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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v.

ROGER DALE GORDON,

Respondent.

CASE NO. 71,221

_____ /

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TOPICAL INDEX

PAGE(S)

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT

THE DISTRICT COURT ERRED IN LIMITING
A SENTENCING JUDGE'S DISCRETION
UNDER THE SECOND SENTENCING
GUIDELINES CELL SO AS TO PRECLUDE IN
ALL CASES THE COMBINATION OF
COMMUNITY CONTROL AND STATE PRISON
INCARCERATION WHERE NO SUCH INTENT
TO LIMIT SENTENCING DISCRETION
OTHERWISE AFFORDED BY THE GUIDELINES
IS DEMONSTRATED.....3-9

CONCLUSION.....10

CERTIFICATE OF SERVICE.....10

AUTHORITIES CITED

<u>CASE(S)</u>	<u>PAGE(S)</u>
<u>Francis v. State,</u> 487 So.2d 348 (Fla. 2d DCA 1986), <u>rev. denied.</u> 492 So.2d 1332 (Fla. 1986).....	1,5
<u>Hankey v. State,</u> 505 So.2d 701 (Fla. 5th DCA 1987).....	1,5,9
<u>Pompano Horse Club v. State,</u> 93 Fla. 415, 111 So. 801 (1927).....	8
<u>State v. Mestas,</u> 507 So.2d 587 (Fla. 1987).....	7

OTHER AUTHORITIES

§ 948.01(5), Fla. Stat. (Supp. 1986).....	6
§ 948.01(8), Fla. Stat. (Supp. 1986).....	4,5,6
Fla. R. Crim. P. 3.701(b)(6).....	4
Fla. R. Crim. P. 3.701(b)(7).....	5
Fla. R. Crim. P. 3.701(d)(8).....	4
Fla. R. Crim P. 3.701(d)(12).....	8

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with four violations of controlled substance laws (R 27-29, 43).¹ On September 25, 1986, he entered pleas of guilty to two counts of delivery of cocaine and one count of possession of less than twenty grams of cannabis (R 62-3).

On November 7, 1986, respondent was sentenced. The recommended guidelines sanction was the second cell, twelve-thirty months incarceration or community control (R 8, 67). The sentence imposed was thirty months' incarceration followed by two years' community control (R 13-15, 70-77).

The district court of appeal vacated the sentence, relying on its decision in Hankey v. State, 505 So.2d 701 (Fla. 5th DCA 1987), which forbids **any** combination of incarceration and community control. The decision expressed conflict with the second district's Francis decision. The state timely filed its notice to invoke discretionary jurisdiction on September 28, 1987.

By order dated January 15, 1988, this honorable court accepted jurisdiction and dispensed with oral argument.

Petitioner unsuccessfully moved to have this case travel together with other cases before this court with the same issue. This brief follows.

¹(R) refers to the record on appeal.

SUMMARY OF ARGUMENT

The district court of appeal misconstrued the intent of the sentencing guidelines drafters in limiting the sentencing discretion of the trial court under the second guidelines cell by precluding the "split-sentence" combination of community control and state prison incarceration. The guidelines are not intended to limit sentencing discretion within a sentencing range. Trial judges have always been statutorily authorized to combine community control. It should be presumed that such discretion is intended to continue to exist.

Furthermore, the "or" language of the second cell communicates only an intent to allow the sentencer the discretion to authorize alternative sentencing forms, not that they necessarily be mutually exclusive.

ARGUMENT

THE DISTRICT COURT ERRED IN LIMITING
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IS DEMONSTRATED.

The question to be resolved in this case is one of sentencing discretion and legislative intent. Did the legislature intend that "community control or 12-30 mos. incarceration" in the second guidelines cell of each sentencing scoresheet provided two mutually exclusive sentencing alternatives, or can a sentencing judge exercise his discretion to combine the two potential penalties?²

Under the district court of appeal decision, a trial judge **may never** combine community control and state prison time for whatever punitive and/or rehabilitative purposes under the second guidelines cell despite the clear choice afforded by that cell. In choosing to read the "or" language restrictively, the district court has clearly undermined the stated intent of the drafters of the guidelines "to aid the judge in the sentencing decision and are not intended to usurp judicial discretion ..." Fla. R. Crim.

²This same issue is presented in State v. Vankooten, FSC Case No. 71,170; State v. Avera, FSC Case No. 71, 171; State v. Johnson, FSC Case No. 71,193.

P. 3.701(b)(6). In combining community control and the potential for state prison time in the same guidelines cell, it is obvious that the drafters sought to afford sentencers some measure of discretion to appropriately sentence those defendants whose criminal conduct has necessarily demonstrated the need to punish beyond probation or county jail time. Indeed, Florida Rule of Criminal Procedure 3.701(d)(8) specifically notes that "a sentence range is provided in order to permit some discretion without the requirement of an explanation for departing from the presumptive sentence".

