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Incarceration as a Condition of Probation: New Limitations

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Abstract

In the past, Florida judges have attempted to circumvent a parole policy, which they considered to be ineffective. They withheld imposition of sentence upon a defendant found guilty of the crime for which he was charged, and imposed an order of probation with the condition that the defendant serve a lengthy term in the county jail or state penitentiary.

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In the past, Florida judges have attempted to circumvent a parole policy, which they considered to be ineffective. They withheld imposition of sentence upon a defendant found guilty of the crime for which he was charged, and imposed an order of probation with the condition that the defendant serve a lengthy term in the county jail or state penitentiary. Because the defendant was not incarcerated pursuant to a sentence, but rather as a condition of probation, he was technically ineligible for parole consideration even after he had served the statutory period of confinement. Abuse of this technicality effectively granted the trial judge the power to incarcerate the defendant for a full term rather than relinquishing the discretion to the Parole Board to grant the defendant an early release.

The authority to impose incarceration as a condition of probation is established by Florida Statutes section 948.01(4).¹ The interpretation and application of this section has continually been the source of debate and controversy. It has, however, been consistently construed to permit trial courts to order incarceration followed by probation, or to withhold adjudication of the defendant's guilt and impose probation with the condition that he serve some portion thereof incarcerated.² The abuse of the statute arose from its failure to prescribe the reasonable lengths of incarceration which could be imposed as a condition of probation.

In its recent decision, *Villery v. Florida Parole & Probation Com-*

1. FLA. STAT. § 948.01(4) (1981).

2. FLA. STAT. § 948.01(4) (1981) provides:

(4) Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court.

mission,³ the Florida Supreme Court attempted to quell much of the controversy by setting a maximum of less than one year for which incarceration may be imposed as a condition of probation. Furthermore, the court established a more definite framework for application of the statute than existed in the past, and articulated concrete guidelines for correcting prior decisions which are inconsistent with *Villery's* holding. This comment will explore the past confusion, analyze the *Villery* decision and review subsequent application of the statute under *Villery's* direction.

Probation and the Validity of Imposing Incarceration as a Condition of Probation

In discerning whether the imposition of incarceration as a condition of probation is proper and whether a probationer who is incarcerated pursuant to such an order is eligible to be considered for parole, Florida's Supreme Court first considered the rationale and authority for granting probation and imposing incarceration as a condition. Florida Statutes section 948.01(1) and (3), grants the trial court the discretion to withhold adjudication of guilt, or adjudge the defendant guilty but withhold the imposition of sentence, and place the defendant on probation with the hope that he may return to a useful life. This is generally done if the court determines that the defendant is not likely to be involved in further criminal activity and the interests of society and justice do not appear to be jeopardized.⁴ Moreover, the statute al-

3. 396 So. 2d 1107 (Fla. 1980).

4. FLA. STAT. § 948.01(1), (3) (1981) provides:

(1) Any court of the state having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty by the verdict of a jury or has entered a plea of guilty or a plea of nolo contendere or has been found guilty by the court trying the case without a jury, except for an offense punishable by death, may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of probation of such defendant.

(3) 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 shall presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and with-

lows the court to impose probation, with or without adjudication of guilt, to avoid inflicting upon the defendant the stigma of a criminal conviction⁵ and thus prevent the loss of the defendant's civil rights by virtue of the criminal conviction where such a loss may not be wholly justified.⁶

In granting probation, however, the trial judge may feel that a sample of prison life would be extremely instructive as part of the rehabilitation process. In this regard, the Second District Court of Appeal recognized "that salutary results may be obtained by first giving one who is to be placed on probation a 'taste of prison' in order to graphically demonstrate what is likely to happen to him should he violate the terms of that probation."⁷ The trial judge's authority to impose such incarceration as a condition of probation, often referred to as the split sentence alternative, stems from Florida Statutes section 948.01(4).

During the life of section 948.01(4), however, this grant of authority has not always been well defined. Prior to July 1, 1974, the trial judge had specific authority only to impose incarceration in the *county jail* followed by a period of probation.⁸ Therefore, the split sentence alternative could be utilized only in the case of misdemeanor offenses.⁹ However, the Florida Legislature amended the statute effective July 1, 1974, by expanding the trial court's authority to grant the split sentence alternative in cases involving misdemeanors *and* felonies,¹⁰ presumably encompassing orders imposing prison sentences, as well as terms in the county jail.

hold the adjudication of guilt and in either case stay and withhold the imposition of sentence upon such defendant, and shall place him upon probation under the supervision and control of the [parole and probation] commission for the duration of such probation.

