IN THE SUPREME COURT OF FLORIDA



MARVIN LEE KING,

Petitioner,

v. CASE NO. 85,026

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, Marvin Lee King, appellant below and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). Additionally, references to the transcript of the original sentencing hearing in Circuit Court Case No. 89-3279, which was included as an addendum to the State's motion to supplement the record on appeal before the First District, will be by the symbol "ASM" followed by the appropriate page number(s).

## STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record.

## SUMMARY OF ARGUMENT

When the trial court originally sentenced petitioner, it determined that he was a habitual felony offender as defined in Section 775.084(1)(a), Florida Statutes, but it imposed a guidelines probationary split sentence. However, when petitioner subsequently violated his probation, the trial court revoked his probation and sentenced him to prison as a habitual felony offender.

Section 948.06(1), Florida Statutes, authorizes a trial court to impose any sentence it originally could have imposed when it revokes a defendant's probation. Thus, because the trial court in this case could have habitualized petitioner when it originally sentenced him, the court's imposition of a habitual offender sentence when it revoked petitioner's probation was proper under Section 948.06(1). Further, pursuant to well-settled case law, petitioner's claim that the trial court violated double jeopardy by imposing a prison term after revoking his probation is without merit. This Court should approve the First District's decision below and answer the certified question in the affirmative.

## ARGUMENT

### ISSUE/CERTIFIED QUESTION

AFTER A TRIAL JUDGE MAKES A VALID FINDING THAT A DEFENDANT IS AN HABITUAL FELONY OFFENDER, AND IMPOSES A NON-HABITUAL OFFENDER SENTENCE OF PRISON, FOLLOWED BY PROBATION, AND THE DEFENDANT SERVES THE PRISON TERM, BUT SUBSEQUENTLY VIOLATES HIS ORDER OF PROBATION, MAY THE TRIAL JUDGE, UPON RESENTENCING, IMPOSE AN HABITUAL FELONY OFFENDER PRISON TERM, THE TOTAL OF WHICH DOES NOT EXCEED THE MAXIMUM ALLOWED BY LAW, PROVIDED THAT IT ALLOWS CREDIT FOR ALL PRIOR PERIODS OF INCARCERATION?

When the trial court in this case originally sentenced petitioner, it determined that he was a habitual felony offender as defined in Section 775.084(1)(a), Fla. Stat. (Supp. 1988), but it imposed a guidelines probationary split sentence. Subsequently, however, when petitioner violated his probation, the trial court revoked his probation and sentenced him to prison as a habitual felony offender. The First District affirmed this sentence, holding that because the trial court could have sentenced petitioner as a habitual felony offender when it originally sentenced him, the court again had that option pursuant to Section 948.06(1), Fla. Stat. (1989), when it revoked his probation in 1993.

Petitioner now claims that the First District erred in affirming the habitual offender sentence he received after revocation of probation because the trial court "acquitted" him of being a habitual offender at the original sentencing proceeding, and thus did not have the option of habitualizing him either when it originally sentenced him or after it revoked his

probation. Alternatively, petitioner contends that because he previously had served the prison portion of his probationary split sentence, the trial court's imposition of a habitual offender prison term after it revoked his probation constituted an impermissible double punishment for the same crime. The State will address each of petitioner's claims separately.

**A. Petitioner's claim that the trial court "acquitted" him of being a habitual felony offender.**

Initially, petitioner alleges that the First District's certified question incorrectly states that the trial court found that petitioner was a habitual felony offender. According to petitioner, "the trial court expressly found that he was not" a habitual felony offender:

> The trial court found it unnecessary for the protection of the public to declare petitioner an habitual offender, and therefore it acquitted him of being one, and imposed a guidelines sentence as a "satisfactory alternative."

Petitioner's merits brief at 9 (emphasis in original). Petitioner further claims that although the trial court found he "qualified" for sentencing under Section 775.084, "the trial court refused to actually find him to be an habitual offender because it was 'not necessary for the protection of the public.'" Petitioner's merits brief at 10. The record does not support petitioner's allegations on this point.

At the original sentencing hearing in this case, the trial court made the following determination:

> [F]irst of all, [I] find that you do qualify as a habitual felon offender because of the convictions for felonies within the five years prior to today's date. The Court, however, believes that considering the guideline sentence, considering the facts and circumstances of this case proved at trial, that the imposition of a sentence under the habitual felon section is not necessary for the protection of the public because a satisfactory alternative exists in imposing a guideline sentence, and, therefore, I shall not impose a sentence in accordance with the habitual felon statute, but I shall hereby sentence you to 10 years in the state prison followed by two years' probation.

(ASM 14-15) (emphasis added).

It is apparent from the foregoing that petitioner's claim that the trial court "refused to actually find" he was a habitual offender, and that the court somehow "acquitted" him of being a habitual felony offender merely because it decided a habitual offender sentence was "not necessary for the protection of the public," is simply incorrect. As petitioner recognizes, this Court has held that the determination that a defendant is a habitual felon under the statute is a ministerial one. State v. Rucker, 613 So. 2d 460, 462 (Fla. 1993). Consequently, when, as in this case, the State presents evidence demonstrating that the defendant meets the statutory definition of a habitual felony offender, the trial court must find that the defendant is a habitual felon,[1] and it may then sentence him or her as such. If the court concludes that it does not wish to sentence a habitual

[1] Section 775.084(4)(c) provides that "[a]t any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3)." (Emphasis added).

felon pursuant to the penalties provided in Section 775.084, the court may (either explicitly or implicitly) make a determination under Section 775.084(4)(c) that a habitual offender sentence is "not necessary for the protection of the public,"[2] and it may impose a guidelines sentence. See State v. Rinkins, 646 So. 2d 727 (Fla. 1994); Geohagen v. State, 639 So. 2d 611, 612 (Fla. 1994) (holding that a trial court need not make a specific finding that an enhanced sentence is not necessary for the protection of the public before it sentences a habitual offender more leniently than required by the habitual offender statute).

The trial court in this case, by finding that petitioner qualified for sentencing under Section 775.084 (i.e., that he was a habitual felony offender), and then making the Section 775.084(4)(c) determination that a habitual offender sentence was not necessary for the protection of the public, merely followed the procedure set forth in the habitual offender statute. Clearly, the court did not "acquit" petitioner of being a habitual felon under the statute, as petitioner suggests. To the contrary, the court specifically found that petitioner was a habitual felony offender as defined by the statute (ASM 14). Compare Davis v. State, 587 So. 2d 580, 581 (Fla. 1st DCA 1991) (emphasis added) (where the trial court "declined" to make the initial finding that the defendant was a habitual felony offender, and where the First District concluded that "[t]he

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[2] Section 775.084(4)(c) provides in pertinent part that "[i]f the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section."

trial court's initial decision not to find Davis a habitual offender, after considering the evidence and hearing argument on that issue, constituted an acquittal of a habitual offender sentence").

