OA 5.6.85

FILED
SID J. WHITE
JAN 15 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v.

CASE NO. 65,615

MARTIN K. SANDERSON,

Respondent/Cross-Petitioner.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

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IN THE FLORIDA SUPREME COURT

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v.	:	CASE NO. 65,615
MARTIN K. SANDERSON,	:	
Respondent/Cross-Petitioner.	:	

BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

The state is the petitioner regarding the question of the right to counsel at sentencing (Issue I) and will be referred to in this brief as the "State". Martin Sanderson is the cross-petitioner regarding the right of counsel at a probation revocation hearing (Issue II) and will be referred to by his proper name. Reference to the state's brief on the merits will be by "SB". Reference to the record will be by "R". Attached hereto as an appendix is a copy of the opinion of the lower tribunal.

II STATEMENT OF THE CASE AND FACTS

Sanderson accepts the recitation at SB 2-5, quoting from Sanderson v. State, 447 So.2d 374 (Fla. 1st DCA 1984).

III ARGUMENT

ISSUE I

SANDERSON DID NOT ENTER A KNOWING AND INTELLIGENT WAIVER OF COUNSEL FOR THE PROBATION REVOCATION, AND THE OFFER OF COUNSEL SHOULD HAVE BEEN RENEWED AT SENTENCING (ISSUE RESTATED BY SANDERSON).

The First District found no proper waiver of counsel by Sanderson at any time prior to the probation revocation hearing:

> The criteria necessary to a finding of a proper waiver of counsel are clearly absent in this case. See Swift v. State, 440 So.2d 655 (Fla. 2d DCA 1983); Tucker v. State, 440 So.2d 60 (Fla. 1st DCA 1983); Keene v. State, 420 So.2d 908 (Fla. 1st DCA 1982), rev. denied 430 So.2d 452 (Fla. 1983); Williams v. State, 427 So.2d 768 (Fla. 2d DCA 1983); Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984); Fla.R.Cr.P. 3.111(d). However, we find that Sanderson was not entitled to appointed counsel at the revocation hearing.

447 So.2d at 376. Tucker, Keene, and Smith were First Distict cases in which the court found no valid waiver of counsel for trial. Thus, the First District has equated the requirement for a valid waiver at a probation revocation hearing with the requirements for a valid waiver at trial.

The Second District has likewise held that the heavy burden required for a knowing and voluntary waiver of counsel at trial is also the same for a waiver of counsel at a probation revocation. Swift v. State, supra; Smith v. State, 427 So.2d 773 (Fla. 2d DCA 1983); Mullins v. State, 438 So.2d

908 (Fla. 2d DCA 1983). These decisions make good sense, for if there is a constitutional right to counsel at a probation revocation (as argued in Issue II, infra) the requirements for a valid waiver should be the same, whether it occurs at the time of arraignment, plea, trial, probation revocation, or sentencing. See the discussions in Carnley v. Cochran, 369 U.S. 506, 516 (1962) and Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

Two older cases also support this principle. In Dortch v. State, 165 So.2d 409 (Fla. 1st DCA 1964), a defendant sought collateral attack because he did not have counsel at any stage of the proceedings. The trial court summarily denied the motion, finding that his guilty plea acted as a waiver of counsel for his later probation revocation. The court held that the defendant has presented a claim for relief sufficient to require an evidentiary hearing. In Machwart v. State, 222 So.2d 38 (Fla. 2d DCA 1969), the defendant waived counsel at arraignment and pled guilty. He was placed on probation, one month later, without counsel. One month after that, his probation was revoked and he was sentenced to five years in prison. The court held:

> On May 21 probation was revoked and the defendant was sentenced. The right to counsel at sentencing is a constitutional right which must be waived, if waived at all, voluntarily, knowingly, and intelligently. . . . and where both revocation of probation and sentencing occur in the same proceeding both the sentence imposed and order revoking his probation are void if defendant was not afforded the opportunity to be represented by counsel.

Id. at 41; citations ommitted. The court found no valid waiver of counsel at the probation revocation since the de-

fendant has not been again offered counsel.

Thus, since Sanderson has a right to counsel at his probation revocation (as argued in Issue II, infra) his waiver of that right must be judged by the same strict standards which govern a waiver of counsel at trial. The First District properly found no adequate waiver in this case.

