IN THE SUPREME COURT OF FLORIDA

ALVIN COOPER MACK,
Petitioner/Appellant,

vs.

STATE OF FLORIDA,
Respondent/Appellee.

CASE NO.: SC00-2355
L. T. NO.: 5D00-1274

REPLY BRIEF OF PETITIONER TO RESPONDENT'S RESPONSE

On Discretionary Review From The
Fifth District Court of Appeal

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REBUTTAL ARGUMENT

In all honesty, Petitioner takes serious offense and insult by the Respondent's poorly disguised attempt to blatantly misconstrue and misapply the law in order to misdirect this Honorable Court's attention to the real issue at hand. There is absolutely no basis for their ill-conceived argument either in trying to construe this Court's recent ruling in Carter v. State, 26 Fla.L.Weekly S347 (Fla. May 24, 2001) as a basis to dismiss jurisdiction of this Court, or, in attempting to bypass and circumvent the plain language of King v. State, 681 So.2d. 1136 (Fla. 1996) as to the judge's discretion in sentencing after a violation of probation.

Specifically, the respondent attempts to cause this Court to dismiss jurisdiction of the case at hand, because, they assert, the judge had discretion to impose under some circumstance, the sentence it imposed on Appellant, and thus precluded it from consideration under a 3.800(a) motion to correct illegal sentence.

Their entire reasoning is faulty, in that, no judge has ever been authorized, or enjoyed the discretion to impose the sentence imposed upon Appellant after violation of probation under the given set of circumstances Appellant is in. The Respondent conceded that under the two case numbers at hand, Appellant was sentenced solely to probation in 1990, and upon initial violation, resentenced to an extended term of probation. Nowhere in either case, was Appellant habitualized or

sentenced as a habitual offender, or had habitual offender sentencing hanging over his head should he violate, prior to 1998, 8 years after the initial imposition of a probation sentence. It is important to note that at the time the trial court imposed the habitual offender sentences being challenged, King v. State, 681 So.2d. 1136 (Fla. 1996) had been rendered by this Court, and the trial court knew, or should have known, that the sentence it imposed was illegal from its inception. Secondly, it must also herein be noted that the only reason for the sentence imposed being challenged, is due solely to the misrepresentation at the trial court level by the prosecutor (See Sentencing Transcript for 1998), which the Respondent is continuing to attempt to perpetuate, thus causing Petitioner to be illegally detained for an extended period of time not authorized by law in his particular case.

Specifically, their are numerous cases that state emphatically, that the judge at that trial court level, had the discretion initially, to impose either probation, incarceration, or some combination thereto, up to and including habitual offender sentencing in 1990. See, e.g., Poore v. State, 531 Do.2d. 161 (Fla. 1988). The judge exercised his discretion at that point in time, choosing to sentence Appellant to probation only on the two case numbers being considered. Once that was done, then upon violation, the only discretion left to the judge was to either reimpose probation, depending on the severity and/or nature of the violation, or a sentence of incarceration with a one-cell bump, his discretion being limited by the statutory

maximum for a third degree felony, clearly set forth in Fla. Stat. §775.082(3)(d). Further, and seeing the possibility of violation of probation, the legislature and this Court, in promulgating the rules of sentencing as found in Rule 3.701(d)(14), (1989), Fla.R.Crim.P. and Fla. Stat. §921.0011 (1993), both in existence long before the 1998 sentencing proceeding, provided that "Sentences imposed after revocation of probation or community control **must** be in accordance with the guidelines. 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." (Emphasis added). King also supports this.

Thus, it can be clearly seen that, based on statutory law alone, no judge had the authority to sentence Appellant as an habitual offender after violation of straight probation. And King makes this equally abundantly clear. The respondent's attempt to state that there is a difference between a guidelines term of incarceration followed by probation as was the case in King, and the Appellant's case where he was merely sentenced to probation is refuted by King, wherein this Court stated that it is the act of the judge in **not** sentencing Appellant in 1990 to habitual offender sentences, pursuant to section 775.084 that triggers the sentencing guidelines procedures." Therefore, any sentence imposed other than habitual offender sentencing triggers the guidelines and restricts any further

sentencing. Even though probation is not recognized as a "sentence" governed by the sentencing guidelines in terms of length, it is recognized as a sentence, pursuant to the statutory maximum as no sentence of probation or incarceration or both may exceed the statutory maximum. See Fla.R.Crim.P. 3.701(d)(10); Bernard v. State, App. 5 Dist., 571 So.2d 560 (1990) (Statutory maximum sentence controlled sentence even where sentence exceeding statutory maximum fell within "permitted range" based on defendant's "score."); Cartwright v. State, App. 5 Dist., 565 So.2d 784 (1990) (Defendant, upon revocation of probation, could not be sentenced under guidelines to 20 years imprisonment for two second-degree felonies, where maximum sentence for the felonies was 15 years.), e.g..