5. *Holland v. Florida Real Estate Comm'n*, 352 So. 2d 914, 916 (Fla. 2d Dist. Ct. App. 1977).

6. *Delaney v. State*, 190 So. 2d 578, 580 (Fla. 1966).

7. *Olcott v. State*, 378 So. 2d 303, 305 (Fla. 2d Dist. Ct. App. 1979).

8. FLA. STAT. § 948.01(4) (1971) originally provided: "(4) Whenever punishment by imprisonment in the county jail is prescribed . . ."

9. *State v. Jones*, 327 So. 2d 18, 24 (Fla. 1976).

10. Effective July 1, 1974, FLA. STAT. § 948.01(4) was amended by 1974 Fla. Laws ch. 74-112 to read as follows: "(4) Whenever punishment by imprisonment in the county jail for a misdemeanor or a felony, except for a capital felony . . ." (lined-through words deleted, underscored words added). *Id.* at 342.

Despite the Florida Legislature's efforts toward clarity, the trial courts continued to indicate confusion in their application of the statute.¹¹ Numerous sentences of probation, imposed to follow periods of incarceration were declared void and improper by the district courts.¹² They generally recognized that the "withholding of sentence or a portion thereof is an indispensable prerequisite to entry of an order placing a defendant on probation."¹³ Further, "[there] is no authority for an adjudication of guilt and a sentence to straight probation."¹⁴ "[P]robation is concerned only with suspension of the imposition or pronouncement of sentence."¹⁵

State v. Jones Authorizes Incarceration for Felony Offenses as Well as Misdemeanors

In 1976, the Supreme Court of Florida, in *State v. Jones*,¹⁶ recognized the inconsistency in the methods used by the trial courts in applying the split sentencing alternative. The court stated in *Jones*, that "[t]he District Courts have both approved and restricted these orders to the extent that it is difficult for the trial court to determine the proper procedure to use."¹⁷ In *Jones*, the defendant, after pleading guilty to "(1) possession of heroin, (2) [issuing] a worthless check, and (3) . . . a forged instrument,"¹⁸ was ordered by the trial court to confinement in the Dade County jail for one year, to be followed by five years probation.¹⁹ Upon violation of the probation, the trial judge revoked Jones' probation and sentenced him to three concurrent terms of two years each in the state penitentiary.²⁰ Upon review, the Third Dis-

11. *Jones*, 327 So. 2d at 22.

12. *Waters v. State*, 290 So. 2d 503 (Fla. 1st Dist. Ct. App. 1974); *Williams v. State*, 280 So. 2d 518 (Fla. 3d Dist. Ct. App. 1973); *Washington v. State*, 284 So. 2d 236 (Fla. 2d Dist. Ct. App. 1970).

13. *Brown v. State*, 302 So. 2d 430, 432 (Fla. 4th Dist. Ct. App. 1974).

14. *Id.*

15. *State v. Williams*, 237 So. 2d 69, 70 (Fla. 4th Dist. Ct. App. 1970).

16. 327 So. 2d at 22.

17. *Id.*

18. *Id.* at 20.

19. *Id.*

20. *Id.* at 21. Jones was given 135 days credit for time already served in the county jail.

strict Court affirmed the judgment of the trial court, but reversed the sentence stating that the maximum period for which the defendant could be incarcerated pursuant to his violation of probation could equal only that period of the original sentence withheld by the trial court at the original sentencing.²¹

However, the Florida Supreme Court reinstated the amended sentence of the trial court, imposed pursuant to the probation violation. The court specifically ruled that the "trial courts have both general and specific authority for imposition of the split sentence probation alternative."²² Moreover, "the trial courts of this state have the general authority to require incarceration as a condition of probation for felony and misdemeanor offenses pursuant to the general condition provisions of section 948.03, Florida Statutes"²³ While incarceration was generally not regarded as a condition of probation, the court's holding in *Jones* expressly approved the split sentence alternative as provided by statute²⁴ and rejected the claim that the trial judge must withhold a

21. *Id.*

22. *Id.* at 24.

