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IN THE SUPREME COURT OF FLORIDA

ARTHUR L. DISBROW, JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.
_____/

CASE NO.: 82,857

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# RESPONDENT'S BRIEF ON THE MERITS

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## SUMMARY OF THE ARGUMENT

The State's position in this case is that the sentence imposed is illegal or at the very least an improper downward departure with no written reasons. Numerous appellate courts have held that a sentence which includes probation should require the defendant to complete any incarceration portion of the sentence prior to serving any probation or community control. While the goal of such sentencing is not without some merit, there are numerous sentencing options which are legal and which can accomplish the same purpose. A probationary split sentence or even a true split sentence both reward a defendant with a less restrictive form of observation while still holding a potential penalty over his head for failure to conform his behavior.

To allow the existence of back-end split sentences without even requiring any written reasons for departure defeats the entire concept of the guidelines. The guidelines weigh both the quality and the quantity of crimes committed by a defendant in determining the permitted sentence. In this case the Petitioner's actions created a range of 17-40 years. To call a sentence of only community control plus the potential of incarceration a legitimate sentence in this situation returns the guidelines to nothing but suggestions and not requirements.

## ARGUMENT

### POINT OF LAW

WHETHER BACK-END SPLIT SENTENCES ARE ILLEGAL AND WHETHER THEY CONSTITUTE A DOWNWARD DEPARTURE WHICH WOULD REQUIRE WRITTEN REASONS.

The Petitioner in this case was given an eighteen year prison sentence which was to be served only if he violated his community control. This type sentence is often called a back-end split sentence. The State in this case simply requested a guideline sentence. (R 31) Under the sentencing guidelines, the Petitioner scored 344 points which placed him in the recommended cell of 22-27 years and a permitted range of 17-40 years. Since the sentence imposed initially included no period of incarceration to be served, the State asserted that such a sentence was illegal.

At the district court the State submitted that this sentence was improper for two reasons: 1) it was an illegal sentence; and 2) it was a downward departure without written reasons. The appellate court agreed and vacated the sentences.

Reviewing the facts from the trial level shows that the Petitioner was sentenced on the 18th of September 1992, for violation of probation in two cases: 87-5228-CFA, burglary of a dwelling, and 87-5227-CFA, burglary of a conveyance. (R 23-51, 70-75) In case 87-5227, the court sentenced the Petitioner to thirteen years incarceration; however, this prison time was suspended pending the outcome of the Petitioner's serving of two years community control. In case 87-5228, the court sentenced the

Petitioner to five years incarceration which was to be consecutive to 87-5227's back-end split sentence of two years community control and thirteen years DOC, with the prison sentence "modified" or suspended if Petitioner served his two years of community control. (R 23-51, 70-75) The practical effect of this sentence is that if the Petitioner successfully served his two years of community control he would never serve any of the prison time.

Supporting the State's argument that the sentence is illegal is the case Poore v. State, 531 So. 2d 161 (Fla. 1988), which sets out five sentencing alternatives none of which include a back-end split. As noted by the Fifth District Court of Appeal in Ferguson v. State, 594 So. 2d 864 (Fla 5th DCA 1992):

> In Poore, 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, (footnote omitted) consisting of a period of probation preceded by a period of confinement imposed as a special condition; and 5) straight probation. 531 So. 2d at 164.

In Ferguson, the defendant was given 364 days in the county jail suspended upon successful completion of probation. The Fifth District Court held that the sentence was not one of the sentencing alternatives set out in Poore nor was there express authority for this type of conditional or suspended sentence in Section 921.187, Florida Statutes (1987). Ferguson, at 866. See also, Bryant v.

State, 591 So. 2d 1102 (Fla. 5th DCA 1992) (sentence of ten years prison the serving of which was subject to whether the defendant successfully completed two years community control was illegal).