The state cites this Court's unfortunate opinion in Jones v. State, 449 So.2d 253 (Fla. 1982) for the proposition that the offer of counsel need not be renewed at sentencing, after probation has been revoked, since to do so would be to "exalt form over substance". Jones assumes there has been a valid waiver of counsel at some prior date in the proceedings. In fact, this Court in Jones made the specific finding that the defendant has entered a valid waiver of counsel at trial:

> We are satisfied that defendant by his persistence in demanding counsel of his choice waived his right to appointed counsel and that the court conducted an appropriate inquiry to satisfy itself that defendant was competent to exercise his right to self-representation and was determined to do so. Faretta [v. California, 422 U.S. 806 (1975)] holds that the Sixth Amendment grants an accused the right to self-representation. The record affirmatively shows that defendant was literate, competent, and understanding, that he was voluntarily exercising his informed free will, and that the court made it explicitly clear that it thought defendant was making a mistake in refusing to accept the appointment of counsel.

Id. at 257. Because there was no valid waiver of counsel by Sanderson at the probation revocation, Jones is totally inapplicable to the instant case, and cannot be cited for the proposition that the offer of counsel need not be renewed

at the time of sentencing.

Jones is an unfortunate decision because it neglects to distinguish prior cases, cited in Sanderson, which hold that, whether or not a valid waiver of counsel has been received for trial, counsel must again be offered for sentencing. Baranko v. State, 406 So.2d 1271 (Fla. 1st DCA 1981); Billions v. State, 399 So.2d 1086 (Fla. 1st DCA 1981). It is unfortunate also that it neglects to cite Florida Rule of Criminal Procedure 3.111(d)(5), which seems to clearly require the court to renew the offer of counsel at sentencing:

> If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

Jones appears to be an aberration from existing law. It more likely may be explained by the fact that this Court found Jones to be an opstreperous defendant, who had repeatedly been told prior to and during the trial that he could not select appointed counsel of his own choosing:

> This request occurred on the second day of trial, after the jury was selected and after the state had commenced its case. The request for counsel was accompanied by a motion for an continuance. The trial promptly adivsed defendant that he had previously fired court appointed counsel, refused other counsel, and had chosen to exercise his constitutional right to represent himself after a proper inquiry. The court properly exercised its discretion in refusing to permit the defendant to delay the proceedings further by withdrawing from that choice during the course of the trial. As we make clear below, neither the exercise of the right to self-representation nor to appointed counsel may be used as a device to abuse the dignity of the court or to frustrate orderly proceedings.

* * *

> Following the jury verdict of guilt, the jury was excused until the following morning and the court announced that it would conduct a hearing at that time on the proposed jury instructions for the penalty phase. At that hearing, defendant presented a motion for appointment of private counsel and requested that the court grant $25,000 for the purpose of obtaining such counsel. The trial court pointed out to defendant that numerous competent attorneys had been previously appointed, that he had discharged all of them, and that he was not entitled to the appointment of an attorney of his choice, that he had chosen to represent himself, and that they were now in the middle of the trial. Defendant stated in support of his motion that all the appointed lawyers were incompetent. Defendant now urges that the trial court failed to renew the offer of counsel at the sentencing stage and that this constitutes reversible error. We disagree, as this would exalt form over substance. It is clear from the record that the issue of counsel was before the court and that defendant was merely repeating his earlier meritless arguments that he was entitled to a lawyer of his choice.

Id. at 257-258.

Thus, while it may have been futile to renew the offer of counsel at sentencing to Jones, it does not "exalt form over substance" to offer counsel to a defendant who is to be sentenced following a probation revocation hearing, especially where that defendant has not previously entered a valid wavier of counsel, and especially where the Supreme Court has held that counsel is constitutionally required. See Mempa v. Rhay, 389 U.S. 128 (1967), which is discussed further in Issue II, infra. Even those courts which do not require the apointment of counsel at the revocation hearing do require it

when the defendant is sentenced. See e.g., Woodard v. State, 351 So.2d 1096 (Fla. 3d DCA 1977). Because Sanderson never entered a valid waiver of counsel at the probation revocation, Jones is totally in opposite to the instant case.

ISSUE II

THE FIRST DISTRICT WAS INCORRECT IN DECLINING TO ADOPT A PER SE RULE REQUIRING APPOINTMENT OF COUNSEL IN PROBATION REVOCATION HEARINGS (ISSUE RESTATED BY SANDERSON).

