IN THE SUPREME COURT OF FLORIDA



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| HOLLIS JONES, Petitioner, | ) | |
| vs. | ) | CASE NO. 64,042 |
| STATE OF FLORIDA, Respondent. | ) | |

# RESPONDENT'S ANSWER BRIEF OF THE MERITS

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TABLE OF CONTENTS

## TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

## TABLE OF CITATIONS
(Continued)

## PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record

All emphasis has been added by Appellee unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as found on pages two and three of Petitioner's Initial Brief on Merits.

## POINTS INVOLVED ON APPEAL

### POINT I

WHETHER THE STATE MAY SEEK CERTIORARI REVIEW OF A TRIAL COURT DECISION IF OTHER APPELLATE REVIEW IS NOT POSSIBLE?

### POINT II

WHETHER WHERE THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY DISMISSING THE CHARGE OF VIOLATION OF PROBATION ON THE BASIS OF DOUBLE JEOPARDY, THE COURT OF APPEAL PROPERLY TREATED THE STATE'S APPEAL AS A PETITION FOR WRIT OF CERTIORARI, AND PROPERLY GRANTED THE WRIT?

### POINT III

WHETHER WHERE THE FOURTH DISTRICT COURT OF APPEAL TREATED THE STATE'S APPEAL AS A PETITION FOR WRIT OF CERTIORARI, THE REQUIREMENT OF A FORMAL PETITION WAS INAPPLICABLE?

## ARGUMENT

### POINT I

THE STATE MAY SEEK CERTIORARI REVIEW OF A TRIAL COURT DECISION IF OTHER APPELLATE REVIEW IS NOT POSSIBLE.

The state first submits that it has a constitutional right to appeal final orders and judgments entered against it in violation of probation cases pursuant to Art.V, §4(b)(1) of the Fla. Const.[1] Art. V, §4(b)(1) provides in part:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

If the section emphasized above does not create a right of appeal, the language would then appear to be mere surplusage. Presumably those words however were chosen for the purpose of accomplishing some object. It is a fundamental rule of constitutional construction that a construction of the constitution which renders superfluous, meaningless or inoperative

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[1] In addition to this current provision of the Florida Constitution, the predecessor provision, Article V, §3, of the 1956 Constitution also provided the state with the same right:

> Appeals from trial courts in each appellate district, . . may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

any of its provisions should not be adopted by the courts. Construction of the constitution is favored which gives effect to every clause and every part thereof. Burnsed v. Seaboard Coastline Railroad Company, 290 So.2d 13, 16 (Fla. 1974). Consequently, it is Respondent's position that the phrase emphasized above in Article V of the Constitution is not mere surplusage but does create a right of appeal. Moreover, Respondent would point out that this court has expressed its preference for interpreting such provisions of the Constitution as self-executing where there is a choice, for such construction avoids the occasion by which the people's will may be frustrated. Gray v. Bryant, 125 So.2d 846, 852 (Fla. 1960).

In State v. W.A.M., the Fifth District Court of Appeal cited Crownover v. Shannon, 170 So.2d 299 (Fla. 1964) for the constitutional interpretation of the predecessor article to the one at issue (i.e., Article V, §5 Fla. Const. 1956). 412 So.2d 49 (Fla. 5th DCA 1982). The Fifth District reasoned that the new article as well as the old granted a right of appeal as a matter of course which was not dependent on legislation for implementation. In Crownover, it was said:

> The right to appeal from the final decisions of trial courts to the supreme court and to district courts of appeal has become a part of the constitution and is no longer dependent on statutory authority or subject to be impaired or abridged by statutory law.

In addition to the fact that Respondent maintains

that the provisions of Art. V, §4(b)(1) are self-executing, Respondent also maintains that there is statutory authority for the State to obtain review of a final order discharging an individual in a probation revocation proceeding. §924.05, Fla. Stat. (1981) defines "appeal as a matter of right" as "appeals provided for in this chapter are a matter of right." §924.07(1), Fla. Stat. (1981) allows the State to appeal from an order dismissing an indictment or information or any count thereof. Respondent submits that an affidavit in support of a probation violation is sufficiently analogous to an information for the purposes of the above-cited statutes. Moreover, §924.08(2), Fla. Stat. (1981) confers jurisdiction on the courts of appeal to hear appeals from final judgments in all cases in which the circuit court has original jurisdiction except those which may be directly appealed to the Supreme Court. By reading these statutes in pari materia, it seems clear that the district courts do have statutory authority to hear appeals from final orders in probation revocation cases.

Cf. Whidden v. State, 159 Fla. 691, 32 So. 2d 577 (Fla. 1947) (same analysis used in finding that circuit courts have appellate jurisdiction over appeal from an order by county judge quashing an affidavit). In addition, §924.37, Fla. Stat. (1981) discusses orders or decisions of the appellate court "[w]hen the State appeals from an order dismissing an indictment, information, or affidavit ...."