Another case holding that such sentences are illegal is Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992). In Gaskins, the defendant was given a ten year "conditional suspended sentence" which would not be served if the defendant completed five years of probation. Id. at 475. The First District Court of Appeal held that the sentence was illegal.[1]

An additional reason the sentence is illegal is that case law has consistently required that the incarceration portion of a sentence be completed prior to the commencement of the probationary portion of the sentence. See Horner v. State, 617 So. 2d 311 (Fla. 1993), Walker v. State, 604 So. 2d 913 (Fla. 1st DCA 1992), Humphrey v. State, 579 So. 2d 335 (Fla. 2d DCA 1991). Assuming the Petitioner violates his community control, his prison sentence would be served only after he had already served a portion of his community control.

Even if the Petitioner's sentence is found to be a legal possibility, it is still improper because it is a downward departure for which the trial court did not provide any written reasons at the time the sentence was imposed. See, Pope v. State, 561 So. 2d 554 (Fla. 1990), State v. McCulloch, 573 So. 2d 395

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[1]In fact, the First District certified a question concerning not only the issue of the conditional suspended sentences but also the issue of whether the defendant could wait until he violated the probation before he challenged original sentence. Id. at 476.

(Fla. 5th DCA 1991). In the instant case, the trial court did not provide any written reasons for granting a departure sentence, and upon remand, the trial court must resentence the Petitioner within the guidelines. See, Pope.

The case State v. Waldo, 582 So. 2d 820 (Fla. 2d DCA 1991), addressed a situation very similar to the instant case in which the trial court imposed a five and one-half year suspended prison sentence service of which was dependent upon the defendant's completion of two years of community control. The Second District noted

> When sentencing pursuant to the guidelines, a trial judge may impose a split sentence, but if he does, the incarceration portion must not be less than the minimum guidelines range. Comm.Note (d)(12) Fla.R.Crim.P 3.701. The trial judge may, of course, depart from this requirement if he provides a valid written reason for doing so. State v. McCall, 573 So. 2d 362 (Fla. 5th DCA 1990). The appellee's sentence did not require him to serve at least the minimum sentence required by the guidelines and was, accordingly, a downward departure. Since the trial judge failed to provide written reasons for departing from the guidelines, and the state did not agree to the downward departure, the appellee's sentence must be reversed. State v. Allen, 557 So. 2d 960 (Fla. 4th DCA 1990).

The Petitioner submits that §948.01(11), Fla. Stat. (1991), authorizes the back-end, conditional sentences evidently without

regard to the guidelines.[2] However, the State disagrees. To attempt to allow its application without regard to the guidelines would grant the trial court such unfettered discretion that the guidelines would be rendered meaningless. While the exact application of that section is questionable, nowhere does it exempt itself from the requirements of the guidelines. A comparison can be seen by looking at the old habitual statute which was not exempt from the guidelines as opposed to the new statute which specifically provides that it is outside the dictates of the §921.001. See, §775.084(4)(e) (1993); Whitehead v. State, 498 So. 2d 863 (Fla. 1986).

A last point is that the Petitioner submits that the sentence imposed is within the guidelines. To support such an argument, the claim is made that a prison sentence has been imposed which the Petitioner "may" in fact serve one day.[3] While everyone is aware of the fact that the realities of the system are such that defendants often actually serve little of the sentences imposed, the idea that it is sufficient that a defendant "may" serve some prison time when his permitted guideline range is 17-40 years would stretch the guidelines beyond not only recognition but of any legitimate use.

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[2]The State also notes that no attempt to rely upon §948.01(11) was made at the district court level, and, therefore, any such argument should be found to be not properly preserved by the Petitioner. See, Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

[3]While it does often seem that probation violation is automatic, to base the legitimacy of suspended conditional sentences on such an inevitability helps to show the illegality of such a sentencing scheme.

## CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this honorable Court approve the decision of the district court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by delivery to Anne Moorman Reeves, attorney for the petitioner, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 30th day of March 1994.

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