IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 71,420
	)	
CLYDE GARLAND WAYNE,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

Respondent was originally sentenced to two and a half years in prison and two and a half years probation. After serving the prison portion and having had the probation revoked, he was again sentenced on the burglary conviction to four years in prison with credit for time served. Whatever the basis - in this case the split sentence form in Florida Rules of Criminal Procedure 3.896 - such a second sentence is a violation of the constitutional principle of double jeopardy. As articulated by the United States Supreme Court in Roberts v. United States, the application of this principle prevents a court from sending someone to prison in advance of probation and later upon revocation of probation setting aside that sentence and increasing the term of imprisonment.

ARGUMENT

THE DISTRICT COURT WAS CORRECT IN RULING THAT WAYNE COULD NOT BE SENTENCED TWICE FOR THE SAME OFFENSE.

Indeed, Pandora's box has been opened (Brief of Petitioner, Page 6), but it was done long before this case or Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987). A commentator on a case invoked by petitioner, State v. Jones, 327 So.2d 18 (Fla. 1976), predicted that the application of Jones, which sanctioned the split sentence probation alternative, would permit a court upon probation revocation to vacate a partially satisfied sentence and impose a new and increased sentence, in derogation of the principle that a court does not have the authority to increase a sentence once the defendant has begun serving it. Sentencing upon Revocation of Probation in Florida, 30 U.Miami L.Rev. 1063-74 (1976). This is what happened here. Wayne was originally sentenced to two and a half years in prison and two and a half years on probation in 1985. Upon probation revocation in 1986 his prison sentence was increased to four years for the same burglary, contrary to the principle that one cannot be twice lawfully punished for the same offense. Ex Parte Lange, 85 U.S. 163, 18 Wall. 163, 21 L.Ed. 872, 876 (1873). Restricting the definition of the term "sentence" to exclude probation has thus helped to disguise the reality of a violation of constitutional double jeopardy. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107, 1112 (Fla. 1980), Overton, J. diss.

The source of the problem lies in the lack of a sensible public policy regarding crime, punishment and rehabilitation, and in the confusion of the declared primary purpose of sentencing - punishment of the offender - with that other traditional, supposedly desirable, but now subordinate goal of the criminal justice system - rehabilitation. Florida Rule of Criminal Procedure 3.701(b). Such confusion, and its attendant double jeopardy trap, finds expression in the first paragraph of the "split" sentence form in 3.986, which Petitioner strives to preserve (Brief of Petitioner, Pages 11-17), and which Judge Cowart says should be eliminated. Wayne v. State, 513 So.2d 689 (Fla. 5th DCA 1987).

As the court recognized in Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed.41 (1943), only when incarceration has been suspended or not imposed in the first place, and a probation term substituted, but not when an incarceration term has been partially satisfied, can double jeopardy - double punishment be avoided. Punishment and incarceration go together, as do probation and rehabilitation. By definition, any incarceration on conviction for a criminal offense is punishment. When a person has been sentenced to a period of incarceration for such offense, to sentence him again to any additional time on the same offense is to punish him twice for the same offense, the very thing disallowed by the principle of double jeopardy.

The only way to avoid running foul of double jeopardy in sentencing to a term of imprisonment, followed by a period of

probation, is to suspend part of the prison sentence and substitute probation, with the suspended part held in reserve to be reimposed, in full or in part, if the probationer violates his probation before he has completed the probation term. In the suspended sentence scenario, as Judge Cowart pointed out in this case and in Poore v. State, 5Ø3 So.2d 1282 (Fla. 5th DCA 1987), there is no resentencing, or a new, second, or different sentence.

Petitioner has recourse (Brief of Petitioner, Page 8) to State v. Payne, 4Ø4 So.2d 1Ø55 (Fla. 1981), and Justice Frankfurter's dissent in Roberts for the proposition that increased "second sentences" are constitutionally proper. Such recourse is misplaced because Payne dealt with a suspended sentence, not as here prison plus probation. Payne did not serve a prison term before probation.

As explained in the majority opinion in Roberts, the authority of a court to resentence upon revocation of probation to any term which it might have originally imposed depends on either of two situations. In the "suspended execution of sentence" situation, the probationer was not sent to prison before probation, but given a suspended term which is now activated; or the suspended term is set aside and the original prison sentence which might originally have been imposed, and is more than the suspended term - in Roberts three instead of two years - is imposed. In the "suspended imposition of sentence" situation, the probationer was not given any suspended term of imprisonment but placed on probation alone, which he violated and

thus left himself liable to have his probation revoked, and to be sent to prison for any term which the court might have originally imposed. In neither situation can a court send someone to prison first, after sentencing him to a term of imprisonment in advance of probation, and later upon revocation of probation set aside that sentence and increase the term of imprisonment. Such was the holding in Roberts, but that was what happened here and is the reason for the double jeopardy violation caused by departing from the principles of Roberts.

The way to take care of what Justice Frankfurter called the meaningless imposition of a suspended term of imprisonment which contradicts the central idea of probation, rehabilitation, is to stop putting the cart before the horse, punishment before rehabilitation, prison before probation. Especially now that sentencing guidelines are in effect, the imposition of a term of probation up to the statutory maximum sentence and beyond the maximum guidelines prison sentence is a transparent attempt to defeat the guidelines system, which will be successful if this court countenances the imposition of a new and increased prison sentence upon probation revocation.

The confusion between punishment and rehabilitation, prison and probation, has become complete if Petitioner's analogy of probation and plea bargaining is accepted, and the alleged waiver of double jeopardy, by accepting probation, made the equivalent of the waiver of trial rights when an accused pleads guilty or no contest. However, Respondent is confident that this court is not about to walk down the garden path Petitioner would

lead them. The suggestion is preposterous that by acknowledging that the conditions of probation have been explained to him, a probationer has waived his right not to be punished twice for the same offense (Brief of Petitioner, Page 9). No probationer bargains for the conditions and terms of probation; they are imposed on him. If one of those terms was a waiver of double jeopardy, Petitioner might have an argument to make, but Respondent doubts that even the most benighted court would have the nerve even to think of imposing such a condition.

As for Ricketts v. Adamson, 483 U.S. _____, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), Wayne did not bargain for anything here with anyone; he was on the receiving end of the judge's sentences. Courtroom architecture expresses the basic difference between the relative position of an accused entering into a plea agreement with the prosecutor, and the same accused now adjudicated being sentenced by a judge. There is some equality in the bargaining power of the former that is non-existent between defendant and judge.

Petitioner's concern is that if the only prison plus probation option is a suspended sentence of imprisonment, the probationer can weigh the relative merits of violating probation and serving the remaining part, or completing the probation (Brief of Petitioner, Pages 8-9). Although invoking Justice Frankfurter, Petitioner does not show the same concern for the integrity of probation as Frankfurter does. Instead of probation being an opportunity for rehabilitation of the criminal offender away from the prison situation, in Petitioner's world it is an

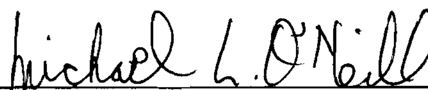
opportunity to prolong the offender's potential exposure to imprisonment, an opportunity that will be realized if the double jeopardy problem can be overcome.

CONCLUSION

BASED UPON the argument made and authorities cited herein, Respondent asks this Honorable Court to affirm the decision of the Fifth District Court of Appeal in this cause.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert Butterworth, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, in his basket at the Fifth District Court of Appeal, on this 4th day of April, 1988.

MICHAEL L. O'NEILL
ASSISTANT PUBLIC DEFENDER