The respondent further attempts to deny petitioner review by asserting that since the 5th DCA did not address this particular claim in its opinion, it cannot form the basis of discretionary review. However, Appellant contends that the 5th DCA **did** address this claim by referring to it as "having no merit". That statement, in and of itself, under the circumstances and facts of the case presented herein, is a blatant falsehood, and this Court recognized that fact when it granted discretionary review.

As stated in Petitioner's earlier motion(s), the 5th DCA willfully chose to grant Petitioner the least amount of relief possible, and attempted to bar him from further review by denying the issue discussed herein as "without merit." That act,

in and of itself, as far as Petitioner is concerned is unethical, underhanded, and shortchanges the principles of justice. And the respondent's feeble attempt to perpetuate such action by any court, beginning with its false representation to the trial court that began this long process back in 1998, and now attempting to give credence to the 5th DCA's erroneous, seriously flawed, and defective effort to cheat petitioner out the relief he is fully entitled to, calls into serious question the integrity of the Florida Judicial System as a whole. Is this the game being played on pro se appellants en banc? Does any Court have the right to deny relief to an appellant who has shown beyond any measure of reasonable doubt his entitlement to it? Does any court have the right to attempt to or actually procedurally bar an appellant simply because they don't feel like addressing his meritorious issues by calling his issue meritless or frivolous? Appellant would hope that the answer to these questions is a resounding **NO!!**.

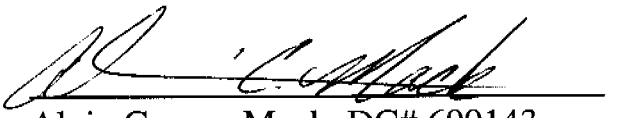
Lastly, Appellant chooses not to address the respondent's attempt to address an issue denied review by this Court. The Appellate Court did judge correctly as to the true split sentence issue and Appellant has no problem with that, as it is the foundation of this issue as to how petitioner was initially sentenced.

In conclusion, the key issue is conceded by the state in its opening paragraphs, where they graphically portray, display and materially demonstrate that Petitioner was not sentenced as an habitual offender in either case number

before this court in 1990, and that alone is sufficient to warrant no further consideration of habitual offender sentencing at any time after that. Further, Petitioner sentence ranks as illegal because (a) no judge could impose the sentences being challenged under the given set of circumstances given herein; and (b) his sentence of 10 years is in excess of the statutory maximum of five years that Petitioner could have received, thus allowing him, even under the restrictive language of Davis v. State, 661 So.2d. 1193 (Fla. 1995) to raise this claim via 3.800(a).

Therefore, contrary to what the respondent attempts to assert, Petitioner is fully entitled to a complete review, and granting of relief to the issues in question. He is currently being illegally detained, as the granting of relief would entitle him to immediate discharge from incarceration. The Respondent could have been honorable, conceded error, and let the matter go. But in its arrogance and self-deception, it has chosen to pursue this route of perpetual misrepresentation, misinterpretation and misapplication of the law, and Petitioner has no choice but to seek relief and correction of the manifest injustice being perpetrated upon him from this Honorable Court. Wrong is wrong, and once notified of error, the Court has an ethical obligation to correct that wrong and make it right. Bain v. State, 730 So.2d. 296 (Fla. 2d DCA 1999); Maddox v. State, 760 So.2d. 89 (Fla. 2000).

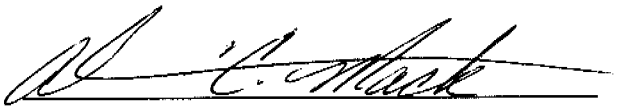
Respectfully submitted,



Alvin Cooper Mack, DC# 699143

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to the Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118 by U. S. Mail this 19th day of June, 2001, by the undersigned.



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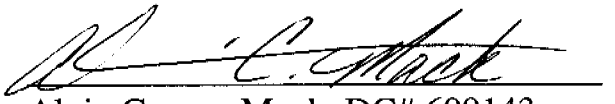
CERTIFICATE OF COMPLIANCE

I, the Petitioner, Alvin Cooper Mack, appearing pro se, hereby certifies that this Initial Brief is submitted in compliance as to type size, pursuant to Rule 9.210, Fla.R.App.P., as this Brief is computer typed in Times New Roman 14.



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