Furthermore, it must be remembered that the trial court sentenced petitioner in September of 1989, which was well before this Court held in Burdick v. State, 594 So. 2d 267 (Fla. 1992), that sentencing under Section 775.084 is permissive rather than mandatory. Prior to Burdick, courts generally interpreted the "shall" language in Section 775.084(4)(a) as mandating that habitual (non-violent) felons sentenced pursuant to that section must receive the sentences listed in subsections (4)(a)1-3. See, e.g., Burdick v. State, 584 So. 2d 1035 (Fla. 1st DCA 1991); Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990). The trial court in this case therefore may have believed that if it sentenced petitioner as a habitual felon, it would have no choice but to impose a life sentence. See Section 775.084(4)(a)1 (providing that a career criminal convicted of a first degree felony "shall" be sentenced to life in prison). Indeed, the trial court's statement that "a satisfactory alternative exists in imposing a guidelines sentence" of ten years (ASM 15) reflects the court's belief that it could not have imposed a ten-year sentence under the habitual felony offender statute. Hence, the trial court's determination that a habitual offender sentence was "not necessary for the protection of the public" very likely reflected the court's determination that a life sentence was not necessary, rather than a decision to "acquit" petitioner of

habitual felon status. Accordingly, because petitioner qualified for habitual offender sentencing, the trial court had the option of sentencing him as such both when it originally sentenced him and (pursuant to Section 948.06(1), Fla. Stat. (1989)) when it revoked his probation. Thus, petitioner's claim that the trial court did not "make[] a valid finding that [he was] an habitual offender," and that the certified question is incorrect, must fail.

Petitioner's argument on this point closely resembles that presented by the defendant in Williams v. State, 581 So. 2d 144 (Fla. 1991), where this Court approved the trial court's imposition of an upward departure sentence following revocation of probation, even though the court had imposed a guidelines sentence at the original sentencing hearing.[3] Just as petitioner contends that it is inconsistent for a trial court to impose a habitual offender sentence following revocation of probation when the court determined at the initial sentencing hearing that such a sentence was not necessary for the protection of the public, the defendant in Williams argued that it was

> inconsistent to permit a departure based on reasons which existed at the time he was placed on probation, because in placing him on probation the court necessarily had to find that he was not likely again to engage

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[3] This Court's decision in Williams is discussed more fully in the State's argument under part B, infra.

> in a criminal course of conduct. See § 948.01(3), Fla. Stat. (1987).

Id. at 146. This Court rejected Williams's argument, concluding that

> section 948.06(1), Florida Statutes (1987), provides that upon revoking a defendant's probation the court is authorized to impose any sentence that it might have originally imposed before placing a defendant on probation.

Id.

Similarly, the trial court in the case at bar determined that although a habitual offender sentence might not have been necessary when it originally sentenced petitioner, such a sentence was appropriate pursuant to Section 948.06(1) after petitioner violated his probation. The trial court's initial determination that a habitual offender sentence was not necessary for the protection of the public therefore did not preclude the court from imposing such a sentence after it revoked petitioner's probation, particularly in light of the fact that petitioner received notice of the State's intention to seek a habitual offender sentence prior to the sentencing hearing at which he was placed on probation. Moreover, as was the case in Williams, the trial court's initial decision to give petitioner a second chance by imposing a guidelines sentence was not "inconsistent" with the court's decision to sentence petitioner as a habitual offender after it revoked his probation. Petitioner's argument on this point therefore must fail.

**B. Petitioner's claim that the imposition of a prison sentence following revocation of the**

**probationary portion of his probationary split sentence violated double jeopardy.**

Petitioner next claims that even if the trial court had the option of sentencing him as a habitual offender after it revoked his probation, the court's imposition of an enhanced prison sentence after it revoked his probation must be reversed because it violates double jeopardy. In making this argument, petitioner focuses on the fact that before he began serving the probationary portion of his sentence, he already had received and served a prison term as part of that sentence. Petitioner's argument on this point is as follows:

> Mr. King [petitioner] was sentenced to 10 years [sic] prison, to be followed by two years probation. HE SERVED THE PRISON PORTION OF HIS SENTENCE, was released on probation, and before the probationary period had ended the probation was revoked.
>
> * * *
>
> The Appeal Court majority, apparently ignoring the fact that petitioner had served his sentence of imprisonment, express the opinion that a "critical intervening factor" was present -- the violation of probation. [Slip op. at 6] The majority then cited Williams v. State, [supra], wherein this Court held a departure sentence could be imposed upon revocation of probation, "based upon reasons which existed at the time of the initial sentence of probation." [Slip op. at 7] However, in Williams, the trial court originally withheld imposition of sentence and imposed probation. Thus the "departure sentence" AFTER probation was revoked, was the first time the defendant had been imprisoned.
>
> Unlike Williams, petitioner was imprisoned BEFORE probation, then HAVING SERVED his sentence of imprisonment, he is AGAIN sentenced to prison on the same charges

> after probation is revoked. Thus, having satisfied one imprisonment, petitioner is again imprisoned for the same crime.

Petitioner's merits brief at 14-15 (capitalized words provided by petitioner). Petitioner thus takes the novel, and radical, position that a defendant who serves the prison portion of a probationary split sentence, and then violates probation, can never again be sentenced to prison because the "second sentence" violates double jeopardy.

In making the aforementioned argument, petitioner has overlooked numerous decisions from this Court and other courts holding that even when a defendant has served the prison portion of a probationary split sentence, the imposition of a greater term of imprisonment following revocation of probation does not violate double jeopardy principles. As this Court explained in Poore v. State, 531 So. 2d 161 (Fla. 1988),

> We agree . . . that **double jeopardy does not forbid the imposition of a longer period of incarceration when a petitioner violates probation in a probationary split sentence[.]** . . .
>
> It is well-settled in federal law that jeopardy has attached when a prisoner begins serving a sentence, such that the original sanction may not be increased based solely on the same facts at issue in the trial. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). However,
>
> "[a] trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'"

> Id. at 723, 89 S.Ct. 2079 (quoting Williams v. New York, 337 U.S. 241, 245, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949)). In essence, the Supreme Court required that a new fact be produced that was not before the court at the original sentencing. Based upon this principle, the Fifth Circuit has concluded that
>
> "[w]hen a greater sentence is imposed upon the revocation of probation, it can be based upon the defendant's subsequent conduct demonstrating his lack of amenability to reform."
>
> Williams v. Wainwright, 650 F.2d 58, 61 (5th Cir. 1981). We ourselves have held that
>
> "a trial judge who previously sentenced a defendant to a term of years less than the maximum allowable by law, may, after a new trial wherein defendant is placed on probation, impose for violation of the terms of probation, any sentence up to the maximum which could have been originally imposed."
>
> Scott v. State, 326 So. 2d 165, 166 (Fla.), cert. denied, 429 U.S. 836, 97 S.Ct. 104, 50 L.Ed.2d 103 (1976). Such a resentencing does not violate the prohibition against double jeopardy. Williams, 650 F.2d at 61; State v. Payne, 404 So. 2d 1055 (Fla. 1981). **Provided there is a relevant new fact not previously considered, the trial court constitutionally is permitted to impose a greater sentence, as authorized by section 948.06.**

Id. at 163-164 (emphasis added).

