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IN THE SUPREME COURT
OF FLORIDA

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CASE NO.: 90,439

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DAVID L. TAYLOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.



On Discretionary Review From a Decision
of the Fifth District Court of Appeal

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# REPLY BRIEF OF PETITIONER

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## SUMMARY OF THE ARGUMENT

The petitioner, David L. Taylor, was sentenced illegally to ten years probation for a third degree felony which has a maximum penalty of five years. The trial court charged Mr. Taylor with violation of his probation and revoked his probation. The trial court lacked the authority to do either because Mr. Taylor was serving an illegal sentence. Mr. Taylor's charge of violation and revocation of probation should be reversed.

Mr. Taylor did not waive and is not estopped from arguing that his probation revocation is illegal. A defendant cannot agree to an illegal sentence. Further, any agreed-upon terms of sentence are not valid if they exceed the statutory maximums. When a sentence is found to be illegal for exceeding the statutory maximums, there is no "legal" portion of that sentence. The sentence is void ab initio and is incapable of having a "legal" portion. As such, the district court's decision should be reversed.

The State bears the burden of showing that the error was harmless beyond a reasonable doubt. The Criminal Appeal Reform Act which would shift the burden of establishing prejudicial error to the petitioner, does not apply in the instant case. Nonetheless, if the Criminal Appeal Reform Act does apply to the instant case, the appellant has demonstrated that he is subject to a term of imprisonment for allegedly violating probation imposed as part of an illegal sentence. Such constitutes fundamental, prejudicial error.

Accordingly, petitioner respectfully requests that his charge of violation of probation and the revocation of such probation be reversed and his case be remanded for resentencing.

## ARGUMENT

### I.

### ESTOPPEL/WAIVER.

The State initially argues that the petitioner, David L. Taylor, is estopped from challenging the legality of the original sentence, citing Warrington v. State, 660 So.2d 385 (Fla. 5th DCA 1995) and Gaskins v. State, 607 So.2d 475 (Fla. 1st DCA 1992). However, the State's proposition of estoppel does not apply according to the court's decision in Warrington when a sentence imposed violates the statutory maximum. Warrington, supra at 387. The Warrington court explained that one cannot waive an illegal sentence if it violates a statutory maximum:

> Usually, a defendant cannot agree to an illegal sentence, but when the illegal alternative and conditional defects which benefited that defendant are no longer in effect, the terms of incarceration that were agreed upon are valid so long as they are not beyond the statutory maximums for the offenses for which the defendant was convicted.

Id. (emphasis added). In the instant case, the original sentence of ten years probation and thus the revocation sentence exceeds the statutory maximum for a third degree felony (i.e., five years imprisonment), and is thus invalid.

Nonetheless, the State inappropriately and unpersuasively attempts to distinguish this language on the basis that it would only be relevant if Mr. Taylor were still serving an illegal sentence. The State, however, offers no justification for its interpretation of Warrington. Despite what the State may argue, it overlooks the simple fact that Mr. Taylor was illegally sentenced

beyond the statutory maximum. According to Warrington, Mr. Taylor cannot waive or be estopped from asserting this error simply because he somehow benefitted from an illegal sentence.

Likewise, the waiver/estoppel theories do not apply unless the defendant takes advantage of the benefits of a plea bargain. See Collins v. State, ___ So.2d ___, 22 F.L.W. D1981 (4th DCA August 20, 1997). The instant case did not involve a plea bargain. Id. at D1982. Accordingly, the principle of estoppel is inapposite.

## II.

## "LEGAL" vs. "ILLEGAL" PORTION OF SENTENCE.

The State next improperly argues that there is no error because Mr. Taylor's probation revocation occurred during the first five years of his probation and thus fell within the "legal" portion of the sentence. However, in Cecil v. State, 614 So.2d 603 (Fla. 1st DCA 1993), the court confirmed that a defendant may not be violated on a condition of probation while serving an illegal sentence even if during the so-called "legal" portion of the sentence. In Cecil, the violation occurred within the "legal" portion of the sentence. Nonetheless, the court held that the defendant could not be charged with violating his probation while serving an illegal sentence. Id.

The Fourth District recently receded from a similar decision, Jackson v. State, 654 So.2d 234, 236 (Fla. 4th DCA 1995), when it rendered its opinion in Collins v. State, ___ So.2d ___, 22 FLW D1981 (4th DCA August 20, 1997). The court stated in Collins that as long as a probation "violation occurs during the legal portion of a probationary sentence, the error in the illegal portion of the sentence is harmless." Id. at D1982 (emphasis added). However, the Fourth District overlooked prior caselaw demonstrating that error in sentencing beyond the maximum statute limit is fundamental and "can never be considered irrelevant, moot or harmless." Skinner v .State, 366 So.2d 486, 487 (Fla. 3d DCA 1979).

The State would have this Court ignore the Cecil and Jackson cases as aberrants of the law. However, these cases are consistent

with the reasoning that an illegal sentence is void ab initio and is incapable of having a "legal" portion. For example, in Robbins v. State, 413 So.2d 840, 841 (Fla. 3d DCA 1982), the defendant pled guilty to robbery and unlawful display of a firearm during the commission of the robbery. The defendant was sentenced to five years imprisonment for the robbery to be followed by three years probation for the unlawful display. After completing his prison term, the defendant was charged with violation of probation which was revoked. The defendant was sentenced to fifteen years imprisonment. Id. On appeal, the defendant argued that the original sentencing order placing him on probation was illegal as it violated the "single transaction rule." Id. The Third District agreed that the probationary sentence was illegal and thus void ab initio. Id. at 841-42. The appellate court further held that "all proceedings flowing from the probation are also a nullity. Therefore, the sentence imposed for violation of the probation is an illegal sentence." Id. at 842; see Eaton v. State, 307 So.2d 881 (Fla. 3d DCA 1975) (illegally imposed probation is a nullity and void ab initio).

