IN THE SUPREME COURT OF FLORIDA

ROBERT BERNARD FRANKLIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 72,488

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

On March 4, 1983 Petitioner was charged by information with burglary of a dwelling (R21). Six weeks later Petitioner was charged by a second information with assault in a county jail (R23). On October 14, 1983, after entering pleas of guilty, Petitioner received two concurrent sentences of three years in a youthful offender facility followed by three years community control (R25-26). On November 14, 1986 Petitioner was charged by warrants with violating his community control by failing to submit reports, failing to pay cost of supervision and changing his residence without notification (R24-30). Petitioner entered pleas of guilty to the violations (R33-36).

The defense questioned a scoresheet prepared by the State. Petitioner was scored for eight prior convictions, many juvenile. Defense attorney made this comment:

> Under the situation with the vast amount of points we were wondering if it wouldn't be too much trouble to have J & S's produced, because if there is a possibility of a greater sentence I want to make sure those are the crimes that the defendant did, in fact, commit (R7).

Sentencing was continued, and at the hearing a probation officer said that twelve of Petitioner's juvenile judgments and sentences had been destroyed (R13). The court relied on a list of dispositions in a Health and Rehabilitative Services waiver hearing report to calculate the scoresheet (R14,41-43). The defense attorney twice commented that judgments and sentences were needed (R14,17). The court asked defense counsel if he took exception to any of the prior convictions. Defense counsel responded:

> Your Honor, to be very honest with you, I haven't received any information as to what Mr. Franklin had actually as a record; but due to the fact that all the records have been destroyed, the rules provide for J &S's. We would ask the court not to go ahead and use any of those prior convictions, scoring against him (R14).

Petitioner was sentenced to fifteen years imprisonment with credit for three years forty-three days served (R44-47). This was a guideline sentence (R39-40). A notice of appeal was timely filed (R50). An "Anders" brief was filed in this appeal. (The brief was filed prior to the 5th DCA's decision in Wayne v. State, infra). The Fifth District Court of Appeal ordered that tan amended initial brief be filed. The Fifth District Court of Appeal affirmed Petitioner's sentence and receded from its Wayne

decision. Franklin v. State, 13 FLW 1269 (Fla. 5th DCA April 24, 1988). The District Court certified the following question:

> HAVING SENTENCED A DEFENDANT TO A TERM OF INCARCERATION FOLLOWED BY PROBATION OR COMMUNITY CONTROL, MAY THE COURT AFTER A VIOLATION OF THE PROBATION OR COMMUNITY CONTROL, IMPOSE ANY SENTENCE WHICH COULD HAVE BEEN ORIGINALLY IMPOSED WITH CREDIT FOR TIME SERVED AND MUST SUCH SENTENCE BE WITHIN THE GUIDELINE RANGE UNLESS VALID REASONS FOR DEPARTURE ARE GIVEN?

SUMMARY OF ARGUMENT

Petitioner argues that when a defendant is sentenced to incarceration to be followed by a period of probation or community control the defendant cannot be sentenced to further incarceration should he violate the probation. Well established double jeopardy principles prohibit punishing a defendant twice for one offense, which is what the appellate court's decision allows in this case.

ARGUMENT

IT IS ERROR FOR A COURT TO IMPOSE ANY SENTENCE FOLLOWING A VIOLATION OF THE COMMUNITY CONTROL OR PROBATIONARY PORTION OF A SPLIT SENTENCE IMPOSING INCARCERATION FOLLOWED BY PROBATION OR COMMUNITY CONTROL.

This case deals with split sentences and the consequences of violating the conditions of the non incarcerative portions of these sentence. The Fifth District Court of Appeals has recognized two types of split sentences which petitioner will attempt to define here.

Poore sentences: Sentences of the type dealt with in Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987)(review granted, Florida Supreme Court Case No. 70,347). Sometimes referred to as a "true" split sentence, this is the imposition of a period of incarceration, which is suspended after a designated amount of prison time is served, with the remaining time to be served on probation. In Poore, the Fifth District Court held that if the probation is violated, the lower court must incarcerate the defendant for whatever time remains of the original period of incarceration imposed.

Wayne sentence: Sentence of the type dealt with in Wayne v. State, 513 So.2d 689 (Fla. 5th DCA 1987) review granted Florida Supreme Court Case No. 71,420. This is a sentence in which a period of incarceration is imposed, to be followed by a period of probation or community control. No portion of the incarcerative part of the sentence is suspended. In Wayne the Fifth District Court of Appeal held that if a defendant serves the incarcerative portions of the sentence and then violates

probation, a court is precluded by constitutional double jeopardy from sentencing the defendant again. Thus the probationary portion of the sentence is a nullity.

In this case the Fifth District Court of Appeal has receded from its decision in Wayne and from "the dictum in Poore which was later relied on in Wayne". Petitioner here argues that the Fifth District Court of Appeal was correct in its Wayne opinion, and that the opinion in the case at bar allows for an unconstitutional double jeopardy violation.

As the Unites States Supreme Court held in Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed.2d 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 the 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.

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.

One of the most well established principles of American criminal law, as pointed out in Ex Parte Lange, 85 U.S. 163 (1873), is "Nemo bis punitur pro eodem delicto" or "no one can be twice punished for the same crime." The opinion of the Fifth District Court of Appeal in the case at bar ignores that principle.

Two cases relied on by the Fifth are State v. Payne, 404 So.2d 1055 (Fla. 1981) and State v. Jones, 327 So.2d 18 (Fla. 1976). Petitioner argues that Payne does not apply to the case at bar because Payne involved a Poore type suspended sentence. Jones does deal with a Wayne sentence and holds that when a

defendant violates the probationary period of the sentence he may be resentenced to any sentence he could originally been given. It should be noted that when the sentencing procedure in Jones was found constitutional in Federal court in Williams v. Wainwright, 650 F.2d 58 (5th Cir. 1981), the sentence being examined was a Poore type sentence.

Petitioner is not contending that a defendant can not be placed in prison following a probation violation when the original sentence was of the Poore type. In that situation only one sentence has been imposed and the Constitution has not been violated. In this case, and all Wayne cases, however, two sentences are being imposed for one crime. Petitioner can only ask, as did Judge Cowart in his dissent in this case, that this Court re-examine its opinion in Jones.

Reversing the District Court of Appeal in this case and affirming Wayne would not prevent a trial court from imposing a split sentence. Poore type sentences may be constitutionally imposed, with reasons for departure from the guidelines given if the total sanction exceeds the guidelines recommendation.

The question certified by the District Court of Appeal is a compound one asking first if sentences such as the one in this case may be imposed, and second if they are imposed must they be within the guideline range. Petitioner urges this court to disallow such sentences on constitutional double jeopardy grounds. If, however, the Court upholds the sentence, the second portion of the certified question must be answered affirmatively

CONCLUSION

Based on the foregoing cases, authorities and argument, Petitioner respectfully requests this Honorable Court is asked to answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 in his basket at the Fifth District Court of Appeal and mailed to Robert Bernard Franklin, #A091677, 1150 S.W. Allapattah Rd., Indiantown, Fla. 33456 on this 27th day of June 1988.

Kenneth Witts
KENNETH WITTS
ASSISTANT PUBLIC DEFENDER