Again, petitioner claims that because he served time in prison before being released to complete the probationary portion of his probationary split sentence, the trial court was precluded from imposing any type of prison term after it revoked his probation. Clearly, however, pursuant to Poore and the cases cited therein, because the trial court had before it the "relevant new fact" that petitioner had violated the terms of his

probation, the court's imposition of a lengthier, habitual offender sentence following its revocation of petitioner's probation did not violate double jeopardy principles. Indeed, under petitioner's argument, the type of probationary split sentence authorized by Poore would become meaningless because a defendant would have absolutely no incentive (via the threat of future imprisonment for a violation of probation) to comply with the conditions of his or her probation. The defendant thus could violate probation with impunity. This is not only nonsensical, but it also overlooks this Court's express determination in Poore that if a trial court imposes "a 'probationary split sentence' consisting of a period of confinement, none of which is suspended, followed by a period of probation," and if the defendant "violates his probation [under that alternative], section 948.06(1) and [North Carolina v. Pearce, supra] permit the sentencing judge to impose any sentence he or she originally might have imposed, with credit for time served[.]" Poore, 531 So. 2d at 164. Thus, petitioner's claim that the trial court's imposition of any prison term after it revoked his probation violated double jeopardy principles is completely without merit, and this Court must reject it.

The real issue in this case, as set forth in the First District's certified question, is whether a trial court which determines that a defendant is a habitual felony offender under the criteria set forth in Section 775.084, but which nevertheless imposes a guidelines probationary split sentence of prison followed by probation, may sentence the defendant as a habitual

felony offender following revocation of probation. Under the circumstances of this case, this Court should affirm the First District's determination that the trial court properly sentenced petitioner as a habitual felony offender after it revoked his probation.

On September 18, 1989, the State filed a Notice of Intention to Seek Habitual Felony Offender Sentencing against petitioner in Case nos. 89-3278, 89-3279 and 89-3280 (R 17). Petitioner proceeded to trial in Case no. 89-3279 (the only case at issue here), and on September 27, 1989, a jury found him guilty as charged of one count of burglary with assault and one count of robbery (R 18). The trial court conducted a sentencing hearing in Case no. 89-3279 on October 24, 1989 (ASM 1-17). At that time the prosecutor reiterated the State's request that the court sentence petitioner under the habitual felony offender statute (ASM 3). The prosecutor then introduced, without objection from petitioner, certified copies of three prior convictions (ASM 8-9), and he asked the trial court to impose a life sentence and "punish [petitioner] with a maximum sentence allowable by law as a habitual felon" (ASM 10). Petitioner's trial counsel conceded that petitioner "would probably qualify as a habitual felon" based on the documentation provided by the State (ASM 11). Nevertheless, defense counsel requested that the court impose a guidelines sentence (ASM 11-14). After hearing argument from the defense and from the State, the trial court found that petitioner qualified as a habitual felony offender based on the evidence submitted by the State (ASM 14), but the court imposed a

guidelines probationary split sentence of ten years' imprisonment followed by two years' probation (ASM 15). However, after it revoked petitioner's probation on March 29, 1993, the trial court sentenced petitioner under the habitual offender statute to concurrent prison terms of thirty years in Counts I and II of Case no. 89-3279 (R 61 and 65-69).

Section 948.06(1), Fla. Stat. (1989), provides as follows:

> If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, **and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.**

(Emphasis added). Thus, pursuant to the plain language of Section 948.06(1), when a trial court revokes a defendant's probation, the court may impose any sentence it could have imposed at the original sentencing hearing.

The State in the case at bar filed its notice of intention to seek habitual offender sentencing before petitioner's trial (and, ergo, well before the sentencing hearing). Moreover, the trial court determined at the sentencing hearing that petitioner was a habitual felony offender as defined in Section 775.084. The trial court therefore clearly had the option of habitualizing petitioner when it initially sentenced him on October 15, 1989. Hence, pursuant to the plain language of Section 948.06(1), the trial court again had the discretion to habitualize petitioner when it revoked his probation in 1993. As set forth in the

State's argument in part A above, the fact that the trial court declined to impose a habitual offender sentence did not deprive the court of the habitualization option either at the original sentencing hearing or when it revoked petitioner's probation. Thus, the trial court had the authority under Section 948.06(1) to sentence petitioner as a habitual felony offender when it revoked his probation, and petitioner's argument to the contrary must fail.

The case at bar is analogous to Williams v. State, supra. The defendant in Williams initially was placed on probation, and after several violations, the trial court revoked Williams's probation and sentenced him to a term of years which exceeded the one-cell increase authorized by the guidelines. In so doing, the court provided two reasons for upward departure. Williams argued before this Court that the departure sentence was unlawful under Lambert v. State, 545 So. 2d 838 (Fla. 1989), which precludes imposition of a departure sentence after revocation of probation when the reasons for departure relate to the acts constituting the violation of probation. However, this Court rejected Williams's argument, reasoning that because the trial court departed from the guidelines based on factors which existed at the time it originally sentenced Williams, and because the trial court was free under Section 948.06(1), Florida Statutes, to impose after revocation of probation any sentence it might have originally imposed, the departure sentence was lawful. Williams, 581 So. 2d at 146.

As was the case in Williams, when it revoked petitioner's probation in Case no. 89-3279, the trial court in the case at bar was free under Section 948.06(1) to impose any sentence it might have originally imposed. Again, because petitioner was given notice prior to the initial sentencing hearing of the State's intention to seek habitual offender sentencing, and because the trial court specifically found that petitioner met the criteria for enhanced sentencing under Section 775.084, the court had the discretion to habitualize petitioner when it sentenced him on October 25, 1989. Thus, pursuant to Williams and Section 948.06(1), the trial court again had the discretion to habitualize petitioner when it revoked his probation in 1993. See also Snead v. State, 616 So. 2d 964, 965 (Fla. 1993) (where this Court indicated that habitualization would have been permissible after revocation of guidelines probation if the State had notified Snead before he entered his plea that it intended to seek habitual offender sentencing);[4] and Anderson v. State, 637 So. 2d 971 (Fla. 5th DCA 1994) (affirming habitual offender sentence imposed under circumstances identical to those in the case at bar). Hence, because the sentence imposed by the trial court in this case is proper under Williams, Snead, and Section

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[4] Because petitioner in the case at bar proceeded to trial in Case no. 89-3279 instead of entering a plea, the aspirational language in Ashley v. State, 614 So. 2d 486 (Fla. 1993), indicating that a defendant should be made aware of the consequences of habitual offender sentencing prior to entering a plea, clearly does not apply here. In any event, because the State sought habitual offender sentencing and requested that the trial court impose the maximum possible sentence of life in prison before petitioner was placed on probation (ASM 10), petitioner was well aware of the consequences he faced if he did not successfully complete his probationary term.

948.06(1), this Court should affirm the First District's determination that the sentence was lawful.

