IN THE SUPREME COURT OF FLORIDA

ALVIN COOPER MACK

Petitioner/Appellant,

v. CASE NO. SC00-2355

STATE OF FLORIDA,

Respondent/Appellee.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent generally agrees with Mack's Statement of the Case and Facts, and provides the following additions and reiterations thereto:

On September 29, 2000, the Fifth District Court of Appeal issued an opinion affirming the trial court's order denying relief in all of Mack's cases, except for case number 90-2582, wherein the courtourt reversed the order denying relief and remanded for resentencing on count II. Mack v. State, 766 So. 2d 1254, 1255 (Fla. 5th DCA 2000).[1] The opinion reads as follows:

> Alvin Cooper Mack appeals the summary denial of his motion to correct sentence filed pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure. Mack was sentenced under Count II in trial court case number 90-2582 to three and one-half years incarceration as a habitual offender. The true split sentence required Mack to serve two years of the three and one-half year sentence. The balance of incarceration, one and one-half years, would be suspended and probation imposed.
>
> Having served the first two years of his sentence, Mack was placed on probation. He was then sentenced to five years incarceration upon violating the terms of that probation. We agree with Mack that when he was resentenced to five years incarceration, a sentence that exceeded the three and one-half years originally imposed, he was sentenced a second time for the same offense and for a longer time than originally imposed in violation of double jeopardy principles. See *Poore v. State*, 531 So. 2d 161 (Fla. 1988).
>
> In *Jefferson v. State*, 677 So. 2d 29 (Fla. 1st DCA 1996), the First District held that when a trial court imposes a sentence after revoking the probationary portion of a

[1]See attached Appendix A

> true split sentence, any sentencing error would not result in an illegal sentence unless the statutory maximum penalty was exceeded. If we followed *Jefferson*, Mack's five year habitual offender sentence that was imposed after the probationary portion of his true split sentence was revoked would not be illegal because it did not exceed the enhanced statutory maximum penalty under the habitual offender statute of ten years incarceration for grand theft, a third degree felony. However, we do not choose to follow *Jefferson* in this case. Instead we find Mack's sentence to be an illegal sentence that is apparent on the face of the record and subject to correction under Rule 3.800(a). See *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). Included in the record before this court is the State's appendix that shows (1) the sentence imposed in case number 90-2582, when Mack received five years incarceration on count II after his probation was revoked, and (2) the original true split sentence for count II verifying Mack's claim of error.
>
> We find no merit in the remaining points raised by Mack and affirm the order denying relief as to all other cases except case number 90-2582. As to case number 90-2582, we reverse the order denying relief and remand for resentencing on count II to the unserved portion of the three and one-half years incarceration.
>
> AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Mack, 766 So. 2d at 1255.

The record in this case demonstrates that between the time Mack was originally sentenced in case number 90-2582 in 1990 and the time that he was violated in 1998 and received a five year sentence, his original probation had been modified and extended four years. No challenge was ever made to this modification, which came after the court had dismissed a violation of probation warrant.

The record on appeal before the district court did not contain the sentences Mack received in 1998 following the revocation of prbation in case numbers 90-657 and 90-661. Assuming the information set forth in Mack's brief is correct, the following are the sentences he received in 1990, 1996 and 1998:

Case No. 90-657-CFA:

Count I--Burglary of a Structure, third degree felony; and

Count II--Grand Theft, third degree felony.

1) Original 1990 Sentence:

> The trial court withheld adjudication and imposition of sentence on all counts and placed the defendant on one and a half years under the supervision of the Department of Corrections; concurrent on all counts but consecutive to prison sentence in case number 90-2582-CFA.

2) 1996 VOP Sentence:

> The trial court dismissed the violation of probation warrant and modified the defendant's supervision to extend four (4) years from that date (September 30, 1996).[2]

3) 1998 VOP Sentence:

> The trial court revoked the Petitioner's probation and sentenced him as a habitual felony offender for 10-years on both counts I and II, to run concurrent with his previous sentences.[3]

Case No. 90-661-CFA:

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[2]Although Mack contends in his brief that he was adjudicated guilty, the trial court's sentencing orders do not indicate such.

