a drug treatment program .... If referred by the court, the referral may be in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any other similar action.

The supreme court held that there was no conflict between the sentencing provisions of section 893.13(1) and section 397.12 since the provisions of section 397.12 specifically and unambiguously referred to chapter 893 in authorizing alternative sentences.

In a somewhat similar case, State v. Ross, 447 So. 2d 1380 (Fla. 4th DCA), rev. denied, 456 So. 2d 1182 (Fla. 1984), this court held that the discretionary provisions of section 397.12 did not constitute an exception to the minimum mandatory sentence provided by section 775.087(2)(a), Florida Statutes (1981). Section 775.087(2)(a) provided that any person convicted of certain specified offenses while having a firearm in his possession shall be sentenced to a three year minimum term of incarceration and further:

> Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.27 or s. 944.29, prior to serving such minimum sentence.

This court in Ross based its decision on the rule of statutory construction that the latest enacted statute controls. Ross, 447 So. 2d at 1382. The basis for this rule is the idea that the more recent statute is usually the last and controlling statement of legislative intent, as the legislature is presumed to be aware of the earlier law. The court found the language of section 775.087(2)(a) to be unambiguous in providing for a minimum mandatory sentence for the particular offense. Of course, the Ross holding may be in some doubt given the supreme court's recent holding in Scates. The trial court in Ross apparently based its sentence on the fact that Ross was under the influence of drugs when he committed the criminal offense.

THIS CASE

McKendry relies primarily on a statutory comparison of section 790.221(2) to other penal statutes such as section 775.087(2)(a) which have mandatory minimum sentences and have explicit preclusive language barring any suspension of sentence. This preclusive language is lacking in section 790.221(2). In addition, section 775.087(2)(a) expressly refers to section 948.01 in barring any suspension of the mandatory sentence. There is no similar reference to section 948.01 in section 790.221(2). Of course, McKendry now also has the Scates decision on his side of the issue.

However, unlike the statutes involved in Scates, the statutes here lack any specific relationship: section 790.221(2) is concerned specifically with the possession of a short-barreled rifle, shotgun or machine gun, while section 948.01 is concerned generally with leniency for deserving defendants in all cases. Unlike section 397.12, which specifically refers to chapter 893, there is no reference in section 948.01 to specific offenses or circumstances meriting special treatment.

Section 948.01 was first enacted in 1941, well before the minimum mandatory provisions of section 790.221, and well before the sentencing guidelines were adopted as the general sentencing policy in Florida. The purpose of section 948.01 is to avoid giving a criminal record to those persons whose prospects appear good for rehabilitation. Holland v. Florida Real Estate Comm'n, 352 So. 2d 914 (Fla. 2d DCA 1977). This section was enacted at a time when trial courts still had virtually unlimited discretion in sentencing, and most sentencing decisions were immune from appellate review or collateral attack.

There is clearly a tension, if not a conflict between section 948.01 and the sentencing guidelines, as well as the provisions for minimum mandatory sentences contained in various other statutes. The discretionary application of section 948.01, in all cases, without consideration of the guidelines, would negate the complex and comprehensive provisions of the sentencing guidelines and their underlying policy to standardize sentencing throughout the state. For instance, if section 948.01 is considered in isolation, it would immediately negate the

statutory and rule requirements that written reasons be provided for any deviation from the guidelines. We conclude that the only way that section 948.01 can be reconciled with the sentencing guidelines is to limit its application to those situations where the guidelines themselves permit a suspended sentence.

In our view, the application of section 948.01 has now been limited by the adoption of the sentencing guidelines. The guidelines in turn, specifically provide in Rule 3.701(d)(9) for the enforcement of minimum mandatory sentences. Section 948.01 may now be invoked only when the sentencing guidelines provide for a range of sentencing that includes probation or where appropriate reasons exist to deviate from the guidelines. While we sympathize with the plight of a trial judge who believes the mandatory sentence to be too harsh under the circumstances of a particular case, we are constitutionally bound to apply the punishment philosophy adopted by the legislature regardless of our opinion as to whether it makes good sense. Because of the conflicting provisions of the statutes and the substantial effect thereof on a large number of persons across the state, we certify the following as a question of great public importance:

> DO THE PROVISIONS OF SECTION 948.01, FLORIDA STATUTES (1989), AUTHORIZE THE IMPOSITION OF A SENTENCE OTHER THAN AS PROVIDED IN SECTION 790.221(2), FLORIDA STATUTES (1989)?