Relying on Judge Benton's dissent below, petitioner now briefly asserts that the trial court's imposition of a habitual offender sentence following revocation of probation was improper because the statutes under which he was convicted provide that the offenses he committed are "punishable as provided in s. 775.082, 775.083, or 775.084." See Sections 810.02 and 812.13, Fla. Stat. (1989) (emphasis added). According to petitioner, "the word 'or' indicates that the court may chose [sic] to sentence under s. 775.082 or s. 775.084, but not under both." Petitioner's merits brief at 14 (emphasis in original). Again, however, what petitioner overlooks is the fact that following revocation of probation, it is as if the defendant is being sentenced for the first time, and pursuant to Section 948.06(1), after a trial court revokes a defendant's probation it may impose any sentence it originally could have imposed, provided the court gives the defendant credit for any prison time previously served. A defendant who initially receives a guidelines sentence, but who then receives a habitual offender sentence following revocation of probation, thus is not punished simultaneously under Sections 775.082 and 775.084, as petitioner suggests. Compare Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993) (defendant committed one offense but received a hybrid punishment of both a guidelines prison term and a period of probation as a habitual offender, which was not part of the negotiated plea agreement). Rather, the only punishment to be examined is the one imposed following

revocation of probation. Because petitioner in the case at bar was sentenced only pursuant to Section 775.084 after he violated his probation, he did not receive simultaneous punishments under Sections 775.082 and 775.084. Consequently, petitioner's claim that the sentence imposed by the trial court violates the "or" portion of Sections 810.02 and 812.13 must fail.

Furthermore, it should be noted that if petitioner is correct on this point, his "or" claim will work both ways, so that a trial court which habitualizes a defendant and imposes a split sentence of prison followed by probation will be constrained to impose only a habitual offender sentence if the defendant violates probation. In other words, once a trial court imposes a habitual offender sentence, it will never have the discretion to impose a non-habitual offender sentence, even if it determines that under the circumstances of a given case, habitualization is no longer necessary following revocation of the defendant's probation.

Finally, the Court must not lose sight of the fact that although the trial court in this case could have sentenced petitioner to life in prison under Section 775.084 when it originally sentenced him, the court gave petitioner a second chance by imposing a relatively lenient term of ten years in prison (with credit for time served) followed by two years' probation. If petitioner is successful in his argument and this Court determines that a trial court cannot habitualize a career criminal after revoking the probationary portion of a non-

habitual probationary split sentence, even when the defendant is made aware of the consequences of habitualization before he or she is placed on probation, then no courts in the future will afford habitual felons the same kind of second chance the trial court in this case initially afforded petitioner. Rather, if this Court determines that habitual offender sentencing is not an option after revocation of probation in cases where it was an option when the defendant was originally sentenced and placed on probation, then the only viable choice trial courts will have will be to sentence career criminals to lengthy prison terms under Section 775.084 from the very beginning. See Williams v. State, 581 So. 2d at 146 ("[W]e believe that the position advocated by Williams could have a deterrent effect on probation. A judge might be less willing to give the defendant another chance by putting him on probation if he knew that the preexisting reasons for departure could not be considered in the event the probation was violated."). A successful argument by petitioner on this point thus may result in harsh consequences for future defendants in petitioner's position. Accordingly, this Court should reject petitioner's argument, answer the certified question in the affirmative, and approve the First District's decision.

## CONCLUSION

For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative and approve the decision of the First District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Raymond Dix, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 21st day of April, 1995.

Amelia L. Beisner
Assistant Attorney General

APPENDIX

Copy of opinion in Marvin Lee King v. State of Florida, No. 93-1261 (Fla. 1st DCA December 15, 1994).

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IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

MARVIN LEE KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 93-1261



Opinion filed December 15, 1994.

An appeal from the Circuit Court for Escambia County. John Kuder, Judge.

Nancy A. Daniels, Public Defender; Faye A. Boyce, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Amelia L. Beisner, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

LAWRENCE, J.

Marvin Lee King (King) appeals his judgments and sentences as an habitual felony offender in three separate cases. In cases 89-3278 and 89-3280, the State properly concedes that the sentences should be reversed and remanded for resentencing because King was misinformed as to the maximum sentences which could be imposed before he entered a plea of nolo contendere.

In case no. 89-3279, King was charged with one count of

burglary of a dwelling with assault and one count of robbery. The State served King before trial with a notice of intent to seek habitual felony sentencing. King was convicted as charged by a jury. The sentencing judge found King to be an habitual felony offender, based upon the statutory criteria, but elected to impose a non-habitual felony offender sentence of ten years in prison to be followed by two years of probation. After being released from prison and while on probation, King violated the order imposing probation. The State, prior to sentencing, served King with a second notice of its intent to seek sentencing as an habitual felon. The judge sentencing King for violation of probation noted that King had been found to be an habitual felony offender at his original sentencing hearing; the judge then sentenced King to concurrent terms of thirty years in state prison as an habitual felon.

King raises two issues, one of which is his challenge to the facial constitutionality of section 775.084, Florida Statutes (1989). Section 775.084 was held constitutional in Seabrook v. State, 629 So. 2d 129 (Fla. 1993). We therefore reject any contention to the contrary.

The second issue raised by King is whether the trial judge, upon revocation of King's probation, could lawfully impose an habitual felony offender sentence, despite having declined to impose such a sentence at the original sentencing.

Counsel have not cited, nor does our own research reveal,

any Florida case which presents the precise issue presented in the instant case. However, having concluded that the trial judge imposed a lawful sentence, we affirm.

We note initially that sentencing under the habitual felon statute is permissive. Burdick v. State, 594 So. 2d 267 (Fla. 1992). Thus, the trial judge, notwithstanding his determination that King was an habitual felon, was not required at the original sentencing hearing to impose a sentence of life for burglary of a dwelling with assault, and a term of years not exceeding thirty for robbery, in conformity with section 775.084(4)(a).

King, in arguing that his sentence was illegal, relies on Snead v. State, 616 So. 2d 964 (Fla. 1993), although he concedes in his brief that the precise issue presented in the instant case was not presented in Snead. Snead entered a plea of nolo contendere to the charge of possession of cocaine, and was placed on probation. The state's first notice of its intent to seek habitual felony offender sentencing for Snead came only after Snead violated the order of probation and was awaiting sentencing for the second time. In contrast, King was properly determined to be an habitual felon at his first sentencing hearing. The decision in Snead hinged on the fact that, at the first sentencing hearing, Snead did not have notice nor was any attempt made by the state to have him sentenced as an habitual felon, and "[t]herefore, the trial judge did not, at the time of the original sentencing hearing, have the option of imposing a

habitual offender sentence." Snead, 616 So. 2d at 965. In contrast, the trial judge in the instant case, after having determined that King was an habitual felon, had the option of imposing such a sentence on him at the first sentencing hearing.

King's reliance on Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), and Moore v. State, 616 So. 2d 596 (Fla. 4th DCA 1993), is similarly misplaced because, as in Snead, the state did not seek habitual felony offender sentencing in either of these cases at the first sentencing hearing.

King next argues that his position is supported by Lambert v. State, 545 So. 2d 838 (Fla. 1989). However, an habitual felony offender sentencing issue was not present in Lambert. This case merely held that factors considered in finding a violation of probation or community control could not serve as a valid reason for a guidelines departure sentence. The Snead court said:

> We have limited *Lambert* to those cases "where the factors on which the departure sentence is based relate to the acts or episode constituting the violation of probation or community control." *Williams v. State*, 581 So. 2d 144, 145-146 (Fla. 1991) (quoting *Williams v. State*, 566 So. 2d 299, 301 (Fla. 1st DCA 1990). However, if the reasons for departure existed when the judge *initially* sentenced the defendant, then the trial court may depart from the presumptive guidelines range and impose a sentence within the statutory limit. *Id.*; § 948.06(1), Fla. Stat. (1989). Subsection 948.06(1), Florida Statutes (1989), provides that

> if probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.