The First District declined to hold that counsel is required in all probation revocation cases. 447 So.2d at 377. This decision is erroneous for several reasons. First, the court should not have relied on Gagnon v. Scarpelli, 411 U.S. 778 (1973) because a probation revocation in Florida is substantially different than the procedure approved in Gagnon. Second, the Supreme Court's earlier decision Mempa v. Rhay, 389 U.S. 128 (1967) requries counsel when the revocation and sentencing hearings are combined into a single proceeding, as in Florida. Third, there are numerous constitutional and procedural rights which could be unknowingly lost by a probationer who is required to represent himself. Fourth, the acceptance of Gagnon will place an onerous burden upon Florida trial and appellate courts. These will be discussed in turn.

In Gagnon, supra, the Supreme Court held there is no federal constitutional right to counsel in a state probation revocation hearing where the defendant had already been sentenced, had his sentence suspended, and had been placed on

probation. Gerald Scarpelli was sentenced by a Wisconsin state judge to 15 years in prison. The judge suspended the sentence and placed him on 7 years probation under supervision of the Wisconsin Department of Public Welfare. When Scarpelli violated his probation, the Department, not the judge, revoked it without a hearing and required him to begin serving his 15 year prison sentence.

In deciding whether a probationer should have the right to counsel, the court drew heavily upon its decision before in Morrissey v. Brewer, 408 U.S. 471 (1972) in which court reserved the question of right to counsel in a parole revocation hearing. In Morrissey, the defendant was sentenced to 7 years in an Iowa prison. After service of one year in prison, he was granted parole. Seven months later, his parole was revoked by the Iowa Board of Parole without a hearing and he was returned to prison. The Supreme Court, in holding that a parole revocation requires only minimal due process, unlike a criminal trial for which all constitutional rights would be provided, placed heavy reliance upon the fact that a probation revocation was not a sentencing proceeding by a judge, but rather a post-sentencing proceeding before an administrative body:

> We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. Mempa v. Rhay [supra]. Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revo-

> cation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent upon observance of special parole restrictions.

408 U.S. at 480 (emphasis added). The Court viewed the parole board's role in the revocation hearing as primarily a fact-finding body:

> What is needed is an informal hearing structure to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

Id at 484.

Returning to Gagnon, the Court equated the revocation of Scarpelli's Washington probation with the revocation of Morrissey's Iowa parole, since both were done by administrative bodies which did not actually impose the sentence. Therefore, the Court found no federal constitutional right to counsel in every state parole or parole revocation hearing:

> The introduction of counsel into a revocation proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being "predictive and discretionary" as well as fact finding, may become more akin to that of a judge at trial, unless attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of the quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and

> feel more pressure to reincarcerate rather than continue nonpunitive rehabilitation. Certainly, the decision making process will be prolonged, and the financial cost to the State-for appointed counsel, counsel for the state, a longer record, and the possibility of judicial review- will not be insubstantial.
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> * * *
>
> In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes from those hearings, but rather from the peculiarities of particular cases.

411 U.S. at 788-789 (footnote ommitted).

The holding of Gagnon was immediately met with skepticism in Florida. In Singletary v. State, 290 So.2d 116 (Fla. 4th DCA 1974), cert. dism. 293 So.2d 360 (Fla. 1974), the Fourth District quickly recognized the difference between the Florida procedure to revoke probation and the system described in Gagnon, all of which is still accurate today:

> The second and most usual way that revocation proceedings are commenced in Florida is by an affidavit being presented to a committing magistrate, who, after finding from it and other proof presented, that there is reasonable ground to believe the probationer has violated his probation in