23. *Id.*; FLA. STAT. § 948.03 (1981) provides:

(1) The court shall determine the terms and conditions of probationer and may include among them the following, that the probationer shall:

- (a) Avoid injurious or vicious habits;
- (b) Avoid persons or places of disreputable or harmful character;
- (c) Report to the probation and parole supervisors as directed;
- (d) Permit such supervisors to visit him at his home, or elsewhere;
- (e) Work faithfully at suitable employment insofar as may be possible;

(f) Remain within a specified place;

(g) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court;

(h) Support his legal dependents to the best of his ability.

(i) Make payment of the debt due and owing to the state under § 960.17, subject to modification based on change of circumstances.

. . . .

(3) The enumeration of specific kinds of terms and conditions shall not prevent the court from adding thereto such other or others as it considers proper. The court may rescind or modify at any time of the terms and conditions theretofore imposed by the court upon the probationer.

24. 327 So. 2d at 25.

portion of the initial sentence for possible use in the future should the terms of the probation be violated.²⁵ The Florida Supreme Court's rationale in *Jones* was evident in its response to the question certified to it by the Third District Court of Appeal,²⁶ when the court stated:

that a defendant placed on probation pursuant to Section 948.01(4), Florida Statutes (1973) who subsequently violates that probation may be sentenced to imprisonment by the trial judge for the same period of years as the court could have originally imposed in accordance with Section 948.06, Florida Statutes (1973), without the necessity of establishing a term of sentence and withholding a part of it at the initial sentencing proceedings.²⁷

Incarceration as a Condition of Probation Is Not a Sentence For The Purposes of Determining Eligibility for Parole

Despite the Florida Supreme Court's approval in *Jones* of incarceration as a condition of probation, the issue arises whether such condition should be construed to be a sentence for determining a probationer's eligibility for parole consideration. Section 947.16(1) expressly limits such eligibility to those persons incarcerated pursuant to a sentence. The Third District Court of Appeal, in *McGowan v. State*,²⁸ held that incarceration does not constitute a sentence, rather it is no

25. *Id.*

26. The question certified was:

Where one who could be sentenced to imprisonment in the state penitentiary for a period of years is sentenced to imprisonment in the county jail . . . , with direction that he be placed on probation upon completion of a specified period of such sentence with the remainder of the jail sentence stayed and withheld . . . , upon revocation of the probation can the court impose . . . a new sentence in the state penitentiary for a period of years, such as the court could have originally imposed . . . , or is the time to be served, following revocation of probation which has been granted pursuant to § 948.01(4), Fla. Stat., . . . limited to the unserved portion of the previously imposed jail sentence which was stayed and withheld upon placing the defendant on probation?

Id. at 20.

27. *Id.*

28. 362 So. 2d 335, 336 (Fla. 3d Dist. Ct. App. 1978).

more than a condition of probation.²⁹ Moreover, the Third District Court of Appeal recognized the distinction between a sentence and an order of probation. Probation is granted by the grace of the state in lieu of a sentence with its primary purpose to be rehabilitation.³⁰ Whereas, a sentence is imposed "(a) to punish; (b) to deter similar criminal acts; (c) to protect society; or, (d) to rehabilitate."³¹

The Third District Court of Appeal relies upon the express language of the Florida Rule of Criminal Procedure 3.790(a). The rule clearly states, "pronouncement and imposition of sentence of imprisonment shall not be made upon a defendant who is to be placed on probation regardless of whether such defendant has or has not been adjudicated guilty."³² By the language of the statute, the two concepts appear to be mutually exclusive since one who is sentenced may not be on probation.

Probation Conditions Requiring Excessive Terms of Incarceration Are Determined to Diminish Rehabilitative Function of Parole

Even though an order of probation is not a sentence, if an excessive prison term is imposed under the guise of probation, the order no longer serves a rehabilitative function but tends to become punitive in nature.³³ As this inconsistency became apparent, the districts began to overturn the trial courts' imposition of probation which were conditioned on incarcerations of questionable length.³⁴

The Third District Court of Appeal considered the propriety of an

29. *Id.*

30. *Loeb v. State*, 387 So. 2d 433, 436 (Fla. 3d Dist. Ct. App. 1980).

31. *Freeman v. State*, 382 So. 2d 1307, 1308 (Fla. 3d Dist. Ct. App. 1980).

32. FLA. R. CRIM. P. 3.790(a).

33. *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107, 1109 (Fla. 1980).