[3]The undersigned assumes the information alleged by Mack is correct. As urged above, the undersigned was not required by the District Court to address either sentence and has never possessed those records.

Count I--Burglary of a Structure, third degree felony; and

Count II--Grand Theft, third degree felony.

1) Original 1990 Sentence:

> The trial court withheld adjudication and imposition of sentence on all counts and placed the defendant on one and a half years under the supervision of the Department of Corrections; concurrent on all counts but consecutive to prison sentence in case number 90-2582-CFA.

2) 1996 VOP Sentence:

> The trial court dismissed the violation of probation warrant and modified the defendant's supervision to extend four (4) years from that date (September 30, 1996).

3) 1998 VOP Sentence:

> The trial court revoked the Petitioner's probation and sentenced him as a habitual felony offender for 10-years on both counts I and II, to run concurrent with his previous sentences.

Mack's notice to invoke, dated October 26, 2000, was filed in the district court on November 2, 2000.

SUMMARY OF ARGUMENTS

POINT ONE: In light of a recent decision from this Court which further clarified what claims can be raised on a motion to correct illegal sentence, this Court may no longer have jurisdiction to entertain this case since the district court opinion is consistent with this Court's opinions. In any event, the district court erred in remanding this case for resentencing where Mack had accepted the benefits of probation following his first alleged violation.

POINT TWO: This claim is not cognizable on a motion to correct illegal sentence because it does not involve the type of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. In any event, the sentence is proper where Mack was originally sentenced to a term of probation and was declared to be a habitual offender on counts for which he was simultaneously sentenced. Upon his second violation of probation, the trial court could impose any sentence which it could have originally imposed.

ARGUMENT

POINT I

IN LIGHT OF THIS COURT'S RECENT DECISION IN Carter v. State, 26 Fla. L. Weekly S347 (Fla. May 24, 2001), JURISDICTION MAY NO LONGER EXIST SINCE THE DECISION OF THE DISTRICT COURT IS CONSISTENT WITH THIS COURT'S OPINIONS; ALTERNATIVELY, THE DISTRICT COURT ERRED IN RENDERING A DECISION ON THIS POINT AFTER MACK ACCEPTED THE BENEFITS OF PROBATION FOLLOWING HIS FIRST VIOLATION OF PROBATION.

The district court below addressed the sentencing issue under this point on appeal for case number 90-2582. The court, in reliance on Poore v. State, 531 So. 2d 161 (Fla. 1988), agreed with Mack "that when he was resentenced to five years incarceration, a sentence that exceeded the three and one-half years originally imposed, he was sentenced a second time for the same offense and for a longer time than originally imposed in violation of double jeopardy." Mack, 766 So. 2d at 1155. The District Court declined to follow Jefferson v. State, 677 So. 2d 29 (Fla. 1st DCA 1996), wherein the First District had held that when a trial court imposes a sentence after revoking the probationary portion of a true split sentence, any sentencing error would not result in an illegal sentence unless the statutory maximum penalty was exceeded. The court ruled that:

> If we followed Jefferson, Mack's five year habitual offender sentence that was imposed after the probationary portion of his true split sentence was revoked would not be illegal because it did not exceed the enhanced statutory maximum penalty under the habitual offender statute of ten years incarceration for grand theft, a third degree felony. However, we do not choose to follow Jefferson in this case. Instead we find Mack's sentence to be an illegal sentence that is apparent on the face of the record and subject to

> correction under Rule 3.800(a). See State v. Mancino, 714 So. 2d 429 (Fla. 1998).

Mack, 766 So. 2d at 1155.

In Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995), upon which the Jefferson court had relied for its holding, this Court concluded that "an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Several years later in Hopping v. State, 708 So. 2d 263, 265 (Fla. 1998), which was decided after Jefferson, supra, this Court concluded that a sentence that was increased upon resentencing in violation of the Double Jeopardy Clause constituted an illegal sentence in that it exceeded "the maximum period set forth by law for a particular offense without regard to the guidelines." Recently, in Carter, supra, this Court stated that it implicitly, if not expressly, receded from Davis to the extent that it could be read to limit challenges under 3.800(a) to only those sentences that exceed the statutory maximum. Thus, it would appear that Jefferson was implicitly overruled by Hopping as well, since a claim raised pursuant to Poore, supra, is based on a double jeopardy challenge, and would thus be cognizable pursuant to Hopping. Consequently, the district court opinion in the instant case is not in conflict with any other opinions so this Court should decline to exercise its jurisdiction.

If this Court determines that it retains jurisdiction to rule on this case, the State argues that the district court erred in granting relief, because Mack's sentences were modified to concurrent four year terms of probation following his first violation of probation in 1996. While this Court's Poore opinion discusses the various sentencing

options available to trial courts, which included the resulting sentence to be imposed upon violation of a true split sentence, such principles did not apply to Mack's case number 90-2582-CFA. Once Mack's probation was modified to a four year term of probation following his first violation of probation, the original true split sentence faded away because he did not file a direct appeal or collateral motion attacking the resentencing, but chose to wait until after he had violated his probation again. The district courts are in accord that one who takes advantage of probation is later estopped from challenging an earlier sentence. See e.g. Dupree v. State, 708 So. 2d 968, 971 (Fla. 1st DCA 1998)(Defendant did not challenge the trial court's reimposition of two years' community control until after he violated the terms of that community control and the trial court sentenced him to a term of imprisonment. "[O]ne who takes advantage of an invalid sentence until he violates community control is estopped to assert the invalidity of his original sentence[,]" citing Stroble v. State, 689 So. 2d 1089, 1090 (Fla. 5th DCA), rev. denied, 697 So. 2d 512 (Fla. 1997)); Huff v. State, 672 So. 2d 634, 635 (Fla. 1st DCA 1996)(although the defendant's original suspended sentence may have been improper under Poore, it was not reversible error because he had already received the benefits of the improper sentence, citing Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992); Holmes v. State, 728 So. 2d 1214, 1216 (Fla. 4th DCA 1999)(citing Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991)("an invalid sentence, as opposed to an illegal sentence, would not have supported defendant's claim that the probation was improper where defendant had enjoyed the benefits of

probation"); Lee v. State, 666 So. 2d 209, 210 (Fla. 2d DCA 1995)(reversal and remand not warranted where the defendant did not appeal the sentence imposed following his first violation of probation, and waived the right to enforce the earlier true split sentence); Ulmer v. State, 619 So. 2d 443 (Fla. 2d DCA 1993); Whitchard v. State, 459 So. 2d 439 (Fla. 3d DCA 1984); Rodriguez v. State, 441 So. 2d 1129 (Fla. 3d DCA 1983).

In case number 90-2582, Mack was originally sentenced on Count I to five years incarceration and on Count II to three and a half years incarceration; however, after serving a two year period of imprisonment the balance suspended and Mack placed on one and a half years probation (consecutive to Count I). In 1996 following Mack's violation of probation, the trial court modified this case along with Mack's other five cases for concurrent periods of four years of probation. Mack did not appeal or seek any collateral relief while serving the four year term of probation. Thereafter, Mack again violated his probation in 1998, where the trial court revoked his probation and sentenced him to five years imprisonment.

The Fifth District Court of Appeal erred in rendering its decision. The district court overlooked the fact that Mack's original true split sentence as to the probationary portion was replaced in 1996 with a modified four year term of probation. Mack began serving that sentence and again violated his probation. Mack should not have been allowed to challenge the original sentence nor the probationary term given in 1996 once he began serving those sentences.

POINT II

THE INSTANT CLAIM IS NOT COGNIZABLE ON A MOTION FILED PURSUANT TO RULE 3.800; MACK WAS PROPERLY GIVEN HABITUAL FELONY OFFENDER SENTENCES FOLLOWING REVOCATION OF HIS PROBATION WHERE HE WAS SENTENCED AS A HABITUAL OFFENDER ON OTHER COUNTS PENDING BEFORE THE COURT FOR SENTENCING.