a material respect, issues a special arrest warrant. The judge issuing the warrant can endorse thereon the amount of bail, if any. The probationer, when arrested, is either taken forthwith before the court granting such probation, to whom the warrant is returnable, or, pursuant to RCrP Rule 3.130(b)(1), 33 F.S.A., he is taken before a judicial officer, a County Judge within 24 hours of his arrest, for a First Appearance hearing where the County Judge as magistrate, immediately informs him of the nature and cause of the accusation against him and provides him with a copy thereof [RCrP Rule 3.130 (b)(2)]. He is advised of his rights against self-incrimination, and that means will be provided for him to communicate with his counsel, his family, or his friends. Counsel is then appointed for him if he desires, but is financially unable to afford, counsel.[7] In some judicial circuits, the magistrate considers admitting the accused probationer to bail or releasing him on his own recognizance, while in other circuits, if the probation was granted in the Circuit Court, the County Judge does not set bail but forthwith binds the accused over for further proceedings before "the court granting such probation", where the Circuit Judge, as arraignment procedure, again advises the accused of the charge and advises him he is entitled "to be fully heard on his own behalf in person or by counsel." If the violation is not admitted, the Circuit Judge considers releasing him from confinement with or without bail and sets a final hearing "as soon as may be practicable".

7/ RCrP Rule 3.130. In Morrissey and Gagnon the majority declined to hold that counsel must be furnished to the indigent parolee and probationer. Here Singletary was represented at his revocation hearing by appointed counsel, which pratice has been mandated in Florida by state court decree, see Herrington v. State, Fla. App. 1968, 207 So.2d 323, and Gargan v. State, Fla.App. 1969, 217 So.2d 578, Machwart v. State, 222 So.2d 38 (2 DCA 1969), and Annotation: Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R. 3d 306.

Id. at 118-19 (all footnotes except footnote 7 ommitted). Further, the court observed:

> In Florida, the trial judge does not pronounce and impose a sentence of imprisonment upon a defendant who is to be placed on probation [RCrP Rule 3.790 (a)], except in the special county jail split-sentence situation provided in F. S. Section 948.01(4), F.S.A., and in Florida the trial judge granting probation holds the revocation hearing. Therefore, for these reasons and others, in Florida a probationer, arrested and accused of a violation, can never be summarily whisked to prison because he is both required and entitled to appear before the court for his revocation hearing, and, if necessary, sentencing. The probationer's arrest, confinement, hearing and sentencing occur under the canopy of the usual state criminal justice system court rules and statutes, thereby ensuring procedural due process far in excess of minimum requirements of either state or federal constitutions.

Id. at 120-21.

The appellate court in Florida, at least until recently, have held that there is a per se right to counsel in Florida at a probation revocation hearing, regardless of what the Supreme Court held in Gagnon. VanCleaf v. State, 328 So.2d 568 (Fla. 1976); Gleichauf v. State, 334 So.2d 174 (Fla. 4th DCA 1976); Young v. State, 399 So.2d 1082 (Fla. 1st DCA 1981); Watts v. State, 409 So.2d 222 (Fla. 2d DCA 1982); Smith v. State, 427 So.2d 773 (Fla. 2d DCA 1983); Mullins v. State, 438 So.2d 908 (Fla. 2d DCA 1983); Williams v. State, 446 So.2d 721 (Fla. 2d DCA 1984); Hicks v. State, 452 So.2d 606 (Fla. 4th DCA 1984), discretionary review pending, No. 65,495; Thomas v. State, 452 So.2d 609 (Fla. 4th DCA 1984); Hooper v. State, 452 So.2d 611 (Fla. 4th DCA 1984); and Williams v. State, 452 So.2d 618 (Fla. 4th DCA 1984).

But see Woodard v. State, 351 So.2d 1096 (Fla. 3d DCA 1977); Thompson v. State, 413 So.2d 1301 (Fla. 4th DCA 1982); and Grandin v. State, 421 So.2d 803 (Fla. 3d DCA 1982). Thus, the majority of Florida cases have recognized that the Florida revocation procedure is so vastly different from that described in Gagnon; as a result, Florida courts have held that counsel is required in all cases.

The second reason why Gagnon should not apply in Florida, closely related to the first, is that probation in Florida is not a sentence. Peek v. State, 395 So.2d 492 (Fla. 1980); Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980); Florida Rule of Criminal Procedure 3.790(a); and Sections 921.187 and 948.01, Florida Statutes. But see Cervantes v. State, 442 So.2d 176 (Fla. 1983). The Supreme Court, prior to Gagnon, had held in Mempa v. Rhay, supra, that sentencing is a critical stage at which appointed counsel is constitutionally required. In Gagnon, the Court explained its holding in Mempa:

> In Mempa [supra] the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected" . . . and that sentencing is one such stage, the Court concluded that counsel must be provided to an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial.