Accordingly, we reverse and remand for further proceedings consistent herewith.

LETTS and GUNTHER, JJ., concur.

APPENDIX B

Record on Appeal

THE COURT: Mr. McKendry, then based upon the jury finding you guilty in the short-barreled shotgun case and then your pleas of no contest in the cocaine case, I do then at this time adjudge that you are guilty of the several crimes of possession of a short-barreled shotgun, sale and delivery of cocaine, the two counts there, the two counts of possession of cocaine, and the count of conspiracy to sell cocaine.

In the short-barreled shotgun case you are sentenced to five years in Department of Corrections.

However, based upon the wording of the statute and my belief that the statute does not prohibit the suspension of the sentence, I do order that the sentence be suspended, that is, after you have served the time that you have served as of today, that you are placed on community control for a period of one year with credit for the one day that you have served in jail awaiting sentencing, followed by three years on probation.

I do make a special condition that you do receive alcohol and substance abuse evaluation and appropriate treatment, that you do submit to random urinalysis as directed by your probation and community control officer.

In the cocaine case there, I do order you placed on community control for a period of two years with credit for the two days that you have spent in jail awaiting sentencing, this followed by probation for a period of three years.

All the sentences are concurrent, that is, one runs along with the other.

I do make the same special conditions in the cocaine case that I have made in the short-barreled shotgun case.

You do have the right to appeal from the judgments of guilt the sentence, the suspension of the sentence, and placing you on community control and probation in the short-barreled shotgun case and the community control and probation in the cocaine case, or the judgment for attorney's fees and costs in the cases. You must appeal though within 30 days of today or give up your right to an appeal.

You have the right to a lawyer on appeal as you've had at the trial level. If you wish to make an appeal and cannot afford a lawyer, the Public Defender can be your lawyer on appeal. Do you understand your right to an appeal?

THE DEFENDANT: Yes sir.

THE COURT: Okay. The gentleman to your left will fingerprint you and then the officer from Department of Corrections will instruct you.

MR. SMITH: Thank you, Judge.

THE COURT: You're welcome, sir, thank you. Mr. Smith, for the purpose of the record at this time, are you filing a supersedeas?

MR. SMITH: Judge, what I intend--the reason I--what I intended, I filed--or intend on doing, he's--he's indigent.

APPENDIX C

§948.01(4), Fla. Stat. (1989)

CHAPTER 948

PROBATION AND COMMUNITY CONTROL

948.001 Definitions.—As used in this chapter, the term:

(1) "Community control" means a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

(2) "Probation" means a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03.

History.—s. 11, ch. 83-131.

948.01 When court may place defendant on probation or into community control.—

(1) Any court of the state having original jurisdiction of criminal actions may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury. If the court places the defendant on probation or into community control for a felony, immediate supervision shall be provided by an officer employed in compliance with the minimum qualifications for officers as provided in s. 943.13.

(2) When the penalty for the offense may involve imprisonment in the state prison, the circuit court, prior to such hearing, shall, and in a misdemeanor case may, refer the case to the Department of Corrections for investigation and recommendation. The court, upon such reference, shall direct the department, and it shall be the duty of the department, to make an investigation and report in writing at a specified time prior to sentencing to the court upon the circumstances of the offense and the criminal record, social history, and present condition of the defendant, together with its recommendation pursuant to the provisions of s. 921.231.

(3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation. However, no defendant placed on probation for a misdemeanor may be placed under the supervision of the department unless the circuit court was the court of original jurisdiction and the circuit court affirmatively and specifically orders such supervision after finding that supervision in the community is necessary to provide adequate protection to the community or to assist in the rehabilitation of the offender, or both.