If the guidelines are not intended to usurp judicial discretion, especially within a particular sentence range, then why would the creators of the sentencing guidelines limit a sentencer's discretion under the second guidelines cell and require him to impose either community control or 12-30 months state prison time without also allowing him to combine these alternative sentencing forms? Judges have been specifically afforded that discretionary sentencing authority legislatively both before and after the enactment of the guidelines. See, § 948.01(8), Fla. Stat. (Supp. 1986). What if a sentencer was of the opinion that a defendant whose recommended guidelines sentence fell within the second cell was in need of some limited exposure to state prison, but felt that extensive supervision for some period beyond this minimal prison exposure was nevertheless necessary to assure the safety of the public? If the second cell is read to allow alternative use of community control in conjunction with state prison incarceration, then the judge would

be free to combine a short prison term with a period of community control to reach his sentencing goal. Under the district court's limited interpretation, the judge would be forced to impose a lengthier prison term in order to assure the more extensive control over the defendant (not provided by mere probation) necessary in the judge's mind to protect the public. How would this fulfill another stated purpose of the guidelines to limit utilization of state correctional facilities whose capacities are finite? Fla. R. Crim. P. 3.701(b)(7).

The state submits that the simple use of "or" language within the guidelines matrix could hardly serve as adequate and unequivocal legislative intent to overcome the clear authority of trial courts under section 948.01(8) to impose "split-sentences" of community control and state prison incarceration, or to overcome the at least equal intent of the guidelines to protect judicial sentencing discretion especially within a specific guidelines range. Indeed, at least one other district court has specifically rejected the analysis of the district court in Hankey v. State, 505 So.2d 701 (Fla. 5th DCA 1987), which serves as the basis for vacating this otherwise proper split-sentence. The district court determination below clearly conflicts with the well founded decision by the Second District Court of Appeal in Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), rev. denied, 492 So.2d 1332 (Fla. 1986), that community control and state prison incarceration under the second cell are not mutually exclusive.

The Francis court found unreasonable the argument that the

second cell provision was not designed to permit the imposition of either or both sanctions when no other cell was so restricted. Id. at 349. For example, if the defendant had fallen within the third cell of the guidelines allowing two and one-half to three and one-half years state imprisonment, section 948.01(8) would certainly have authorized the trial court judge to combine community control and state imprisonment in a "split-sentence". Why then should it be assumed that the second cell would not authorize a similar "split-sentence" otherwise clearly authorized by statute? Nothing within the guidelines committee notes suggest such a restrictive intent. There is no logical reason to impose such an either/or limitation on sentencing options especially given the stated intent to protect a sentencing judge's discretion. Flexibility allows the trial court to combine punitive and rehabilitative sentencing schemes upon the defendant, and yet maintain protection of the community. In fact, the defendant benefits from allowing combination of community control and incarceration in a "split-sentence" because if a trial court determined that some sort of custodial control over the defendant in excess of a 24 months is necessary, under a restrictive view, he must instead impose incarceration for that full period of time since the community control statute authorizes commitment under that program for only a two year period or less. § 948.01(5), Fla. Stat. (Supp. 1986). Is it not more reasonable to view the second cell language as authorizing a combination of community control and state prison incarceration so as to allow sentencing courts

flexibility even when they determine that the maximum 30 month term authorized by the second cell is appropriate?

It is obvious that community control as a punishment is far less restrictive than state prison incarceration. Community control is not the equivalent of mere probation so as to include it under the **first** cell "non-state prison sanction" under the guidelines; see, State v. Mestas, 507 So.2d 587, 588 (Fla. 1987). Nevertheless, it is clearly not the equivalent of state prison incarceration and is more akin to probation. To hold that community control and state prison incarceration cannot be combined under the second cell will make that the only cell under the guidelines where no such combination is authorized, a distinction for which there is no legal or logical basis. In addition, it appears clear that the different sentencing ranges under each guidelines matrix (after the first cell) are differentiated by incarceration periods and not by potential sentencing alternatives. From the second cell on it is clear that the major distinguishing factor is the potential sentencing period -- 12-30 months incarceration; two and one-half to three and one-half years incarceration; three and one-half to four and one-half years incarceration; etc. Therefore, the distinction between community control and state prison incarceration was never intended by the guideline drafters to limit combinations of the two penalty forms.

Alternatively, the state notes that although the use of the word "or" in a statute or rule is typically construed in the disjunctive, that is not so when there is clear legislative

intent to construe it otherwise. Legislative intent is the determining factor. When used between two terms which describe different subjects of power, the word "or" usually implies discretion when it occurs in a directory provision, and a choice between alternatives when it occurs in a permissive provision. Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927). Certainly, the use of "or" in the limited space of each guidelines matrix was intended to communicate to sentencing judges the availability of these two sentencing alternatives. However, the simple conjunction **does not** mean that only one or the other may be utilized. To the contrary, mutual exclusivity is communicated through the use of "either ... or ..." language. No language appears in the guidelines to demonstrate an intent to usurp judicial sentencing discretion otherwise afforded trial courts to fashion an appropriate sanction. The "or" language was intended to describe the availability of two sentencing alternatives.

Should this honorable court agree that the sentence imposed in this case of thirty months' incarceration followed by two years' community control constitutes a departure from the second cell, nevertheless, petitioner contends the trial court should have the option of reducing the term of incarceration and combining it with a term of community control, with a total sanction of thirty months. The trial court should be permitted to follow that combination sentence with a term of probation up to the statutory maximum without providing reasons for departure. Fla. R. Crim. P. 3.701(d)(12). The trial court's

reliance on Hankey is misplaced; the trial court can fashion a sentence combining several sentencing alternatives which is not a departure from the recommended guidelines sanction. On remand, the trial judge should be permitted to employ the full range of sentencing options provided by law.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Initial Brief on the Merits been furnished by delivery to Daniel J. Schafer, Assistant Public Defender for appellant, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014 this 12th day of February, 1987.

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