34. *Cunningham v. State*, 385 So. 2d 721 (Fla. 3d Dist. Ct. App. 1980) (three years confinement in the state penitentiary as a condition of ten years probation for conviction of manslaughter); *Freeman v. State*, 382 So. 2d 1307 (Fla. 3d Dist. Ct. App. 1980) (five years imprisonment as a condition of ten years probation); *Geter v. Wainwright*, 380 So. 2d 1203 (Fla. 3d Dist. Ct. App. 1980) (ten years imprisonment as a condition of fifteen years probation); *Olcott v. State*, 378 So. 2d 303 (Fla. 2d Dist. Ct. App. 1979) (six years imprisonment as a condition of fifteen years probation).

excessive term of incarceration imposed as a condition of probation in *Shead v. State*.³⁵ The court ruled that when the defendant received a nine and one-half year term of incarceration as a condition of probation, the trial court abused its discretion in imposing the split sentence alternative. The court's reversal was justified by the trial court's statement that its sole purpose in imposing such a term "was to *punish* the defendant by denying her any hope of parole."³⁶

The Second District Court of Appeal in *Olcott v. State*³⁷ identified the imposition of excessive terms of incarceration as conditions of probation as an attempt by the trial courts to evade what they considered to be a liberal parole policy.³⁸ The defendant in *Olcott* pled guilty to one count of attempted burglary, nine counts of burglary and four counts of grand theft.³⁹ The trial court ultimately imposed fifteen years probation with the special condition that the defendant serve six years in prison.⁴⁰ In an *amicus curiae* brief submitted by the Florida Parole and Probation Commission the court believed the Commission accurately stated the problem:

The true issue . . . is one regarding the fundamental nature and relationship of and between probation and parole. The traditional concepts of parole and probation are such that the two are separate, distinct, independent and unrelated conditions. Heretofore, probation has always been accepted as something imposed in lieu of incarceration, while parole has traditionally been accepted as a measure which allows a prisoner to serve out the remainder of his sentence outside incarceration.⁴¹

As noted by the Commission, parole and probation are sharply distinguishable. Parole has been defined as "the release of an offender

35. 367 So. 2d 264 (Fla. 3d Dist. Ct. App. 1979).

36. *Id.* at 267 (emphasis added); *see also Freeman*, 382 So. 2d at 1308, where the Third District Court of Appeal ruled that five years imprisonment to be served in the state penitentiary imposed under the guise of a special condition of ten years probation was not permissible.

37. 378 So. 2d 303.

38. *Id.* at 305.

39. *Id.* at 303.

40. *Id.*

41. *Id.* at 304.

from a penal or correctional institution after he has served a portion of his sentence, under the custody of the state and under conditions that permit his reincarceration in the event of misbehavior.”⁴² Whereas probation is “a disposition that allows the convicted offender to remain free in the community while supervised by a person who helps him lead a law-abiding life.”⁴³

The court in *Olcott* suggested a possible solution would be to “read Section 947.16 broadly enough to encompass a term of confinement of twelve months or more imposed as a condition of probation. But this would contemplate the possibility that a person could be on parole and probation at the same time.”⁴⁴ Furthermore, there exists the possible anomaly that a probationer serving a lengthy term in prison as a condition of probation may consider it advantageous to violate the terms of his probation to provoke the imposition of a sentence under which he would eventually become eligible for parole consideration.⁴⁵

The court in *Olcott* recognized the authority of *Jones*, to “place the defendant on probation and include, as a condition, incarceration for a specific period of time within the maximum sentence allowed.”⁴⁶ The Second District Court of Appeal stated, however, it did not believe *Jones* addressed the issue presented in *Olcott* because it failed to “consider the impact on the parole process of a jail term as a condition of probation.”⁴⁷ Moreover, the Third District Court of Appeal, in *Shead v. State*,⁴⁸ expressed doubt that a trial court, by imposing an excessive prison term as a condition of probation, can usurp the exclusive authority of the Parole Board to grant or deny parole to a person serving time.⁴⁹ Upon this logic, the court in *Olcott* noted, “[t]here is much to be said for a maximum limitation of one year for incarceration as a condition of probation because it would avoid any conflict with Section

42. S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTION* 546 (1963).

43. *Id.* at 176.

44. 378 So. 2d at 304 n.1.

45. *Id.* at 304-05.

46. *Id.* at 303 (emphasis added).

47. *Id.*

48. 367 So. 2d 264.

49. *Id.* at 268.

