IN THE SUPREME COURT OF THE STATE OF FLORIDA

JASON SHENFELD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC09-1395
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
_____	)	

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court for the Fifteenth Judicial Circuit. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appeared in the trial court (i.e., the Defendant and the State).

The following symbols will be used:

"R"	Record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE AND FACTS

Defendant relies on the statement of the case and facts contained in his initial brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE PROBATION VIOLATION WHERE NO WARRANT WAS ISSUED PRIOR TO THE EXPIRATION OF DEFENDANT'S TERM OF PROBATION.

Defendant relies on the argument contained in his initial brief for this Point.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT DEFENDANT COULD NOT BE SENTENCED, UPON THE REVOCATION OF HIS PROBATION, TO A GREATER TERM THAN THE ORIGINALLY IMPOSED TRUE SPLIT SENTENCE.

Recognizing that this issue was not the basis for certified conflict in this case, the State maintains that once this Court has accepted jurisdiction of a case, it may consider other issues "decided by the court below which are properly raised and argued before this Court." Answer brief at 18. However, this power is discretionary, Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982). In the instant case, the decision of the district court of appeal holding that Defendant could be sentenced on the revocation of his probation to no more incarceration than the term of the true split sentence originally imposed is consistent with long-standing decisional law of this Court and the other courts of this State. Defendant has demonstrated no legal grounds for departing from this well-established law other than its dissatisfaction with the particular result in this case.[1] The Court should accordingly decline to exercise its discretion to review this additional issue.

[1]The State's outrage is largely moot. Defendant was charged with violating his probation by committing first degree murder. He was subsequently convicted of that substantive offense pursuant to his plea of guilty to the charge and is currently serving a sentence of life in prison.

In Poore v. State, 531 So. 2d 161 (Fla. 1988), this Court recognized the "true split sentence," where a defendant is sentenced to a term of imprisonment, all or a portion of which is suspended, and the defendant is placed on probation for the suspended portion of the sentence. 531 So. 2d at 164. Where this sentencing option is employed,

> the sentencing judge in no instance may order a new incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence. Section 948.06(1)[[2]] would not apply in this latter instance because no new fact would be available for consideration by the sentencing judge. *See* [*North Carolina v.*] *Pearce* [, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)]. The possibility of the violation has already been considered, albeit progressively, when the judge determined the total period of incarceration and suspended a portion of the sentence, during which the defendant would be on probation. In effect, the judge has sentenced *in advance* for the contingency of a probation violation, and will not later be permitted to change his or her mind on that question.

531 So. 2d at 164-165, emphasis original.

[2]Fla. Stat. (2003), now Section 948.06(2)(e), Fla. Stat. (2005): "If such probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offenses charged and proven or admitted, ... and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or community control."

Disregarding this mandate results in a violation of the double jeopardy clause. *Id.* In Mack v. State, 823 So. 2d 746 (Fla. 2002), this Court summarized its holding in Poore, stating that in that case

> we explained that when a sentencing court imposes a true split sentence, the judge has effectively sentenced the defendant in advance for a probation violation and is not later permitted to change his or her mind. Upon revocation of probation, the court may not order the defendant incarcerated for a period which exceeds the suspended portion because to do so would be a violation of the double jeopardy clause.

823 So. 2d at 748, fn. 3.

Consequently, where a true split sentence is imposed and the defendant is sentenced to prison, with all or a portion of that sentence then suspended and the defendant placed on probation, his prison sentence upon revocation of that probation is limited to the suspended sentence previously imposed. Mack v. State, 823 So. 2d 746; Snell v. State, 845 So. 2d 323 (Fla. 1st DCA 2003).

In the present case, Defendant was originally sentenced to a term of five years imprisonment, but that sentence was suspended and he was placed on five years drug offender probation (R1/32, 49, 48, 44-45). When he satisfactorily complied with the conditions of his probation and paid his restitution, he moved to terminate his probation, but the trial court instead converted his drug offender probation into administrative probation (R1/73). The trial court subsequently

found him to be in violation of his probation and, over his objection (R7/491), sentenced him to fifteen years in prison (R2/184, 239-248, 7/489-491). The trial court's order sentencing Defendant in excess of the five-year suspended sentence which had already been imposed violated the prohibitions of the United States and Florida constitutions against double jeopardy. The Fourth District Court of Appeal corrected this error on direct appeal, a determination that the State now seeks to overturn. The State's position is in contravention of the well-established law on this issue and must be rejected.