## III.

## CRIMINAL APPEAL REFORM ACT.

In support of its argument that sentences which exceed the statutory maximum should not be void ab initio, the State maintains that Mr. Taylor has not been prejudiced, despite the fact that he was sentenced for revoking an illegally imposed term of probation. Nonetheless, the State asserts that Mr. Taylor has the burden of demonstrating prejudicial error under the recently enacted Criminal Appeal Reform Act.

The State improperly argues that pursuant to the amended statutes, a probation violator who admits to the violation cannot appeal the judgment or sentence unless he expressly reserved the right to appeal. While it is accurate that the appellant admitted to the probation violation, he did not enter a plea of guilty or nolo contendere which is required for the Criminal Appeal Reform Act to be applicable in this case.[1] Therefore, the Criminal

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[1] Section 924.06(3), Fla. Stat. (Supp. 1996), was amended to read:

> A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to a direct appeal.

(Emphasis added). Similarly, Section 924.051(4), Fla. Stat. (Supp. 1996), was created and reads:

> If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the

Appeal Reform Act is not a bar to this appeal. The Act is simply not applicable to probation violation proceedings.

The appellant seeks direct appeal of the revocation of probation which was part of an illegal sentence as the sentence exceeded the statutory maximum. The revocation sentence is likewise illegal. A criminal defendant, even without expressly reserving the right to appeal upon a plea of nolo contendere, has the right to a direct appeal of an illegal sentence. See §924.06(3), Fla. Stat., Robinson v. State, 373 So.2d 898, 902 (Fla. 1979); Isley v. State, 565 So.2d 389 (Fla. 5th DCA 1990); Gamble v. State, 449 So.2d 319, 321 (Fla. 5th DCA 1994); Faqin v. State, 668 So.2d 292 (Fla. 1st DCA 1996); Black v. State, 658 So.2d 672 (Fla. 1st DCA 1995).

Besides, §924.06(3), Fla. Stat. (Supp. 1996), despite the State's suggestion, has not been substantially changed or broadened under Chapter 96-248, Laws of Florida, to deny a criminal defendant from appealing the issue of an illegal sentence. Indeed, the act now limits the application of §924.06(3). According to the statute, a defendant shall have no right to a direct appeal of a "legally dispositive issue" without expressly reserving the right to appeal if he pleads guilty or nolo contendere. However, whether a sentence is illegal is not a legally dispositive issue. The appellant is still subject to being resentenced. See Brown v.

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> right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence. (Emphasis added).

State, 376 So.2d 382, 385 (Fla. 1979) (recognizing that dispositive legal issues include motions testing sufficiency of the charging document, constitutionality of a controlling statute, or the suppression of contraband). Therefore, newly amended and enacted §§924.06(3) and 924.051(4), Fla. Stat., are legally inapplicable to this appeal. The Act is simply not applicable to probation violation proceedings.

Additionally, Chapter 96-248, Laws of Florida, did not take effect until July 1, 1996. The State asserts that on May 31, 1996, the appellant pled no contest to violating his probation.[2] If true, the plea was entered over a month before the enactment of Chapter 96-248, Laws of Florida, and does not apply.

Furthermore, one cannot enter a plea of "guilty" or "nolo contendere" regarding a violation of probation; one either admits or denies the violation. See Fla.R.Crim.P. 3.790(b). The statute relied upon by the State applies only to pleas of "guilty" and "nolo contendere." Sections 924.06 and 924.051, Fla. Stat. (Supp. 1996). Such reliance is misplaced as the statutes are inapplicable to a probation violation where the alleged violator cannot legally enter such a plea.

Accordingly, the State has the burden in this case of showing that the error was harmless beyond a reasonable doubt, as required by the Florida Supreme Court in State v. DiGuilio, 491 So.2d 1129

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[2] The State's argument that appellant pled no contest is based upon the judgment/sentence entered on May 31, 1996. However, that plea refers to the original crime of driving while under the influence resulting in serious bodily injury, not the probation violation. [R. 61].

(Fla. 1986). The State has failed to meet that burden or even attempted to meet such burden. The State's conclusory statement in its brief that the error was harmless is simply insufficient to comply with the Florida Supreme Court's requirements in DiGuilio.

However, if this Court rules that the Criminal Appeal Reform Act does apply to this case, the appellant has already demonstrated prejudicial error. Specifically, the appellant is subject to a term of imprisonment for allegedly violating probation imposed as part of an illegal sentence. The revocation sentence itself is illegal as one cannot have his illegal probation revoked and thus constitutes fundamental, prejudicial error. See Cecil v. State, 614 So.2d 603 (Fla. 1st DCA 1993); see also, Ortiz v. State, 696 So.2d 916 (Fla. 5th DCA 1997); Reed v. State, 616 So.2d 592 (Fla. 4th DCA 1993); Robbins v. State, 413 So.2d 840 (Fla. 3d DCA 1982); Skinner v. State, 366 So.2d 486 (Fla. 3d DCA 1979).

## CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that his charge of violating his probation and the revocation of such probation be reversed and that his case be remanded for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **David H. Foxman, Esquire,** Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by United States mail, this 2 day of September, 1997.

ATTORNEY

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