Snead, 616 So. 2d at 965.

The question at bar can arise in several ways. The first is when the trial judge entirely fails to address the issue of habitual offender status at the initial sentencing, even though there may be an underlying factual basis for such status which, if proven and accompanied by proper notice, would qualify a defendant for an habitual offender sentence. The second situation occurs when the trial judge addresses the issue of habitual offender status but, because of some deficiency, determines that a defendant does not qualify for an habitual offender sentence. The third situation occurs when the trial judge validly finds a defendant to be an habitual felony offender but elects, within his discretion, to impose a sentence other than that provided by the habitual felony offender statute. The fourth situation occurs when the trial judge, after proper notice and proof of an adequate factual basis, makes a finding that the defendant is an habitual felon, and imposes an habitual felony offender sentence. King contends that a defendant may not be sentenced as an habitual felon following revocation of

probation if the defendant's case arises in any of the first three situations described above. We disagree regarding the third situation--the one at bar. We find nothing which would preclude sentencing as an habitual felon in this circumstance. The trial judge at King's second sentencing hearing did not vacate or abandon the finding of habitual offender status made at the first sentencing hearing. In fact, the trial judge at the second sentencing hearing specifically found that King had been declared an habitual felon at the initial sentencing hearing, that habitual felon sentencing was an option at that time, and nothing had changed during the intervening time which would affect King's status as an habitual offender.

No sound reason exists for foreclosing a trial judge's sentencing options under the circumstances in the instant case. To follow King's logic, the trial judge had only one opportunity to impose an habitual felony offender sentence--at the initial sentencing; thereafter he was forever barred from that possibility. We cannot agree because a critical factor is present, that King violated his order of probation, which permits the trial judge to impose any sentence which was available to the judge at the first sentencing hearing.

We are of the view that the rationale recited in the majority opinion authored by Justice Grimes in Williams v. State, 581 So. 2d 144 (Fla. 1991), though habitual offender

sentencing is not an issue, provides a sound basis for holding that King's sentence was lawful. The Williams court considered whether a departure sentence could be imposed following revocation of probation, based upon reasons which existed at the time of the initial sentence of probation. The court, in answering the question, reasoned:

> [W]e believe that the position advocated by Williams [disallowing a departure sentence following revocation of probation] could have a deterrent effect on probation. A judge might be less willing to give the defendant another chance by putting him on probation if he knew that the preexisting reasons for departure could not be considered in the event the probation was violated. Thus, we hold that the court could properly impose a departure sentence for valid reasons which existed at the time he was placed on probation.

Williams, 581 So. 2d at 146.

Similarly, to restrict the trial judge to the imposition of an habitual felony offender sentence only at the initial sentencing hearing, might make the judge less willing initially to risk a more lenient sentence. On the other hand, a contrary position might well encourage a trial judge to give a defendant a second chance under appropriate circumstances, if the judge knows that when such confidence is betrayed, an habitual offender sentence can yet be imposed.

One of our sister courts has taken a position consistent with our analysis:

> Since notice of intent to habitualize had been properly filed at the time of the original sentence (assuming defendant had actual notice of the filing as discussed later in this opinion), *Snead v. State*, 616 So. 2d 964 (Fla. 1993), appears to authorize habitualization after violation of probation even if the defendant was not originally habitualized.

Anderson v. State, 637 So. 2d 971, 972 n.1 (Fla. 5th DCA 1994).

Although not cited in the briefs, we are also aware that our sister court in Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993), has held that an initial sentence of incarceration without habitual offender status followed by probation as an habitual offender, is illegal. King's sentence differs however, in that an intervening factor (violation of probation) is present. Nevertheless, to the extent that our holding in the instant case may be contrary to Davis, we certify conflict to the supreme court.

We consider the issue raised in the instant case to be one of great public importance, and certify to the Florida Supreme Court the following question:

> AFTER A TRIAL JUDGE MAKES A VALID FINDING THAT A DEFENDANT IS AN HABITUAL FELONY OFFENDER, AND IMPOSES A NON-HABITUAL OFFENDER SENTENCE OF PRISON, FOLLOWED BY PROBATION, AND THE DEFENDANT SERVES THE PRISON TERM, BUT SUBSEQUENTLY VIOLATES HIS ORDER OF PROBATION, MAY THE TRIAL JUDGE, UPON RESENTENCING, IMPOSE AN HABITUAL FELONY OFFENDER PRISON TERM, THE TOTAL OF WHICH DOES NOT EXCEED THE

MAXIMUM ALLOWED BY LAW, PROVIDED THAT IT ALLOWS CREDIT FOR ALL PRIOR PERIODS OF INCARCERATION?

Accordingly, the judgments in all cases are AFFIRMED. The sentences in cases 89-3278 and 89-3280 are REVERSED and REMANDED for resentencing. The sentence in case 89-3279 is AFFIRMED.

SMITH, Senior Judge, CONCURS; BENTON, J., CONCURS AND DISSENTS WITH WRITTEN OPINION.

BENTON, J., concurring and dissenting.

I concur in the judgment of the court except insofar as it approves imposition of two punishments for the same offense. No statute authorizes imposition of a habitual offender sentence on a convict who has already been sentenced under the guidelines for the same crime and served ten years of the guidelines sentence in prison. Nor does any court rule purport to authorize such additional punishment.

The decided cases do not support and, indeed, refute the majority's assertion that such authority exists. The Florida Constitution contains an absolute "prohibition against multiple punishments . . . . Art. I, § 9, Fla. Const." Thompson v. State, 19 Fla. L. Weekly S555 (Fla. Oct. 27, 1994). The federal Double Jeopardy Clause, applicable by virtue of the Fourteenth Amendment, also forbids double punishment for the same offense. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The crimes of which King was convicted[1] were "punishable as provided in s. 775.082, s. 775.083, or s. 775.084." §§

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[1] After trial by jury, King was convicted of two crimes: "strong arm robbery," a felony of the second degree; and burglary of a dwelling during the course of which he committed a battery, a felony of the first degree punishable by life. Case No. 89-3279-E. In the wake of the adverse jury verdict, King pleaded nolo contendere to other pending charges, three counts alleged in two informations. Cases Nos. 89-3278-E and 89-3280-E. On that basis, he was convicted of two more felonies of the second degree, and a second felony of the first degree punishable by life. All five crimes were "punishable as provided in s. 775.082, . . . or s. 775.084." §§ 810.02 and 812.13, Fla. Stat. (1989).