Finally, it should be noted that an affidavit is the charging document for a violation of probation. Singletary v. State, 290 So.2d 116 (Fla. 4th DCA 1974), cert. dismissed 293 So.2d 361 (Fla. 1974); Cuciak v. State, 410 So.2d 916 (Fla. 1982). Since a probation revocation proceeding is administrative in nature, the matters listed under §924.97, Fla. Stat. (1981) do not prohibit or affect the right to appeal under §924.08, Fla. Stat. (1981). See, Cuciak v. State, 394 So.2d 500 (Fla. 4th DCA 1981), where the Supreme Court of Florida noted the many differences between criminal proceedings and informal probation revocation proceedings. See also, Wilkins v. State, 413 So.2d 464 (Fla. 4th DCA 1982).

The state next submits that even if this court were to decide that no constitutional or statutory right exists to allow the state to appeal final orders of dismissal in violation of probation cases, the district court of appeal nevertheless has certiorari jurisdiction and may issue writs of common law certiorari to review these orders. This was the holding of the opinion from the Fourth District of Appeal in the instant case.

Article V, §4(b)(3) of the Florida Constitution provides in pertinent part:

> A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction.

Fla.R.App.P. 9.030(b) provides as follows with respect to the jurisdiction of the district courts to issue writs of certiorari:

> (2) CERTIORARI JURISDICTION. The certiorari jurisdiction of district courts of appeal may be sought to review:
>
> (A) non-final orders of lower tribunals other than as prescribed by Rule 9,130.
>
> (B) final orders of circuit courts acting in their review capacity.
>
> (3) ORIGINAL JURISDICTION. District courts of appeal may issue writs of mandamus, prohibition, quo warranto, common law certiorari and all other writs necessary to the complete exercise of the court's jurisdiction; ....

It is plain from the foregoing provisions that the Florida Constitution and the Florida Rules of Appellate Procedure provide for the expansive view of certiorari taken by the Fourth District Court of Appeal below.

The Rules of Appellate Procedure provide for certiorari jurisdiction of final orders. Fla.R.App.P. 9.030(b)(2)(B) provides for certiorari jurisdiction in the district courts to review final orders of circuit courts sitting in their appellate capacity. This is the form of certiorari jurisdiction envisioned by the Third District in State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983). However, as the Fourth District Court of Appeal noted in State v. J.P.W. 433 So.2d 616, 619 (Fla. 4th DCA 1983) the conclusion of the court in G.P. that this is the exclusive form of certiorari jurisdiction for final orders is misplaced as it neglects to

consider Fla.R.App.P. 9.030(b)(3) which affords a much broader basis for certiorari jurisdiction encompassing review of final orders rendered by a lower tribunal not sitting in an appellate capacity. G.P. and J.P.W. are currently pending before this Honorable Court.

Contrary to the holding in State v. C.C., ___So.2d ___(Fla. 3d DCA 1983) [8 FLW 938] none of the foregoing rules limit the right of the district court to review interlocutory and final orders by certiorari to only those situations where appellate review is possible. Indeed, it is precisely because no appellate review exists that certiorari is proper. The basic flaw in the Third District's reasoning is its interpretation of the rule that where there is a "jurisdictional limitation" on the authority of a court to hear a direct appeal from a judgment or order, certiorari may not be used to circumvent that limitation. C.C., supra, 8 FLW at 939, n.4; G.P., supra, 429 So.2d at 789. C.C. is also currently pending before this court. The Third District has incorrectly interpreted "jurisdictional limitation" to mean authority to hear a specific issue on appeal; under this reasoning, if there is no authority for the district court to hear a specific issue on appeal, i.e., an appeal on a matter not enumerated in Fla.R.App.P. 9.140 or chapter 924, Fla. Stat. (1981) then there is no certiorari jurisdiction either. However, as pointed out in J.P.W., supra, 433 So.2d at 618, the cases relied

upon by the Third District in support its interpretation [2] actually use the concept of "jurisdictional limitation" to mean something entirely different. "Jurisdictional limitation" means that if the district court is not vested by law with supervisory appellate jurisdiction over the decisions of the court whose order is challenged and for which certiorari review is sought, then the district court also has no jurisdiction by law to review the questions by certiorari. Nellen v. State, 226 So.2d 354, 355 (Fla. 1st DCA 1969). The basic question is which level of court supervises the lower level on review. Thus, for example, when under the former constitutional provision, Article V, §3(b)(1), the district court possessed no appellate jurisdiction to review final decrees passing upon the validity of state statutes, (which jurisdiction was vested only in the supreme court), the district court likewise had no jurisdiction to pass upon that issue in interlocutory review by certiorari. Couse v. Canal Authority, 197 So.2d 841 (Fla. 1st DCA 1967). Cf. State v. Preston, 376 So.2d 3 (Fla. 1979). Similarly, when the district court possessed no appellate jurisdiction to review decisions of a county judge, (which jurisdiction was vested only in the circuit court), then only the circuit court had jurisdiction to review by writ of certiorari an order from the county