947.16.”⁵⁰

Florida Supreme Court Sets Maximum Incarceration Allowable as Condition of Probation in *Villery*

The validity of incarceration imposed as a condition of probation was again examined by the Florida Supreme Court in *Villery v. Florida Parole & Probation Commission*. Lula M. Villery previously pleaded guilty to five counts of knowingly issuing worthless checks in excess of fifty dollars.⁵¹ The trial court withheld adjudication of her guilt and placed her on probation, not to exceed two and one-half years.⁵² Ms. Villery subsequently violated the terms of her probation and, upon rehearing, the trial court adjudicated her guilty of the original charges.⁵³ Pursuant to her violation of probation, the trial court extended her probation to five years and imposed, as a special condition, concurrent county jail terms of two and one-half years for each of the charges.⁵⁴ Ms. Villery was given two days credit toward the jail term for time she had already spent in the Dade County jail.⁵⁵

The Florida Parole and Probation Commission took the position that Ms. Villery was not incarcerated pursuant to a sentence, but rather as a special condition of probation.⁵⁶ Relying on the rule that “[e]very person . . . whose *sentence* . . . or cumulative *sentences* total 12 months or more . . . shall . . . be eligible for consideration for parole”,⁵⁷ the Commission informed Ms. Villery that she did not qualify for parole review because she was not incarcerated pursuant to a sentence.⁵⁸ Ms. Villery asserted that incarceration imposed as a condition of probation should be considered a “sentence” for purposes of parole consideration eligibility.⁵⁹ Thus, Ms. Villery petitioned the Florida Su-

50. 378 So. 2d at 305 n.4.

51. 396 So. 2d at 1108.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. FLA. STAT. § 947.16(1) (1981) (emphasis added).

58. 396 So. 2d at 1108.

59. *Id.* at 1109.

preme Court to issue a *writ of mandamus* to compel the Florida Parole and Probation Commission to review her eligibility for parole⁶⁰ pursuant to Florida Statutes section 947.16(1) (1979).⁶¹

The Florida Supreme Court expressly ruled in *Villery* “that incarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid. This applies to incarceration as a condition of probation as well as to incarceration followed by a specific period of probation.”⁶² The court recognized that a person must be sentenced to at least one year to be eligible for parole under section 947.16(1). It construed this language to indicate a legislative intent “to limit the period of incarceration which may be imposed as a condition of probation under section 948.01(4) to a period of less than one year. If a longer period of incarceration could be imposed as a probation condition the trial judge could, in effect, negate the parole policy of this state.”⁶³

The court went further to rule that *Villery* would apply retroactively and that a person who is serving a term in prison, under the split sentence alternative, which is not in accord with this decision may have

60. *Id.* at 1108.

61. FLA. STAT. § 947.16(1) (1981) (which is identical to the 1979 version) provides:

(1) Every person who has been, or who may hereafter be, convicted of a felony or who has been convicted of one or more misdemeanors and whose sentence or cumulative sentences total 12 months or more, who is confined in execution of the judgment of the court, and whose record during confinement is good, shall, unless otherwise provided by law, be eligible for consideration for parole. An inmate who has been sentenced for an indeterminate term or a term of 5 years or less shall have an initial interview conducted by a hearing examiner within 6 months after the initial date of confinement in execution of the judgment. An inmate who has been sentenced for a minimum term in excess of 5 years shall have an initial interview conducted by a hearing examiner within 1 year after the initial date of confinement in execution of the judgment. An inmate convicted of a capital crime shall be interviewed at the discretion of the commission. As used in this section, the term “confined” shall be deemed to include presence in any appropriate treatment facility, public or private, by virtue of transfer from the Department of Corrections under any applicable law.

62. 396 So. 2d at 1111.

63. *Id.*

the illegal sentence corrected.⁶⁴ The following guidelines were established for the correction of nonconforming decisions:

In correcting the order, the trial court has the option either of modifying the order to make it legal or of withdrawing it and imposing a sentence of imprisonment. However, unless a condition of probation is determined to have been violated, the court may not extend the term of probation either with or without incarceration, nor may the court impose a sentence of imprisonment for a period of time in excess of the original total term of probation. If a condition of probation is found to have been violated, the court may modify or continue the probation or may revoke the probation and impose any sentence which it might originally have imposed before placing the defendant on probation. . . . In modifying probation or in revoking probation and sentencing the probationer, credit must be given for time spent incarcerated pursuant to a split sentence probation order. Thus in modifying a probation order, no additional period of incarceration may be imposed on a probationer who has already served one year or more of incarceration. And in pronouncing a sentence of imprisonment on a probationer whose probation has been withdrawn because of a illegal probation order, the time spent incarcerated pursuant to the probation order will be deemed to have been time spent in prison under a sentence.⁶⁵