810.02 and 812.13, Fla. Stat. (1989) (emphasis supplied). Under the rule of lenity, codified as section 775.021(1), Florida Statutes (1989), "or" should be given its plain meaning and should not be construed to mean "and" in this context.[2]

The Sentencing Options:
Section 775.082 or Section 775.084

Felonies of the second degree like the "strong arm robbery" appellant perpetrated are punishable by up to fifteen years' imprisonment under section 775.082, Florida Statutes (1989), or, as here, because King qualified as a habitual felony offender, by up to 30 years' imprisonment under section 775.084, Florida Statutes (1989). A court imposing a guidelines sentence under section 775.082, Florida Statutes, might not have the option of the fifteen-year statutory maximum: Sentencing guidelines have presumptive application to sentences imposed under section 775.082, Florida Statutes, and may limit the initial prison term a court can mete out. §§ 921.001 et seq., Fla. Stat.; Fla. R. Crim. P. 3.701, 3.702, and 3.986.

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[2] Both imprisonment under section 775.082 and a fine under section 775.083 may be imposed (if imposed simultaneously) for a single offense, only because section 775.083 specifically provides: "A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s. 775.082." Since section 775.084, Florida Statutes, contains no such language, sentencing may not be imposed under section 775.084 "in addition to . . . punishment described in s. 775.082."

Unlike prisoners sentenced under the guidelines, prisoners sentenced as habitual offenders are, moreover, ineligible for parole, conditional release, or control release, and "basic gain-time" cannot foreshorten their prison terms. § 775.084(4)(e), Fla. Stat. (1989); see Lincoln v. Florida Parole Commission, 19 Fla. L. Weekly D2176 (Fla. 1st DCA October 11, 1994); Corley v. State, 586 So. 2d 432 (Fla. 1st DCA 1991).

A burglary with assault is a felony of the first degree punishable by life imprisonment even under section 775.082, Florida Statutes (1989). Originally sentencing King for this offense under section 775.084, Florida Statutes (1989), might nevertheless have allowed greater protection of the public and harsher punishment of appellant, see generally United States v. Lopez, 706 F.2d 108, 110 (2d Cir. 1983), by assuring his incarceration for a longer period. See Burdick v. State, 584 So. 2d 1035 (Fla. 1st DCA 1991), quashed in part on other grounds, 594 So. 2d 267 (Fla. 1992). Unfettered by sentencing guidelines, a court imposing sentence on a habitual felony offender initially under section 775.084, Florida Statutes, is free to impose the statutory maximum.

Habitual Offender Eligibility Determined

Section 775.084(3), Florida Statutes (1989), prescribed the procedure for determining whether appellant qualified as a

habitual felony offender,[3] on the basis of statutory criteria that do not differ in any way material to the present case from those in place today.

> "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any postconviction proceeding.

§ 775.084(1)(a), Fla. Stat. (1989). Since the 1988 amendments, chapter 88-131, section 6, at 706, Laws of

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[3] Until October 1, 1988, the trial judge was obliged to make an affirmative "finding that the imposition of sentence under the [habitual offender statute] is necessary for the protection of the public from further criminal activity by the defendant." § 775.084(4)(a), Fla. Stat. (1987). As to offenses committed after that date, however, there is no requirement to make "specific findings of fact that show the necessity for an enhanced sentence for the protection of the public from further criminal activity." Newman v. State, 575 So. 2d 724, 725 (Fla. 2d DCA 1991); see Arnold v. State, 566 So. 2d 37, 38 (Fla. 2d DCA 1990), review denied, 576 So. 2d 284 (Fla. 1991).

Florida, the determination that a defendant qualifies as a habitual felony offender has been characterized as "ministerial." King v. State, 597 So. 2d 309, 313 (Fla. 2d DCA), review denied, 602 So. 2d 942 (Fla. 1992); see McKnight v. State, 616 So. 2d 31 (Fla. 1993).

Original Sentencing Under Section 775.082

The statutes and cases make clear nevertheless that the trial court must make a genuine choice in deciding whether or not sentencing under section 775.084 is "necessary for the protection of the public." § 775.084(4)(c), Fla. Stat. (1989); e.g., Burdick, 594 So. 2d at 267; Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1993); King, 597 So. 2d at 314; Donald v. State, 562 So. 2d 792, 795 (Fla. 1st DCA 1990) ("court has the option, under section 775.084(4)(c), Florida Statutes (Supp. 1988), of deciding that sentencing under the statute is not necessary for the protection of the public"), review denied, 576 So. 2d 291 (Fla. 1991), disapproved on other grounds, State v. Washington, 594 So. 2d 291 (Fla. 1992).

Because the original sentencing judge concluded that no necessity for sentencing appellant as a habitual offender existed, the statute directed that "sentence . . . be imposed without regard to . . . section [775.084]." § 775.084(4)(c), Fla. Stat. (1989). The trial court ruled, in initially pronouncing sentence:

I believe it appropriate that the Court at

> this time, first of all, find that you do qualify as a habitual felon offender because of the convictions for felonies within the five years prior to today's date. The Court, however, believes that considering the guideline sentence, considering the facts and circumstances of this case proved at trial, that the imposition of a sentence under the habitual felon saction [sic] is not necessary for the protection of the public because a satisfactory alternative exists in imposing a guideline sentence and, therefore, I shall not impose sentence in accordance with the habitual felon statute, but I shall hereby sentence you to 10 years in the state prison followed by two years' probation.

While recognizing that appellant qualified for, and so was in jeopardy of receiving,[4] sentences as a habitual felony offender, the original sentencing judge explicitly rejected the habitual offender option and imposed a guidelines sentence

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[4] See Arizona v. Rumsey, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984). Compare Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) with United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). We held in Davis v. State, 587 So. 2d 580, 581 (Fla. 1st DCA 1991) that the

> trial court's initial decision not to find Davis a habitual offender, after considering the evidence and hearing argument on that issue, constituted an acquittal of a habitual offender sentence. See Brown v. State, 521 So. 2d 110, 112 (Fla.), cert. denied, 488 U. S. 912, 109 S. Ct. 270, 102 L. Ed. 2d 258 (1988); Donald v. State, 562 So. 2d 792, 795 (Fla. 1st DCA 1990), review denied, 576 So. 2d 291 (Fla. 1991).

Citing "appellant's constitutional right to be free of facing double jeopardy," Grimes v. State, 616 So. 2d 996, 998 (Fla. 1st DCA 1993) (corrected opinion), we have refused to allow resentencing under the habitual offender statute on remand from a successful appeal of guidelines sentences.

under section 775.082, Florida Statutes (1989) instead. See State v. Rinkins, 19 Fla. L. Weekly S644 (Fla. Dec. 8, 1994); Geohagen v. State, 639 So. 2d 611 (Fla. 1994); King, 597 So. 2d at 314-15 ("conclud[ing] that a trial judge retains the discretion to . . . decide not to sentence the defendant as an habitual offender").

Second Sentencing For Same Offenses

After appellant had served the prison portion of his guidelines sentences, he was released on probation.[5] Before the probationary period had elapsed, the court ordered probation revoked on grounds not questioned here. At the resentencing hearing, a different judge ruled:

> [T]he Court specifically finds at the time that he was originally placed on supervision that he did, in fact, qualify for the imposition of habitual felony sanctions, and the Court further finds that it is permissible for this Court now to impose those sanctions based on the circumstances as they appeared at the time that he was originally put on probation.