411 U.S. at 781 (emphasis added). Thus, the Supreme Court

clearly anticipated the Florida situation where a defendant has not yet faced the critical stage of sentencing when he is placed on probation. Jerry Douglas Mempa had entered a guilty plea to joy riding in Washington state court, with court appointed counsel. He was placed on two years probation, and the imposition of sentence was the deferred, as it would be in Florida. When his probation was revoked, he was immediately sentenced to ten years in prison, without the offer of counsel. The Supreme Court held that, whether the proceeding labeled a probation revocation or a deferred sentencing, it was necessary for counsel to be appointed, since Mempa was not sentenced at the time of his original guilty plea.

Prior to Mempa, the Florida appellate courts had held that there was no need for counsel at the probation revocation portion of a combined probation revocation and sentencing proceeding. Thomas v. State, 163 So.2d 328 (Fla. 3d DCA 1964); Evans v. State, 163 So.2d 520 (Fla. 2d DCA 1964); Phillips v. State, 165 So.2d 246 (Fla. 2d DCA 1964); and Bryant v. State, 194 So.2d 21 (Fla. 3d DCA 1967). However, once Mempa was decided, the Florida courts quickly recognized that their view was no longer constitutionally permissible. Herrington v. State, 207 So.2d 323 (Fla. 2d DCA 1968); and Gargan v. State, 217 So.2d 578 (Fla. 4th DCA 1969).

Thus, because in Florida a defendant is not yet sentenced at the time he is placed on probation, Mempa requires that counsel be appointed at a combined probation revocation and sentencing proceeding. Gagnon simply does not apply in

Florida where a sentence has not yet been imposed at the time probation is revoked. Sanderson submits that the First District failed to recognize this important distinction, as did the Fourth District in Thompson, supra, and the Third District in Woodard and Grandin, supra.

The third reason why Gagnon should not be applied in Florida, closely related to the first two, that a probationer enjoys several valuable constitutional and procedural rights, which would be lost if he is not afforded counsel at this probation revocation hearing.

In Florida, a probationer is able to claim a violation of his right against unconstitutional search and seizure, at least by a police officer other than his probtion officer. Grubbs v. State, 373 So.2d 905 (Fla. 1979); State v. Dodd, 419 So.2d 333 (Fla. 1982); and State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). In Florida, a probationer is able to claim his right against self-incrimination, at least as to statements which concern separate criminal conduct, where such statements are made to his probation officer. State v. Heath, 343 So.2d 13 (Fla. 1977).

In Florida, a probationer enjoys the benefit of discovery to prepare for his revocation hearing, Hines v. State, 358 So.2d 183 (Fla. 1983), including the right to seek disclosure of a confidential informant. Coby v. State, 397 So.2d 974 (Fla. 3d DCA 1981). This Court has also extended the protection of Richardson v. State, 246 So.2d 771 (Fla. 1971) to undisclosed evidence the state wishes to use in a probation revocation hearing. Cuciak v. State, 410 So.2d 916 (Fla. 1982).

In Florida, the state attorney is required to represent the state's interests in a probation revocation hearing. Carwise v. State, 449 So.2d 943 (Fla. 5th DCA 1984). Compare with Gagnon, where the probation officer played the role of the prosecutor. In Florida, the presiding judge acts as the fact-finder, as opposed to Gagnon, where an administrative body played that role.

In Florida, the rules of evidence are relaxed to the extent that hearsay is admissible, but hearsay cannot be the sole basis for revocation. See, e.g., Reeves v. State, 366 So.2d 1299 (Fla. 2d DCA 1979); Curry v. State, 379 So.2d 140 (Fla. 4th DCA 1980); Clemens v. State, 388 So.2d 639 (Fla. 2d DCA 1980); Purvis v. State, 397 So.2d 746 (Fla. 5th DCA 1981); Sillett v. State, 393 So.2d 53 (Fla. 2d DCA 1981); Clayton v. State, 422 So.2d 83 (Fla. 2d DCA 1982); Miller v. State, 444 So.2d 523 (Fla. 1st DCA 1984); and Robinson v. State, 445 So.2d 1135 (Fla. 2d DCA 1984).