Subsequent Applications of *Villery*

Since the Florida Supreme Court's decision in *Villery*, the Florida District Courts of Appeal have affirmed numerous pre-*Villery* convictions, but remanded the cases to the trial courts for resentencing in accordance with the direction of *Villery*.⁶⁶ Subsequent trial court rul-

64. *Id.* "[A]n error in sentencing that causes a defendant to be incarcerated or restrained for a greater length of time than the law permits is fundamental. Such an error can be corrected on appeal or by a trial court in collateral attack proceedings." *Gonzalez v. State*, 392 So. 2d 334, 336 (Fla. 3d Dist. Ct. App. 1981); *see also* FLA. R. CRIM. P. 3.850 which allows a defendant, who has been incarcerated for a greater time than the law permits because of a sentencing error, to have the error corrected on appeal or by collateral attack in the trial court on the grounds that such error is fundamental.

65. 396 So. 2d at 1112.

66. *See, e.g.*, *Floyd v. State*, 402 So. 2d 77 (Fla. 1st Dist. Ct. App. 1981); Good-

ings imposing the split sentence alternative, or incarceration as a condition of probation, have been carefully framed within the parameters of *Villery*.

Several issues have arisen, which involve the split sentence alternative, but are distinguishable from *Villery*. The first materialized in *Peak v. State*⁶⁷ where the defendant pleaded nolo contendere to one count of attempted murder and two counts of burglary, for which the court imposed a split sentence of five years imprisonment (with a mandatory sentence of three years for use of a firearm) followed by ten years probation.⁶⁸ The defendant cited to *Villery* as the authority for his claim that the order of the trial court was improper.⁶⁹

Florida's Fifth District Court of Appeal ruled that the defendant's sentence was the result of a negotiated plea, and it did not follow a trial and conviction, therefore they could not "give the [defendant] relief from his bargain without also offering the State the same relief."⁷⁰ The appeal was accordingly dismissed without prejudice. The defendant's right to seek relief, if any, had to come from the trial court where he and the State would be at equal advantage.⁷¹

The second instance in which a split sentence was imposed, but not controlled by *Villery*, occurred where the sentencing was pursuant to a conviction for multiple offenses. Florida's First District Court of Appeal recognized that the 364 day maximum for incarceration, imposed as a condition of probation, applies only where incarceration and probation are imposed for the same offense. Such limitation does not apply, however, to a period of incarceration for a year or more followed by probation where the incarceration and probation are imposed for separate offenses.⁷²

Moreover, in a recent decision, Florida's Second District Court of Appeal authorized an innovative combination of split sentences in re-

man v. State, 399 So. 2d 1120 (Fla. 4th Dist. Ct. App. 1981); Walker v. State, 399 So. 2d 63 (Fla. 3d Dist. Ct. App. 1981); Webb v. State, 392 So. 2d 35 (Fla. 5th Dist. Ct. App. 1980).

67. 399 So. 2d 1043 (Fla. 5th Dist. Ct. App. 1981).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1044.

72. Tobin v. State, 401 So. 2d 938 (Fla. 1st Dist. Ct. App. 1981).

viewing the sentence of a defendant convicted of two crimes.⁷³ The court permitted a hybrid of the split sentence alternative which effectively allowed a period of incarceration which *exceeded* one year to precede a period of probation. The sentence imposed was comprised of two five year terms of probation for each offense, to run concurrently, with two terms of incarceration as a condition of that probation of 364 days each, to run consecutively.⁷⁴ The effect was to confine the defendant for two years (less two days) and to subsequently place him on probation for the remaining three years.

Conclusion

The Florida Supreme Court in *Villery* expressly limited the period for which a defendant, convicted of a single offense, may be incarcerated as a condition of probation or pursuant to a split sentence order to less than one year. It has since been decided that the mandate of *Villery* does not generally apply to convictions for multiple offenses or to convictions through negotiated pleas.⁷⁵ Nevertheless, the court, in *Villery*, has substantially clarified the application of section 948.01(4) of the Florida Statutes.

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73. *Ellis v. State*, 406 So. 2d 76 (Fla. 2d Dist. Ct. App. 1981).

74. *Id.*

75. *Peak v. State*, 399 So. 2d 1043 (Fla. 5th Dist. Ct. App. 1981).