When the court referred to "the time that he was originally placed on supervision" or "put on probation," the court necessarily made reference to the time when appellant was

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[5] Our supreme court decided in Poore v. State, 531 So. 2d 161, 164 (Fla. 1988), that sentencing courts have "five basic sentencing alternatives . . . [including] a 'probationary split sentence' consisting of a period of confinement, none of which is suspended, followed by a period of probation." The court made clear that such sentences "always will be subject to any limitations imposed by the sentencing guidelines recommendation." Poore, 531 So. 2d at 165.

originally sentenced. Counsel (and appellee) informed the court on the record during the second sentencing hearing that appellant, in accordance with the original guidelines sentence, had served a prison term before being placed on probation. Even so, the second sentencing judge sentenced appellant "as a habitual offender to 30 years in the state prison" for each of the crimes for which he had originally been sentenced under the guidelines, directing the habitual felony offender sentences "to run concurrent," and allowing credit on each for time already served.

Sentencing Following Revocation of Probation

The original "concept of probation . . . was to provide an alternative to the imposition by sentence, of the penalties provided by law for the commission of a criminal offense." Hankey v. State, 529 So. 2d 736, 738 (Fla. 5th DCA 1988) (Cowart, J., dissenting). Section 948.01(2), Florida Statutes (1993) still provides that

> If it appears to the court . . . 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 . . . shall stay and withhold the imposition of sentence upon such defendant and shall place him on probation.

The statutory authority for sentencing after revocation of probation assumes there has been no previous sentence of imprisonment, when it provides: "If . . . probation . . . is revoked, the court shall . . . impose any sentence which it

might have originally imposed before placing the probationer . . . on probation . . . ." § 948.06(1), Fla. Stat. (1989); see State v. Watts, 558 So. 2d 994 (Fla. 1990).

Construing these statutory provisions together with the sentencing guidelines requirements, the supreme court has authorized trial courts to "impose a departure sentence for valid reasons which existed at the time [the defendant] was placed on probation," Williams v. State, 581 So. 2d 144, 146 (Fla. 1991), where a trial court has withheld imposition of sentence[6] of imprisonment and placed the defendant on

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[6] Probation has itself been deemed a sentence for purposes of allowing direct review, even without objection in the trial court, of illegal conditions of probation. Larson v. State, 572 So. 2d 1368 (Fla. 1991). The supreme court recently held that

> the double jeopardy protection against multiple punishments includes the protection against enhancements or extensions of the conditions of probation. See Williams v. State, 578 So. 2d 846 (Fla. 4th DCA 1991) (finding that extension of probationary period at subsequent restitution hearing when sentence already imposed at earlier sentencing hearing violated double jeopardy).
>
> Section 948.06, Florida Statutes (1987), "provides the sole means by which the court may place additional terms on a previously entered order of probation or community control." Clark v. State, 579 So. 2d 109, 110 (Fla. 1991). Before probation may be enhanced, a violation of probation must be formally charged and the probationer must be brought before the court and advised of the charge. Id. at 110-11; § 948.06(1), Fla. Stat. (1987). Absent proof of a violation, the court cannot change an order of probation by enhancing the terms. Clark, 579 So. 2d at 110-11.

Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994). In these

probation, then imposed sentence of imprisonment for the first time upon revocation of probation. The only prison sentence involved in Snead v. State, 616 So. 2d 964 (Fla. 1993) was also imposed for the first time after probation was revoked.[7]

Absent errors of law or fact at the original sentencing, imposition of a second sentence of imprisonment after a convict has served part of his original prison term is not authorized, except in the case of "bump-ups" under the guidelines. Florida Rule of Criminal Procedure 3.701(d)(14) provides: "The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure." But the rule unequivocally requires: "Sentences imposed after revocation of probation or community control must be in accordance with the guidelines." Fla. R. Crim. P. 3.701(d)(14); see Franklin v. State, 545 So. 2d 851 (Fla. 1989).

The defendant in Davis v. State, 623 So. 2d 547, 548

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senses, probation has been described as one of "five basic sentencing alternatives in Florida." Poore v. State, 531 So. 2d 161, 164 (Fla. 1988). Most recently, however, our supreme court has espoused the more traditional view that a "probationary period is not a 'sentence.'" State v. Summers, 642 So. 2d 742, 744 (Fla. 1994).

[7] In Anderson v. State, 637 So. 2d 971, 972 n.1 (Fla. 5th DCA 1994), language interpreting Snead, while it supports the majority's position, fails to take into account that Snead had never begun service of a guidelines sentence.

(Fla. 2d DCA 1993) was sentenced to prison followed by probation. He "was not sentenced to prison as a habitual offender, but the sentence form provided that he would serve his probation as a habitual offender." (The original sentencing judge in the present case never purported to place King on any such "habitualized probation.") Reversing Davis' habitual offender sentence imposed on revocation of probation, the court held that, having "served the imprisonment portion of his sentence under the guidelines[, Davis] could not be sentenced as a habitual offender upon revocation of probation." Davis, 623 So. 2d at 548. Other habitual offender sentences imposed after revocation of probation, following imprisonment under the guidelines, have also been reversed. See Thompson v. State, 618 So. 2d 335, 336 (Fla. 2nd DCA 1993) (rejecting imprisonment under the guidelines coupled with probation as a habitual offender as an "illegal hybrid sentence"); Moorer v. State, 614 So. 2d 643 (Fla. 2d DCA 1993); Burrell v. State, 610 So. 2d 594 (Fla. 2d DCA 1992).

In a somewhat different context (so-called reverse split sentences), our supreme court "has made it clear that sentencing alternatives should not be used to thwart the guidelines. Poore v. State, 531 So. 2d 161, 165 (Fla. 1988)." Disbrow v. State, 642 So. 2d 740 (Fla. 1994) (no exemption from guidelines "mentioned . . . any place . . . in section 948.01"); Lambert v. State, 545 So. 2d 838 (Fla. 1989); Poore,

531 So. 2d at 165 ("the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation"). See Cook v. State, 19 Fla. L. Weekly S608 (Fla. November 23, 1994).

Florida Constitution Prohibits Double Punishments

"No person shall . . . twice be put in jeopardy for the same offense." Art. I, § 9, Fla. Const. "The guarantee against double jeopardy consists of three separate constitutional protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969) (footnotes omitted) (emphasis added). It is the third protection against multiple punishments for the same offense that is implicated in this case." Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994).

At one time it was clear, as a matter of Florida constitutional law, that "[o]nce a defendant begins to serve his sentence, the court has no authority to resentence him to a longer term of imprisonment." Hinton v. State, 446 So. 2d 712, 713 (Fla. 2d DCA 1984). "[A]rticle I, section 9, of the Florida Constitution . . . provide[s] that no person shall be put in jeopardy more than once for the same criminal offense.

. . . [R]esentencing on the same charge is a violation of double jeopardy." Hinton, 446 So. 2d at 713. The cases held "that the trial court is without power to set aside a criminal judgment after it has been partly satisfied by the defendant, and impose a new or different judgment increasing the punishment." Beckom v. State, 227 So. 2d 232, 233 (Fla. 2d DCA 1969), citing Smith v. Brown, 135 Fla. 830, 832, 185 So. 732, 733 (Fla. 1938); see Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973).