In Florida, an affidavit of violation of probation should be dismissed if it was not filed within the probationary period, or at least tacked on to a previously- issued affidavit. Gardner v. State, 412 So.2d 10 (Fla. 2d DCA 1981); White v. State, 410 So.2d 588 (Fla. 2d DCA 1982); Williams v. State, 406 So.2d 86 (Fla. 1st DCA 1981); Fredrick v. State, 405 So.2d 1344 (Fla. 3d DCA 1981); Kimble v. State, 396 So.2d 815 (Fla. 4th DCA 1981); Jess v. State, 384 So.2d 328 (Fla. 3d DCA 1980); Curry v. State, 362 So.2d 36 (Fla. 3d DCA 1978); Bouie v. State, 360 So.2d 1142 (Fla. 2d DCA 1978); and Rich v. State, 350 So.2d 1114 (Fla. 2d DCA 1977).

In Florida, probation cannot be revoked for failure to pay court costs or restitution, without proof by the state that the probationer had the financial ability to pay them. See, e.g., Murrell v. State, 364 So.2d 96 (Fla. 4th DCA 1978); Cohen v. State, 365 So.2d 1052 (Fla. 4th DCA 1978); Coxon v. State, 365 So.2d 1067 (Fla. 2d DCA 1979); Martin v. State, 366 So.2d 141 (Fla. 2d DCA 1979); Abelson v. State, 367 So.2d 633 (Fla. 2d DCA 1979); Young v. State, 370 So.2d 832 (Fla. 2d DCA 1979); Smith v. State, 373 So.2d 76 (Fla. 3d DCA 1979); Woodard v. State, 371 So.2d 708 (Fla. 4th DCA 1979); McPherson v. State, 376 So.2d 898 (Fla. 2d DCA 1979); Brooks v. State, 376 So.2d 898 (Fla. 2d DCA 1979); Smith v. State, 377 So.2d 250 (Fla. 3d DCA 1979); Martin v. State, 378 So.2d 875 (Fla. 2d DCA 1979); Porter v. State, 380 So.2d 523 (Fla. 4th DCA 1980); Leggett v. State, 379 So.2d 1030 (Fla. 2d DCA 1980); Abel v. State, 383 So.2d 325 (Fla. 2d DCA 1980); Byrd v. State, 390 So.2d 145 (Fla. 3d DCA 1980); Shaw v. State, 391 So.2d 754 (Fla. 5th DCA 1980); and Marshal v. State, 400 So.2d 567 (Fla. 2d DCA 1981).

Thus, because a Florida probation revocation hearing is so similar to a criminal trial, with the presence of a judge and a prosecutor, the appointment of counsel is necessary to ensure due process. An uncounseled probationer, who presumably would be ignorant of these valuable and procedural rights, would be at the mercy of the court and the prosecutor if required to appear without an attorney to assist him.

The fourth reason for rejecting Gagnon is based upon the burden probation revocation place upon the trial courts

in Florida. According to figures provided to the undersigned by the Florida Public Defender Coordination Office for fiscal year 1983-84, the twenty public defender offices in Florida were reappointed to represent previous clients in a total of 17,157 probation revocation and community control revocation cases. The burden which would be created if trial judges were required to sift through 17,000 violation of probation warrants to determine which charges were too "complex" in order to qualify for counsel, would be intolerable. Likewise, it may be safely assumed every probationer who felt he was unfairly denied his right to counsel would file an appeal on that basis, thus further burdening the appellate courts of this state. As the Second District observed in Smith v. State, supra, 427 So.2d at 775:

> Under the Gagnon test a criterion is the relative complexity of reasons for conduct which is alleged to constitute a probation violation. That criterion would in itself have the potential for complexity and uncertainty in application.

The state relies heavily in its brief upon the concurring opinion of Judge Glickstein in Hooper v. State, supra, 452 So.2d at 611-18 (SB at 14-15). It appears that Judge Glickstein's primary concern with adopting a per se right to counsel in probation revocations is that the Legislature has not provided such authority, along with the corresponding tax dollars for support. This simplistic view ignores the realities of the probation revocation procedure in Florida, which was outlined in detail above. Moreover, the courts, not the Legislature, have historically mandated the right to counsel. The courts do so in performing

their duty of interpreting the Constitution, in light of their beliefs in justice and fair play at any one point in time. See Gideon v. Wainwright, 372 U.S. 335 (1963), which overruled Betts v. Brady, 316 U.S. 455 (1942), and which was expanded by Argersinger v. Hamlin, 407 U.S. 25 (1972). Judge Glickstein's further concern that probation revocations are a burden on the judicial system ("clogged with additional proceedings") overlooks the fact that there will be 17,000 cases in circuit court, with or without lawyers.