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[2] Nellen v. State, 226 So.2d 354 (Fla. 1st DCA 1969); Lee v. State, 374 So.2d 1094 (Fla. 4th DCA 1979); State v. Brown, 330 So.2d 525 (Fla. 1st DCA 1976); Couse v. Canal Authority, 197 So.2d 841 (Fla. 1st DCA 1967).

judge. Nellen, supra. In the present case, therefore, since the districts (not the supreme court or the circuit courts) have appellate jurisdiction to review final orders from circuit courts (with the exceptions listed in Fla.R.App.P. 9.030(a)(1)), the district courts likewise have certiorari jurisdiction "in such cases."

In addition, ample authority exists to support the state's position that the district court has certiorari jurisdiction to review final orders of circuit courts not sitting in their appellate capacity so long as the orders are not directly reviewable by the supreme court. See, State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981) (certiorari is proper remedy to review nonappealable final order of trial court finding defendant not guilty by reason of insanity); State v. I.B., 366 So.2d 186 (Fla. 1st DCA 1979) (certiorari available to review non-appealable final order of trial court withholding adjudication and placing defendant on probation); State v. Wilcox, 351 So.2d 89 (Fla. 2d DCA 1977) (certiorari may be used to review non-appealable final order of trial court placing defendant on unsupervised probation); see also, State v. Williams, 237 So.2d 69, 71 (Fla. 2d DCA 1970) (certiorari would be proper remedy to review non-appealable final order placing defendant on probation).

In summary, the state submits that the Fourth District Court of Appeal has properly interpreted the general rule that the right to certiorari review is available in those cases

where "appellate jurisdiction" is found. Well-established Florida decisional law and the clear provisions of the Florida Rules of Appellate Procedure and the Florida Constitution afford certiorari review in the district courts of final orders in violation of probation cases (not appealable to the supreme court or the circuit court) brought by the state for which no other appellate review is possible. Moreover, the state contends that there is also a right of appeal by the state to review final orders in violation of probation cases.

## POINT II

WHERE THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY DISMISSING THE CHARGE OF VIOLATION OF PROBATION ON THE BASIS OF DOUBLE JEOPARDY, THE COURT OF APPEAL PROPERLY TREATED THE STATE'S APPEAL AS A PETITION FOR WRIT OF CERTIORARI, AND PROPERLY GRANTED THE WRIT.

Petitioner properly states that certiorari review is only proper where the trial court ruling departed from the "essential requirements of law." In this case, the trial court's dismissal of the charge against Petitioner of violation of probation on the basis of double jeopardy was a departure from essential requirements of law, and thus the granting of the writ was proper.

On Februry 13, 1981, an affidavit for violation of probation was filed against Appellee. The revocation hearing was set for May 15, 1981. The state sought a continuance, which was denied. The court then dismissed the affidavit based on the state's inability to proceed. On August 31, 1981, the state filed another affidavit against Appellee based on the same violation that was asserted on February 13. Upon Appellee's motion to dismiss on grounds of former jeopardy, the court discharged Appellee (R 31-32; see R 3-5, where all concerned agreed to these facts).

The basis of the trial court's dismissal was double jeopardy (R 39). Under any of the many ways in which this bar to prosecution has been stated, it does not apply here.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) stated that the "guarantee" consists of three separate constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense.

In the instant matter, the first affidavit was dismissed because the state was unprepared. None of the above three "protections" were involved, as Appellee was neither acquitted, convicted, nor punished at the earlier proceeding. Under Pearce, double jeopardy did not bar the state from proceeding.

Green v. United States, 355 U.S. 184, 188 (1957), stated the rule as follows:

> ... a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent, he cannot be tried again.

Bernard v. State, 261 So.2d 133 (Fla. 1972) applied a similar standard to non-jury trials: jeopardy commences when the presentation of evidence begins. Appellee here was not "put to trial" before any trier of fact. Under the language of Green and Bernard, jeopardy did not attach under the first affidavit, and the second affidavit should not have been dismissed based on former jeopardy.

In Brown v. State, 367 So.2d 616 (Fla. 1979), a plea arrangement was agreed to on the condition that the defendant

would perform certain cooperative acts with police. Upon his reneging, the plea was vacated, and the case brought to trial. The court rejected the defendant's claim that double jeopardy barred trial. The Florida Supreme Court defined "jeopardy" as,

> ...[s]ubmission of the guilt or innocence question to the person (judge) or persons (jury) with authority to make that determination ...
>
> 367 at 621, Footnote 8.