The District Court below only addressed Mack's case number 90-2582 (point I above), and found no merit to his remaining claims. Mack v. State, 766 So. 2d 1254, 1255 (Fla. 5th DCA 2000). Under Article V, Section 3(b)(3) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. The conflict must be found within the four corners of the district court's opinion. Reaves v. State, 485 So. 2d 830 (Fla. 1986). Since the district court did not address this issue within the four corners of the opinion, it cannot form the basis for conflict jurisdiction.

Needless to say, if this Court decides to address the merits of this point on appeal, Mack urges in his brief that the habitual felony offender sentences for case numbers 90-657 and 90-661 were illegal, because he was not originally nor after his first violation of probation, sentenced as a habitual felony offender. Respondent first contends that this is not an issue that can be raised pursuant to Florida Rule of Criminal Procedure 3.800, because this is **not** the "kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any

set of factul circumstances." Carter, supra. In fact, the sentence is totally consistent with Florida's sentencing statutes. Mack was found to be a habitual offender in case number 90-2582, for which he was simultaneously sentenced with the instant cases. Thus, he was declared to be a habitual offender at sentencing, he meets the qualifications to be declared a habitual offender, and does not challenge this classification. Further, the offense for which he was sentenced is subject to habitual offender sanctions, and the sentence is within the statutory maximum. Consequently, there is nothing illegal about the sentence he received upon his violation of probation, so the claim is not cognizable on a 3.800 motion.

Following this same logic, even if the claim is cognizable, the sentence was properly imposed. The standard of review of a pure law question is de novo. See Demps v. State, 761 So. 2d 302, 306 (Fla. 2000)("A trial court's ruling on a pure question of law is subject to de novo review"); Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). The trial court properly imposed habitual felony offender sentences against Mack following his second violation of probation because no "sentences" in a technical sense were ever initially imposed in case numbers 90-657 and 90-661. Further, Mack was declared to be a habitual offender in case number 90-2582, for which he was simultaneously sentenced to a term of incarceration. Thus, when Mack violated his probation the second time, the trial court could impose any sentence that it could have originally imposed, including a habitual offender sentence.

The State first urges that since Mack was originally sentenced as a habitual felony offender in case number 90-2582 at the same time he was sentenced in this case, then surely the trial court should be able to sentence him as such following violation of probation. For example, the First District Court of Appeal in Powell v. State, 774 So. 2d 869 (Fla. 1st DCA 2000) recently made the following observation:

> . . . [W]e question the reasonableness in the requirement that because the trial judge did not utilize the magic words "you are on probation as a habitual offender," the defendant could not be sentenced as a habitual offender upon violation of probation. It seems to us that find a person to be qualified as a habitual offender should have legal significance and that requiring that it to be stated again as part of the sentence mandates needless repetition. In effect, the case law appears to state that an initial determination concerning defendant's qualification for habitualization is of no significance if it is not restated in the sentence.
>
> The general rule as provided in section 948.06(1), Florida Statutes, should apply: When a person violates probation, the court may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control." A prisoner who qualifies as a habitual offender should be subject to the penalties applicable to that status. Artificial sentencing limitations, as imposed here, seem to us to create unnecessary questions as to the wisdom of our sentencing system.

Powell, 774 So. 2d at 870; See also Rodriguez v. State, 766 So. 2d 1147, 1149 (Fla. 3d DCA 2000)("[W]e are inclined to think that where multiple cases and/or multiple counts are before the court for simultaneous sentencing, a habitual offender disposition can be

imposed on all counts if habitual offender authority is used on any count. To hold otherwise would require count-by-count habitualization, and would make sentencing even more complicated than it already is").

