IN THE SUPREME COURT OF FLORIDA

ROBERT BERNARD FRANKLIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 72,488

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The decision rendered by the district court of appeal in the instant case should be affirmed. It was soundly based on prior decisions of this court which permit an increased "second sentence" following revocation of probation or community control. Such does not violate double jeopardy principles, and the application of the guidelines specifically permits the sentencing court to increase a probationer's sentence to the next higher guidelines cell upon revocation. Oftentimes this can only be done by resentencing or by increasing the sentence. The solutions, as have been set forth in Franklin v. State, 13 F.L.W. 1269 (Fla. 5th DCA, April 24, 1988), to most sentencing problems arising when probation is revoked are supported by logic and practicality.

ARGUMENT

IT IS NOT ERROR FOR A COURT TO IMPOSE ANY SENTENCE WHICH COULD HAVE ORIGINALLY BEEN IMPOSED FOLLOWING A VIOLATION OF THE PROBATIONARY PORTION OF A PREVIOUSLY IMPOSED SPLIT SENTENCE, AS LONG AS THE ACTUAL INCARCERATIVE PORTION OF ANY SENTENCE IMPOSED IS WITHIN THE RECOMMENDED GUIDELINES RANGE.

It should first be noted that the issue in this case is inextricably intertwined with the issues in Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987) and Wayne v. State, 513 So.2d 689 (Fla. 5th DCA 1987), in both of which this Court has granted review. Florida Supreme Court Case Number 70,347 and 71,420 respectively. Since the decision of the Fifth District Court of Appeal in the instant case basically affirms its decision in Poore and recedes from its ruling in Wayne, and the petitioner's main contention in the instant case is simply that Wayne should be resurrected, the necessary and relevant arguments in support of the respondent's position in the instant case are contained in the state's briefs already before this court in State v. Wayne, supra, (Appendix) and Poore v. State, supra.

The opinion of the Fifth District Court of Appeal in the instant case contains a brief, but thorough, analysis of the issues involved in sentencing after a violation of probation or community control: double jeopardy principles and the sentencing guidelines. As recognized by the court in Franklin v. State, 13 F.L.W. 1269 (Fla. 5th DCA, April 24, 1988) preserving the decision in Wayne would mean only that it is necessary at the

initial sentencing to impose a total sanction and immediately withhold a portion of it in order to give the court something to hold over the defendant's head in the event he violates his probation. The district court properly receded from its prior decision in Wayne based upon this court's decision in State v. Jones, 327 So.2d 18 (Fla. 1976). In Jones the necessity of establishing a term of sentence and withholding a part of it at the initial sentencing proceeding was rejected. The constitutionality of **increased** "second sentences" has also previously been addressed by this court in State v. Payne, 404 So.2d 1055 (Fla. 1981) and were found to be proper and nonviolative of a defendant's right against double jeopardy. The decision in the instant case relied heavily on these two cases and in effect allowed that either method of sentencing is acceptable (incarceration followed by probation, or incarceration with a portion withheld and probation substituted), and that upon a violation of probation, the court may sentence the violator to any term which could have originally been imposed, except where the total sentence was imposed with a portion withheld. In that instance, the court would be limited to recommitting the defendant who violates his probation or community control to no more than the balance of the suspended term.

It is only that portion of the decision in Franklin, which limits the court to imposing less than what could have originally been imposed, with which respondent takes issue here. Unless the sentencing court imposes the statutory maximum initially, it would often times be rendered powerless to punish for a violation

of probation, particularly where the probation has been violated more than once and the court wishes to exercise the one cell bump. Regardless of whether a total sanction was imposed and a portion suspended, the sentencing court should be permitted to increase the sentence upon a violation of probation up to the maximum of the recommended guidelines range (including the one cell bump).

That the guidelines do apply when sentencing after violation of probation or community control was discussed in the Franklin decision and in the respondent's brief in State v. Wayne (See, Appendix). The respondent incorporates each in its argument here. The position of the state is that the guidelines, by their own terms, are applicable to sentences imposed upon a violation of probation, and that the length of the initial sentence imposed may exceed the recommended guidelines range as long as a sufficient amount of time is withheld so that the actual incarcerative portion does not exceed the recommended guidelines range. This would be in keeping with the guidelines rule which provides for the imposition of a split sentence so long as the incarcerative portion is within the guidelines range and the total sanction does not exceed the term provided by general law. See, Committee Note (d)(12), Fla. R. Crim. P. 3.701.

To specifically address the question certified by the Fifth District Court of Appeal in its decision in the instant case, which was:

> 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,

the respondent's position on the first part of the question is "yes", and on the second part is also "yes", but only if the word "sentence" refers to the incarcerative portion of the sentence.

The stance taken by the petitioner in this case is unreasonable as it renders the sentencing court a toothless tiger when faced with a person who violates his probation. The petitioner allows that the sentencing method used in Poore is acceptable and does not violate the double jeopardy principles since upon violating probation or community control, one is merely recommitted under the original sentence, but then he argues that the total sanction as originally imposed must be within the recommended guidelines range. That would not only be letting the probation violator have his cake and eat it too, but it totally eliminates the discretion of the sentencing court specifically permitted by the sentencing guidelines to sentence after a revocation of probation within either the original cell or the next higher cell. Fla. R. Crim. P. 3.701(d)(14).

Except for the limitation which Poore placed on the amount of time to which a violator could be recommitted when the sentencing alternative used was one where the total was imposed with a portion immediately suspended, the decision rendered in Franklin should be affirmed. Anything else would violate the

philosophy of probation and infringe upon the intent of the legislature to permit the trial court discretion in dealing with a defendant who has violated the trust which was placed in him when he was placed on probation or community control.

CONCLUSION

Based on the argument and authorities presented herein, respondent respectfully urges this Honorable Court to affirm the decision of the Fifth District Court of Appeal in this case and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished, by mail, to Kenneth Witts, Assistant Public Defender for petitioner, at 112 Orange Ave., Suite A, Daytona Beach, Florida 32014 this 18th day of July, 1988.

Pamela D. Cichon
Of Counsel