In the instant case, the guilt or innocence question was never placed before the judge. Appellee was never placed in jeopardy under the language of Brown.

§910.11(1) Fla. Stat. states the following:

> No person shall be held to answer on a second indictment, information, or affidavit for an offense for which he has been acquitted. The acquittal shall be a bar to a subsequent prosecution for the same offense, notwithstanding any defect in the form or circumstances of the indictment, information, or affidavit.

Appellee was never "acquitted", and there is no statutory bar to prosecution.

For the above reasons, double jeopardy would not have applied in this case, even if the proceedings were criminal trials. A fortiori, the instant case involved probation revocation hearings. Dicta from Wilkins v. State, 413 So.2d 464 (Fla. 4th DCA 1982) indicated that the former jeopardy defense is not available in probation proceedings:

"We are unaware of a case which has held that double jeopardy concepts apply to revocation proceedings ...." The Fourth District Court of Appeal was correct.

Double jeopardy is limited to actual criminal trials. For example, in State v. McCord, 402 So.2d 1147, 1148 (Fla. 1981), the Florida Supreme Court considered whether collateral estoppel applied to pretrial suppression hearings. The court held that collateral estoppel was part of the Fifth Amendment guarantee against double jeopardy, and that a litigant in a pretrial motion had not been put in jeopardy. Therefore, the concept of former jeopardy was not relevant to pretrial suppression hearings. In Serfass v. U.S., 420 U.S. 377 (1975), the Supreme Court held that double jeopardy did not apply to a pretrial dismissal based on a review of evidence that was to be introduced at trial. The defendant would not be facing the hazards of a second trial, and former jeopardy would not be applicable.

Similarly, former jeopardy is not relevant to post-trial probation revocation hearings, because a probationer is not facing multiple trials or punishments. A person on probation has already been convicted of a crime. A fixed sentence has been imposed, but through the "grace" of the court, the privilege of probation has been included as a substitute for incarceration; this is done with the hope that a defendant can be rehabilitated. Bernhardt v. State, 288 So.2d 490, 494 (Fla. 1974). An attempt to revoke that probation does not

constitute "bringing a defendant to trial," but merely seeks to impose upon a person who violated the conditions of his probation privilege the sentence that could have originally been imposed. §945.06(1) Fla. Stat. (1981). Attempting to revoke probation does not place him in jeopardy.

Double jeopardy was the ground raised by Appellee in the trial court, but two other theories were hinted at during the vague argument. Collateral estoppel cannot control here for the reason given in McCord: jeopardy must attach for the principle to apply. In addition, collateral estoppel was defined in Ashe v. Swenson, 397 U.S. 436, 443 (1970), and is not applicable in the instant case where no facts or issues were resolved under the first affidavit:

> When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.

Under res judicata, a "judgment" in a prior suit bars relitigation. Johnson v. U.S., 576 F.2d 606, 611 (5th Cir. 1978); Burleigh v. Buchwald, 368 So.2d 1316, 1321 (Fla. 3d DCA 1979). In addition, "res judicata" has only been applied in civil law. 77 C.J.S. p. 274 (1952).

Double jeopardy did not bar a revocation hearing on the second affidavit of violation because jeopardy never attached in the first proceeding. A fortiori, the defense of double jeopardy is never applicable in probation revocation hearings, as the principle only applies to criminal trials. Collateral

estoppel and res judicata also are inapplicable. Therefore, there was no basis for dismissing the second affidavit, and the trial court erred. This error was a departure from the essential requirements of law, and the Fourth District Court of Appeal properly so held.

## POINT III

WHERE THE FOURTH DISTRICT COURT OF APPEAL TREATED THE STATE'S APPEAL AS A PETITION FOR WRIT OF CERTIORARI, THE REQUIREMENT OF A FORMAL PETITION WAS INAPPLICABLE.

Petitioner argues that no petition was filed in the instant case within thirty (30) days of the rendition of the order as required by Fla.R.App.P. 9.100(c). However, this procedural rule was not applicable since the state proceeded in this case as an appeal, but the district court properly treated the appeal as a petition for common law certiorari. The state timely asserted its appeal.

Fla.R.App.P. 9.040(c) provides that "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy." The committee notes to Fla.R.App.P. 9.040(c) state in part: "Under these provisions a party will not automatically have his case dismissed because he seeks an improper remedy or invokes the jurisdiction of the wrong court. The court must instead treat the case as if the proper remedy had been sought and transfer it to the court having jurisdiction."

Accordingly, Petitioner's argument is without merit.

## CONCLUSION

WHEREFORE, Respondent respectfully requests that this court affirm the opinion of the Fourth District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief on the Merits has been furnished, by courier/mail, to GARY CALDWELL, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 10th day of February, 1984.

Joan Fowler Rossin

Of Counsel