Further, unlike the defendant in King v. State, 681 So. 2d 1136 (Fla. 1996), Mack was not originally sentenced to prison on these counts, but was simply placed on probation. Section 948.01(3), Florida Statutes (1989), provides in pertinent part that:

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

§ 948.01(3), Fla. Stat. (1989); See Landeverde v. State, 769 So. 2d 457, 462 (Fla. 4th DCA 2000)(discussing the technical differences between a period of probation and a sentence); See also Fla.R.Crim.P. 3.650("the judge may withhold such adjudication of guilt if he places the defendant on probation"); State v. McFadden, 772 So. 2d 1209, 1211 (Fla. 2000); Raulerson v. State, 763 So. 2d 285, 294 (Fla. 2000)("a judge is authorized to withhold adjudication in criminal cases if he or she places a defendant on probation," citing Waite v. City of Fort Lauderdale, 681 So. 2d 901 n.1 (Fla. 4th DCA 1996); State v. Gloster, 703 So. 2d 1174, 1175 (Fla. 1st DCA 1997)); Cigelski v. State, 453 So. 2d 840, 841 (Fla.

1st DCA 1984)(recognizing that "the framers of the guidelines did not intend that probation be treated as a sentence").

Consistently, at the time of Mack's offenses, Florida Rule of Criminal Procedure 3.790(a) provided in pertinent part that: "Pronouncement and imposition of [a] sentence of imprisonment shall not be made upon a defendant who is placed on probation regardless of whether such defendant has or has not been adjudicated guilty. . . . The court shall specify the length of time during which the defendant is to be supervised." Fla.R.Crim.P. 3.790(a)(emphasis added); See also Petrillo v. State, 554 So. 2d 1227, 1228 (Fla. 2d DCA 1990)("The *length* of prison sentences recommended under the guidelines has nothing to do with, and does not control, the *length* of a probation sentence chosen as an alternative to prison"); State v. Malone, 489 So. 2d 213, 214 (Fla. 3d DCA 1986)(citing Francis v. State, 487 So. 2d 348 (Fla. 2d DCA 1986)(*extent* of community control is regulated by general law, not by the guidelines)).

"Chapter 948 draws clear distinctions between the term of a sentence and the period of probation." Landeverde, 769 So. 2d at 462. "[I]n a technical sense, a trial court is not authorized to *sentence* a defendant to probation." Id(citing Lennard v. State, 308 So. 2d 579 (Fla. 4th DCA 1975)(citing Brown v. State, 302 So. 2d 430 (Fla. 4th DCA 1974)). Moreover, the district court in Landeverde, cited its Brown decision as stating:

> A court may impose a sentence of imprisonment or fine upon a defendant found guilty of an offense, or it may withhold sentence in whole or in part and place defendant on probation,

> but it cannot sentence defendant to probation, since withholding of sentence or a portion thereof is an indispensable prerequisite to entry of an order placing a defendant on probation. 302 So. 2d at 432.
>
> We further explained that: If a defendant could be sentenced to probation, there would be no judicial recourse in the event the defendant violated his probation. Because the court has already passed sentence, there would be no lawful basis for the imposition of punishment for the violation of the conditions of probation. However, as Chapter 948 envisions, when a sentence or a portion thereof is withheld, there would be a lawful basis for the imposition of punishment for the violation of a condition of probation, namely the withheld sentence. Id.

Landeverde, 769 So. 2d at 462-63(citing Brown, 302 So. 2d at 432).

Once Mack had violated his probation, section 948.06(1), Florida Statutes (1989) came into play. Section 948.06, Florida Statues provided in pertinent part that:

> Whenever within the period of probation . . . there is reasonable ground to believe that a probationer . . . has violated his probation . . . in a material respect . . . [t]he court, upon the probationer or offender being brought before it, shall advise him of such charge of violation and, if such charge is admitted to be true, may forthwith revoke, modify, or continue the probation or . . . place the probationer into a community control program. If probation . . . is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudicated guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation. . . . If such violation of probation . . . is not admitted by the probationer . . . , the court may commit him or release him with or without bail to await further hearing, or it may dismiss the charge of probation . . . violation. If such charge is not at that time admitted by the probationer or offender and if it is not

> dismissed the court, as soon as may be practicable, shall give the probationer or offender an opportunity to be fully heard on his behalf in person or by counsel. After such hearing, the court may revoke, modify, or continue the probation . . . or place the probationer into community control. If such probation . . . is revoked the court shall adjudge the probationer or offender guilty of the offense charged and or admitted, unless he has previously been adjudicated guilty, and impose any sentence which it might have originally imposed before placing the probationer or offender on probation. . . .