(4) If, after considering the provisions of subsection (3) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to imprisonment, the court may place the offender in a community control program. Or, in a case of prior disposition of a felony commitment, upon motion of the offender or the department or upon its own motion, the court may, within the period of its retained jurisdiction following commitment, suspend the further execution of the disposition and place the offender in a community control program upon such terms as the court may require. The court may consult with a local offender advisory council pursuant to s. 948.90 with respect to the placement of an offender into community control. Not later than 3 working days before the hearing on the motion, the department shall forward to the court all relevant material on the offender's progress while in custody. If this sentencing alternative to incarceration is utilized, the court shall:

(a) Determine what community-based sanctions will be imposed in the community control plan. Community-based sanctions may include, but are not limited to, rehabilitative restitution in money or in kind, curfew, revocation or suspension of the driver's license, community service, deprivation of nonessential activities or privileges, or other appropriate restraints on the offender's liberty.

(b) After appropriate sanctions for the offense are determined, develop, approve, and order a plan of community control which contains rules, requirements, conditions, and programs that are designed to encourage noncriminal functional behavior and promote the rehabilitation of the offender and the protection of the community.

(5) The sanctions imposed by order of the court shall be commensurate with the seriousness of the offense.

When community control or a program of public service is ordered by the court, the duration of community control supervision or public service may not be longer than the sentence that could have been imposed if the offender had been committed for the offense or a period not to exceed 2 years, whichever is less. When restitution or public service is ordered by the court, the amount of restitution or public service may not be greater than an amount which the offender could reasonably be expected to pay or perform. An offender who participates in any work program under the provisions of this chapter will be considered an employee of the state for purposes of liability, unless otherwise provided by law.

(6) Whenever an offender is required by the court to participate in any work program under the provisions of this chapter, enters into the pretrial intervention program pursuant to s. 944.025, or volunteers to work in a supervised work program conducted by a specified state, county, municipal, or community service organization or to work for the victim, either as an alternative to monetary restitution or as a part of the rehabilitative or community control program, the offender shall be considered an employee of the state for the purposes of chapter 440. In determining the average weekly wage, unless otherwise determined by a specific funding program, all remuneration received from the employer shall be considered a gratuity, and the offender shall not be entitled to any benefits otherwise payable under s. 440.15, regardless of whether he may be receiving wages and remuneration from other employment with another employer and regardless of his future wage-earning capacity. The provisions of this subsection do not apply to any person performing labor under a sentence of a court to perform community services as provided in s. 316.193.

(7) Upon completion of the sanctions imposed in the community control plan before the expiration of the term ordered by the court, the department may petition the court to discharge the offender from community control supervision or to return the offender to a program of regular probation supervision. In considering the petition, the court should recognize the limited staff resources committed to the community control program, the purpose of the program, and the offender's successful compliance with the conditions set forth in the order of the court.

(8) 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 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.

(9) In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation or into community control unless such defendant is placed under the custody of the department, the Salvation Army, or another public or private entity.

(10) When the court, under any of the foregoing subsections, places a defendant on probation or into community control, it may specify that the defendant serve all or part of the probationary or community control period in a community residential or nonresidential facility under the jurisdiction of the Department of Corrections or the Department of Health and Rehabilitative Services or owned or operated by the Salvation Army or any public or private entity providing such services, and it shall require the payment prescribed in s. 945.30.

(11) Procedures governing violations of community control shall be the same as those described in s. 948.06 with respect to probation.

(12) An offender shall not be placed in community control if:

(a) Convicted for a forcible felony as defined in s. 776.08, and

(b) Previously convicted of a forcible felony as defined in s. 776.08.

Nothing in this subsection shall be construed to prohibit placement of certain inmates on community control pursuant to s. 947.1747. For the purposes of this subsection, a forcible felony shall not include manslaughter or burglary.