Just this year our supreme court extended Floridians' right to be free of double punishments to preclude alteration of terms of probation once probation has begun. Lippman, 633 So. 2d at 1064.

> Once a person begins serving a lawfully imposed sentence, he may not thereafter be resentenced for an increased term of incarceration. Donald v. State, 562 So. 2d 792 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 291 (Fla. 1991). In Royal v. State, 389 So. 2d 696 (Fla. 2nd DCA 1980), the Second District held that where the original five year sentence for a defendant convicted of third degree murder was a legal sentence, the trial court erred in resentencing defendant to 15 years. See also Wilhelm v. State, 543 So. 2d 434 (Fla. 2nd DCA 1989) (motion to correct illegal sentences, made approximately one year after sentencing, did not give trial court authority to modify legal sentences that had been rendered on other counts); McKinley v. State, 519 So. 2d 1154 (Fla. 5th DCA 1988) (resentencing defendant for both attempted murder and forgery, upon remand from appeal of attempted murder sentence, was error in that forgery conviction was unaffected by appeal); Kelly v. State, 508

So. 2d 788 (Fla. 5th DCA 1987): holding limited in part by Franklin v. State, 526 So. 2d 159 (Fla. 5th DCA 1988), approved, 545 So. 2d 851 (Fla. 1989) (double jeopardy was violated by trial court's resentencing of defendant on remand as to count that was unaffected by prior appeal).

Ruffin v. State, 589 So. 2d 403, 404 (Fla. 5th DCA 1991); see Wright v. State, 599 So. 2d 179 (Fla. 2d DCA 1992) (holding habitual offender sentence could not be imposed once service of guidelines sentence had begun); Williams v. State, 553 So. 2d 729 (Fla. 2d DCA 1989); Daniels v. State, 513 So. 2d 244 (Fla. 2d DCA 1987).

Neither the adoption of the guidelines nor the decision in United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980) amended the Florida Constitution. See Traylor v. State, 596 So. 2d 957 (Fla. 1992). On the other hand, in the context of probationary split sentencing under the guidelines, the rule of Troupe and Hinton has been at least implicitly modified; and, again in this narrow context, the concept of constitutional finality has undergone what might be described as an Orwellian transformation.[8] Even

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[8] Citing Scott v. State, 326 So. 2d 165 (Fla.) (holding sentence imposed upon revocation of probation after trial on remand may exceed sentence imposed after first trial), cert. denied, 429 U.S. 836, 97 S. Ct. 104, 50 L. Ed. 2d 103 (1976), and State v. Payne, 404 So. 2d 1055 (Fla. 1981) (holding sentence which probationer never began serving could be enhanced on revocation of probation), the Supreme Court of Florida approved a second guidelines sentence for the same offense in the event probation after an initial term of imprisonment was revoked. Poore, 531 So. 2d at 164. In concluding that "[s]uch a resentencing does not violate the prohibition against double

though service of a guidelines sentence has begun, if ensuing probation is revoked, the original guidelines sentence may be enhanced by "including a one-cell bump-up," Lambert, 545 So.

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jeopardy," Poore, 531 So. 2d at 164, the court did not invoke the Florida Constitution by name. Although the Poore language was obiter dicta, the die was cast.

> Along came Lambert v. State, 545 So. 2d 838 (Fla. 1989). In Lambert, we are told by a divided court that it is no longer possible to depart [from the sentencing guidelines] in [sentencing after revocation for] violation [of probation] cases in excess of the authorized one cell bump up[, but enhancement to this extent is permissible.] The same 4-3 majority confirmed this decision in State v. Tuthill, 545 So. 2d 850 (Fla. 1989) and a unanimous court approved this position in Franklin v. State, 545 So. 2d 851 (Fla. 1989). A 6-1 majority approved it in Dewberry v. State, 546 So. 2d 409 (Fla. 1989). In Hamilton v. State, 548 So. 2d 234 (Fla. 1989) a 5-2 majority again held that factors relating to violations of probation cannot support departure.

Lipscomb v. State, 573 So. 2d 429, 431 (Fla. 5th DCA 1991). Looked at one way,

> when a probationary split sentence is imposed the original term of confinement is always the maximum allowed by statute. In other words, in originally specifying a period of confinement, the trial court contemplates a longer period of incarceration, the upper end of which it does not disclose to the defendant, and suspends all undisclosed portions thereof during the period of probation.

Carter v. State, 552 So. 2d 203, 204 (Fla. 1st DCA) (Barfield, J., concurring), approved, 553 So. 2d 169 (Fla. 1989). This analysis contemplates that a convict sentenced under the guidelines will (perhaps repeatedly) violate terms of probation on which he embarks when he leaves prison. Whatever the number of violations, the term of confinement cannot exceed the maximum sentence authorized by section 775.082, Florida Statutes, however. State v. Green, 547 So. 2d 925 (Fla. 1989), superseded by statute as stated in Bradley v. State, 631 So. 2d 1096 (Fla. 1994).

2d at 840, or on grounds that the scoresheet was inaccurate when sentencing was originally pronounced. Roberts v. State, 19 Fla. L. Weekly S513 (Fla. Oct. 13, 1994).

Unless the defendant misleads the court as to his eligibility for sentencing as a habitual offender, however, see Harris v. State, 19 Fla. L. Weekly S464 (Fla. Sept. 29, 1994) (law); Goene v. State, 577 So. 2d 1306 (Fla. 1991) (facts), imposition of a lawful guidelines sentence on which the convict begins service precludes later imposition of a habitual offender sentence for the same offense. Thompson, 618 So. 2d at 336; Moorer; Burrell; Wright v. State, 599 So. 2d 179 (Fla. 2d DCA 1992); Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991); Troupe; Hinton; Beckom. Subsequent revocation of probation does not alter this rule. Davis, 623 So. 2d at 548.

> [V]iolation of probation is not itself an independent offense punishable at law in Florida. The legislature has addressed this issue and chosen to punish conduct underlying violation of probation by revocation of probation, conviction and sentencing for the new offense, addition of status points when sentencing for the new offense, and a one-cell bump-up when sentencing for the original offense. It has declined to create a separate offense punishable with extended prison terms. If departure based upon probation violation were to be approved, the courts unilaterally would be designating probation violation as something other than what the legislature intended.

Lambert, 545 So. 2d at 841. The court held in Watts that convicts sentenced to probationary split sentences under the

Youthful Offender Act were entitled, at sentencing after revocation of probation, to the benefit of the Act's six-year maximum, despite the State's contention that "the court was free to resentence the defendants under section 948.06(1) to any sentence that the court might have originally imposed." Watts, 558 So. 2d at 996.

The sentences appellant received the second time around also violated his federal constitutional rights. The decision in DiFrancesco does not countenance imposition of successive sentences for the same offense under different, alternative sentencing statutes. See generally Department of Revenue of Montana v. Kurth Ranch, __ U.S. __, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). Under applicable constitutional, statutory, and rule provisions and under the decided cases, the trial court erred in resentencing appellant under the habitual offender statute after initially imposing a probationary split guidelines sentence for the same offenses. To the extent the majority approves what are in my view unlawful and unconstitutional sentences, I respectfully dissent.