In any event, since the 20 public defender offices of this state are currently representing probation violaters these 17,000 cases are included in each office's budget, and are so funded by the Legislature. Authority for the public defender to represent indigent probation violaters already exist in Section 27.51(1), Florida Statutes. Moreover, this Court has, by virtue of Florida Rule of Criminal Procedure 3.130, made appointed counsel available to every person arrested, without excluding those arrested on a probation violation warrant.

The evils of a Gagnon-type case-by-case determination of right to counsel were demonstrated by the only case the First District has dealt with since Sanderson. In Holmes v. State, 448 So.2d 1070 (Fla. 1st DCA 1984), the defendant was charged with failing to pay restitution and failing to seek alcohol counseling. Although these allegations would appear to fail the "complex" test of Gagnon, the First District found Holmes should have been provided counsel:

> We need not comment on the evidence adduced to support the revocation. Although facially sufficient, it may well appear that revocation of probation does not necessarily serve the public interest and is not necessarily warranted if evidence of defenses and mitigating circumstances are properly presented by a competent attorney representing Holmes.

Id. at 1072. When Sanderson was brought to its attention on rehearing, the Court further justified its opinion:

> The revocation charges were tried before the judge in open court, with the prosecuting attorney presenting testimony from four witnesses to support the charges. Nothing in the record shows that Holmes appeared to be capable of speaking effectively for himself, especially in this trial-like adversarial proceeding. On the contrary, Holmes, a construction worker with no apparent legal training, attempted to cross-examine the state's witnesses on several ocassions in a woefully inadequate manner. The record also indicates that Holmes professed in a rather inartful way to have a reasonable basis for contesting the alleged violations and for justifying or mitigating the same so as to make revocation of probation inappropriate. We pointed out at the end of our original opinion that such matters might well have altered the result if properly presented by competent counsel.

Id. at 1074.

Judge Glickstein in Hooper also justified rejection of a per se rule by questioning whether there should be fifty separate procedures for revoking probation in fifty separate states. 452 So.2d at 618. This Court's concern should be whether there would be twenty separate definitions of "complex" cases in the twenty circuits of Florida. If uniformity in criminal sentencing is desirable, as this Court and the Legislature have concluded through sentencing guide-

lines, then uniformity in providing counsel throughout the state to probation violaters is equally desirable. Moreover, another appellate court in Florida could easily determine that Holmes' failure to pay restitution and seek alcohol counseling were not "complex" charges, thus creating conflict among the district courts of appeal on the same set of facts, thereby burdening this Court with more cases.

The First District found Holmes was not "capable of speaking effectively for himself", and so was unable to represent himself. Would a probationer who was capable of expressing himself orally have the knowledge to assert his constitutional and procedural rights noted above in the revocation hearing? The undersigned thinks not. The First District found Holmes' cross-examination was "woefully inadequate". Would a probationer who knew how to ask leading questions on cross-examination know that he must also object to hearsay? Not necessarily. The First District found Holmes contested the violations in an "inartful way". Would one who could adequately explain his conduct know that the state had the burden to prove ability to pay costs and restitution? Probably not.

Thus, Holmes teaches that any standard for appointment of counsel, other than a per se rule, is not subject to even application, and would lead to unfair revocation hearings. This Court must reject the Gagnon approach as being ill-suited to the reality of the revocation procedure in Florida. This Court must rely upon Mempa and hold that probation revocations are a critical stage in Florida since the defendant has not yet been sentenced. This Court must accept the policy

arguments made above that it is unfair to provide constitutional and procedural protections to a probationer, without also providing him with appointed counsel. In short, this Court must adopt a per se rule requiring counsel in all revocation cases.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Sanderson urges this Court to hold that there is an absolute right to counsel at both probation revocation and sentencing, absent a knowing and voluntary waiver of counsel by the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Respondent/Cross-Petitioner on the Merits has been furnished by hand delivery to Mr. Lawrence A. Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to respondent/cross-petitioner, Martin K. Sanderson, 383 Marietta Street, Alpharetta, Georgia 30201 on this 15 day of January, 1985.

P. Douglas Brinkmeyer

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