History.—s. 20, ch. 20519, 1941; s. 7, ch. 22858, 1945; s. 1, ch. 59-130; s. 1, ch. 61-498; s. 1, ch. 65-453; s. 1, ch. 67-204; ss. 12, 13, ch. 74-112; s. 3, ch. 75-301; s. 3, ch. 76-238; s. 90, ch. 77-120; s. 1, ch. 77-174; s. 109, ch. 79-3; s. 13, ch. 83-131; s. 14, ch. 85-288; s. 1, ch. 86-106; s. 4, ch. 87-211; s. 69, ch. 88-122; s. 36, ch. 89-526.

948.011 When court may impose fine and place on probation or into community control as to imprisonment.—When the law authorizes the placing of a defendant on probation, and when his offense is punishable by both fine and imprisonment, the trial court may, in its discretion, impose a fine upon him and place him on probation or into community control as to imprisonment.

History.—s. 1, ch. 59-175; s. 14, ch. 83-131.

948.03 Terms and conditions of probation or community control.—

(1) The court shall determine the terms and conditions of probation or community control and may include among them the following, that the probationer or offender in community control shall:

(a) Report to the probation and parole supervisors as directed.

(b) Permit such supervisors to visit him at his home or elsewhere.

(c) Work faithfully at suitable employment insofar as may be possible.

(d) Remain within a specified place.

(e) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court. The court shall make such reparation or restitution a condition of probation, unless it determines that clear and compelling reasons exist to the contrary. If the court does not order res-

APPENDIX D

Chapter 91-280, Laws of Fla.

reenacting ss. 921.187(1)(a) and 944.28(1), F.S., relating to disposition and forfeiture of gain-time, to incorporate the amendment to s. 948.01, F.S., in references thereto; creating s. 948.015, F.S.; providing for presentence investigation reports; amending s. 948.03, F.S.; revising and reorganizing provisions relating to electronic monitoring and work programs; deleting provisions relating to private entities; amending s. 948.04, F.S.; deleting misdemeanor probation provisions and providing for early terminations of probation; amending and renumbering s. 944.025, F.S., relating to pretrial intervention program; amending and renumbering s. 945.30, F.S., relating to the cost of supervision and rehabilitation payment, and reenacting and amending ss. 946.40(5), 947.1405(2), and 948.06(4), F.S., relating to use of prisoners in public works, conditional release, and violation of probation, to incorporate the amendment to s. 945.30, F.S., in references thereto; creating s. 948.11, F.S.; providing for electronic monitoring devices; creating s. 948.15, F.S.; providing for misdemeanor probation services and requiring private misdemeanor probation services to contract with the county; amending s. 947.146, F.S.; revising and reorganizing provisions relating to control release, and authorizing a warrant to be issued for an ineligible control releasee; amending s. 947.22, F.S.; authorizing the department to arrest offenders who have violated their control release or conditional release; amending section 944.17, F.S.; requiring available health assessments to be presented to the department upon reception; amending section 944.277, F.S.; excluding certain offenders convicted in other jurisdictions from receiving provisional release credits; amending ss. 948.01 and 948.10, F.S.; requiring certain notifications of offender placements and update notifications of offender violations; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Effective October 1, 1991, and applicable to offenses committed on or after that date, section 948.01, Florida Statutes, 1990 Supplement, is amended to read:

948.01. When court may place defendant on probation or into community control

(1) Any court of the state having original jurisdiction of criminal actions may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying the case without a jury. If the court places the defendant on probation or into community control for a felony, the department shall provide ~~supervise the offender and~~ immediate supervision ~~shall be provided~~ by an officer employed in compliance with the minimum qualifications for officers as provided in s. 943.13. In no circumstances shall a private entity provide probationary or supervision services to felony or misdemeanor offenders sentenced or placed on probation or other supervision by the circuit court.