§ 948.06(1), Fla. Stat. (1989); See also Fla.R.Crim.P. 3.790(b) ("Following a revocation of probation . . . , the trial court shall adjudicate the defendant guilty of the crime forming the basis of his probation . . . , if no such adjudication has been made previously. Pronouncement and imposition of sentence then shall be made upon such defendant" [emphasis added]); Landeverde, 769 So. 2d at 462-63.

The district court in State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997), explained the above statutory scheme, which was discussed by this Court in Raulerson v. State, 763 So. 2d 285 (Fla. 2000), which also affirmed Gloster. Although both cases dealt with interpreting section 322.34(1)(c), Florida Statutes, the reasoning of Gloster is relevant to the outcome of this case. This Court in Raulerson discussed the Gloster court's reasoning as follows:

> The First District analyzed section 948.01(2), Florida Statutes, which authorizes a court to withhold adjudication of guilt, and noted that a withhold of adjudication is permitted only if the defendant is placed on probation. See Gloster, 703 So. 2d at 1175(citing Florida Rule of Criminal Procedure 3.670). Based on the interaction between a withhold of adjudication and placement of a defendant on

> probation, the First District Court concluded: Pursuant to his statutory scheme, a defendant who has adjudication withheld and successfully completes the term of probation imposed "is not a convicted person." Thomas v. State, 356 So. 2d 846, 847 (Fla. 4th DCA), cert. denied, 361 So. 2d 835 (Fla. 1978). However, if probation is revoked, the defendant must be adjudicated guilty of the charged offense. § 948.06(1), Fla. Stat. (1995). Applying the foregoing statutory scheme to the issues at hand, it becomes apparent that there are two possible alternatives . . . , either the term of probation will be successfully completed, in which event the defendant will not have been convicted at all; or probation will be revoked, in which case the defendant must be adjudicated guilty of a violation [of the charge on which he was placed on probation] and sentenced accordingly.

Raulerson, 763 So. 2d at 289-90(language added).

The district court was correct in ruling that the issue under this point on appeal was without merit. Whether Mack was adjudicated or not at his first violation probation sentencing, his probation was modified and extended for four years. When Mack violated his probation the second time, the trial court was authorized pursuant to section 948.06(1), Florida Statutes (1989), to impose any sentence that it could have originally, because Mack was serving a term of probation and not an "imposed sentence", particularly where Mack had alreday been declared a habitual offender.

Additionally, the instant case can also be contrasted with this Court's holding in Snead v. State, 616 So. 2d 964 (Fla. 1993), citing section 948.06(1), Florida Statutes (1989), that "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." Snead, 616 So. 2d at 965. The same rationale can apply to the instant case where adjudication was withheld and Mack was placed on probation. It was not until Mack was sentenced to a term of incarceration that the trial court had to make the determination of whether to impose a habitual felony offender sentence or guideline sentence. See e.g. King, 681 So. 2d at 1139-40("It is the decision *not to sentence* the defendant as an habitual offender pursuant to section 775.084 that triggers the sentencing guidelines procedures." "Thus, the sentencing judge may elect to impose an habitual offender sentence or a guidelines sentence, but not both").

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to conclude that Mack was properly habitualized following revocation of his second probation and that the district court erred by considering Mack's habitualization contentions after he had accepted the benefits of being on probation a second time. Alternatively, this Court should conclude that there was no conflict under either point on appeal, and that its discretionary jurisdiction was improvidently granted.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla.R.App.P. 9.210(a)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on the merits in case number S00-2355 has been furnished by U.S. Mail to ALVIN COOPER MACK, DC# 699143, South Bay Correctional Facility, P.O. Box 7171, South Bay, Florida 33493-7171, this ___ day of June, 2001.

_____
ALFRED WASHINGTON, JR.
ASSISTANT ATTORNEY GENERAL