In imposing its fifteen-year sentence, the trial court held that Defendant waived his right to imposition of the five-year suspended sentence by accepting the modification of his drug offender probation to administrative probation, relying on Lee v. State, 666 So. 2d 209 (Fla. 2d DCA 1995). This reliance was misplaced.

In Lee, the defendant was initially placed on probation for five years. When he violated his probation the first time, he was sentenced to a seventeen-year suspended term and placed on community control. When he violated his community control, he was sentenced to a suspended sentence of 22 years and again placed on community control and probation. Finally at his third violation, he was sentenced to the previously-suspended twenty-two-year prison sentence.

When the defendant argued that he should not have been sentenced to more that the seventeen-year suspended he received after his first violation, the appellate court declined to grant him relief. It held that by not appealing the imposition of the twenty-two year suspended sentence when he first violated his community control and instead accepting the benefit of the community control, the defendant had waived his right to enforce the earlier split sentence. Lee, 666 So. 2d at 210.

The facts in the instant case could hardly be more different. Although Defendant's drug offender probation was changed to administrative probation, that change was made, not because Defendant had violated his probation, but, to the contrary, because he had successfully fulfilled most of its terms, including the payment of restitution. Indeed, his probation was modified in response to his own motion to terminate it. Although the trial judge did not grant that motion, it certainly had no intention of sanctioning him for the progress he had demonstrated to that point.

Therefore, while the probation modification below affected the nature of the probation Defendant was serving, and the conditions that he would be required to comply with, it had no effect on and did not alter in any way the suspended prison sentence which had previously been imposed. In this, it was critically different from Lee. Finally, it is important to note that Lee required the trial judge to

impose the last suspended sentence announced, twenty-two years in prison. There was no suggestion that by changing the defendant's sentence, the court was free to impose any sentence it could have originally entered.

Lee therefore provides no basis for disregarding the unambiguous sentencing directives of Poore and its progeny in the instant case. The State's argument before this Court that Defendant's original sentences were improper, answer brief at 20 was never made at the time they were imposed: no objection was made by the State, nor was any appeal taken from the original sentencing or the subsequent modification.

The State's reliance now on Roberts v. State, 644 So. 2d 81 (Fla. 1994) is likewise completely misplaced. That case involved whether, in resentencing a defendant after the revocation of his probation, the trial court had the authority to revise a guidelines sentencing scoresheet to include prior convictions that were mistakenly omitted at the time of the original sentencing. This Court held that such an error could be corrected without violating the double jeopardy clause because it was the defendant's violation of probation which triggered the resentencing.

Unlike that situation, however, where the resentencing after revocation of probation was essentially a *de novo* proceeding (the trial court could, on revocation

of probation "impose any sentence which it might have originally imposed before placing the probation on probation or the offender into community control," Section 948.06(2)(e), Fla. Stat.), in the instant case Defendant's final, true split sentence was imposed at the time that he was originally sentenced: he was already "sentenced in advance." Mack, 823 So. 2d at 748, fn. 3. Therefore, at resentencing after the revocation of probation after the imposition of a true split sentence, there is no *de novo* resentencing to whatever term may have originally been imposed. Instead, the trial court having imposed the final sentence already, he "is not permitted to change his or her mind," but is limited to the imposition of the suspended sentence previously imposed, on pain of violating the double jeopardy clause. *Id.*

Consequently, the Roberts rationale simply does not apply to the instant case. The State has shown no valid legal grounds for departing from established legal precedent in this case. Accordingly, upon revocation of Defendant's probation, the trial court was limited to the imposition of the five-year prison sentence which had been previously suspended. The Fourth District Court of Appeal correctly so held, and its decision on this issue should not be disturbed.

CONCLUSION

Based on the foregoing argument and the authorities cited, the Defendant requests that this Court vacate and set aside the decision of the Fourth District Court of Appeal and remand this cause with directions to require that the Defendant's motion to dismiss be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Daniel P. Hyndman, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by mail this _____ day of FEBRUARY, 2010.

_____

Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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Assistant Public Defender