~~(2) When the penalty for the offense may involve imprisonment in the state prison, the circuit court, prior to such hearing, shall, and in a misdemeanor case may, refer the case to the Department of Corrections for investigation and recommendation. The court, upon such reference, shall direct the department, and it shall be the duty of the department, to make an investigation and report in writing at a specified time prior to sentencing to the court upon the circumstances of the offense and the criminal record, social history, and present condition of the defendant, together with its recommendation pursuant to the provisions of s. 921.231.~~

(2)~~(3)~~ If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation. However, no defendant placed on probation for a misdemeanor may be placed under the supervision of the department unless the circuit court was the court of original jurisdiction ~~and the circuit court affirmatively and specifically orders such supervision after finding that supervision in the community is necessary to provide adequate protection to the community or to assist in the rehabilitation of the offender, or both. Any private~~

~~entity providing services for the supervision of misdemeanor probationers must contract for the provision of such services.~~

~~(3)~~(4) If, after considering the provisions of subsection ~~(2)~~(3) and the offender's prior record or the seriousness of the offense, it appears to the court in the case of a felony disposition that probation is an unsuitable dispositional alternative to imprisonment, the court may place the offender in a community control program as provided in s. 948.10. Or, in a case of prior disposition of a felony commitment, upon motion of the offender or the department or upon its own motion, the court may, within the period of its retained jurisdiction following commitment, suspend the further execution of the disposition and place the offender in a community control program upon such terms as the court may require. The court may consult with a local offender advisory council pursuant to s. 948.90 with respect to the placement of an offender into community control. Not later than 3 working days before the hearing on the motion, the department shall forward to the court all relevant material on the offender's progress while in custody. If this sentencing alternative to incarceration is utilized, the court shall:

(a) Determine what community-based sanctions will be imposed in the community control plan. Community-based sanctions may include, but are not limited to, rehabilitative restitution in money or in kind, curfew, revocation or suspension of the driver's license, community service, deprivation of nonessential activities or privileges, or other appropriate restraints on the offender's liberty.

(b) After appropriate sanctions for the offense are determined, develop, approve, and order a plan of community control which contains rules, requirements, conditions, and programs that are designed to encourage noncriminal functional behavior and promote the rehabilitation of the offender and the protection of the community. If the offense was a controlled substance violation, the conditions shall include a requirement that the offender submit to random substance abuse testing intermittently throughout the term of supervision, upon the direction of the correctional probation officer as defined in s. 943.10(3).

~~(4)~~(5) The sanctions imposed by order of the court shall be commensurate with the seriousness of the offense. When community control or a program of public service is ordered by the court, the duration of community control supervision or public service may not be longer than the sentence that could have been imposed if the offender had been committed for the offense or a period not to exceed 2 years, whichever is less. When restitution or public service is ordered by the court, the amount of restitution or public service may not be greater than an amount which the offender could reasonably be expected to pay or perform. ~~An offender who participates in any work program under the provisions of this chapter will be considered an employee of the state for purposes of liability, unless otherwise provided by law.~~

~~(6) Whenever an offender is required by the court to participate in any work program under the provisions of this chapter, enters into the pretrial intervention program pursuant to s. 944.025, or volunteers to work in a supervised work program conducted by a specified state, county, municipal, or community service organization or to work for the victim, either as an alternative to monetary restitution or as a part of the rehabilitative or community control program, the offender shall be considered an employee of the state for the purposes of chapter 440. In determining the average weekly wage, unless otherwise determined by a specific funding program, all remuneration received from the employer shall be considered a gratuity, and the offender shall not be entitled to any benefits otherwise payable under s. 440.15, regardless of whether he may be receiving wages and remuneration from other employment with another employer and regardless of his future wage earning capacity. The provisions of this subsection do not apply to any person performing labor under a sentence of a court to perform community services as provided in s. 316.193.~~

~~(5)~~(7) Upon completion of the sanctions imposed in the community control plan before the expiration of the term ordered by the court, the department may petition the court to discharge the offender from community control supervision or to return the offender to a program of regular probation supervision. In considering the petition, the court should recognize the limited staff resources committed to the community control program, the

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, Petitioner's Appendix, has been furnished, by United States Mail, to Melvina Racey Flaherty, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299, on this 25th day of May, 1993.

WAXLER & SMITH
Attorneys for Petitioner

BY _____
RONALD B. SMITH
Florida Bar #235555
73 SW Flagler Avenue
Post Office Box 111
Stuart, Florida 34995-0111
(407) 286-4446