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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,574

TIMOTHY BRYAN LIPPMAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER

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INTRODUCTION

The petitioner, Timothy Bryan Lippman, was the appellant in the district court of appeal, and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. This brief refers to the parties as the "defendant" and the "state." The symbols "T.", "R.", and "S.R." designate the transcript of the proceedings in the trial court, the remainder of the original record on appeal, and the supplemental record on appeal, respectively. The symbol "A." designates the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

On August 10, 1987, an information was filed charging Timothy Lippman with three counts of capital sexual battery. (R. 1-3A). He pled not guilty. (R. 4).

Probation Imposed Pursuant to Negotiated Nolo Plea

On September 22, 1987, in a proceeding before Circuit Court Judge Mario Goderich, the defendant entered a negotiated plea of nolo contendere to reduced charges of attempted capital sexual battery. (T. 1-7).

The plea was given in exchange for a withholding of adjudication and a sentence of two years probation, with a condition of psychiatric treatment. (T. 2). The state announced at that time that these would be the only conditions of the plea. (T. 2). The reason for the reduced charge and sentence was that the family of the victim, who was the defendant's younger brother, was not cooperating with the prosecution. (R. 20; T. 2, 41). During the plea colloquy, the defendant informed the court that he lived at his parents' house. (T. 3).[1]

The court accepted the plea, withheld adjudication, and imposed probation in accordance with the negotiated terms. (R. 18-19; T. 4-6). The only special conditions of probation were that the defendant receive psychiatric treatment and that he be permitted to transfer his probation supervision to Mississippi or

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[1]The defendant is one of five children adopted by the Lippmans. The Lippmans also have one natural son. (T. 3, 65, 77, 87, 92, 95).

Georgia. (R. 19).[2]

State Asks Court to Find Violation of Probation

On May 4, 1988, the defendant was brought before Circuit Court Judge Federico Moreno, on charges that he had violated his probation by not complying with his probation supervisor's instructions to resign from his volunteer job at the Florida City Police Department and to remove police department decals from his vehicle, and by committing the offenses of impersonating a police officer, unlawful use of radio equipment, and loitering and prowling. (R. 21; T. 8-18, 34). The defendant denied the allegations. (T. 11).

The defendant was a security guard. (T. 10). His employer informed the court that when the defendant was picked up by the police he was on a job-related errand, getting a piece of radio equipment for his employer. (T. 12). The court set the case for a hearing, but noted that the defendant did not appear to be in violation of the terms of his probation. (T. 15, 16). The court stated:

> The charge is very, very serious originally, but I wasn't involved in that. Now, I'm involved in allegations of violation of probation which are not serious, in fact, based on the evidence before me, I don't think I can find him in violation of anything.

(T. 16).

On May 20, 1988, the date set for hearing, the case came

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[2]The possibility of a transfer of supervision was included at the defendant's request; it was accepted by the state because such transfer would still require a court order. (T. 5-6).

before Judge Thomas Carney, who was sitting in for Judge Moreno. A representative of the Department of Corrections recommended that the probation be modified to include (1) that Mr. Lippman successfully complete the Mentally Disordered Sex Offender Program in which he was already participating although it was not a special condition of his probation[3], (2) that he have no contact with the victim, and (3) that he give up his job as a security officer. (T. 23). Judge Carney continued the hearing to May 24, 1988, so that the matter could be handled by Judge Moreno, who was more familiar with the case. (T. 24).

On May 24, 1988, Judge Moreno dismissed the affidavit of violation of probation because the probation officer was not present, and the state presented no evidence. (T. 26-30).

Court Finds No Violation, but Extends Probation and Adds Conditions.

On May 26, 1988, in another proceeding before Judge Moreno, the probation officer refiled the same affidavit which had been dismissed two days before. (R. 21; T. 34). However, the court stated that it would not violate the defendant based on the allegations in the affidavit (T. 34-39), and the defendant rejected the state's suggestion that he plead guilty so that "we can work it out." (T. 38). The court suggested that the proper course would be to modify probation, in order to "tell [the defendant] what he should not do" (T. 36), and to "have him under control." (T. 39).

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[3]The order of probation imposed a condition that the defendant undergo psychiatric treatment, but did not require him to complete the Division of Mental Health's MDSO program. (R. 19).

The state then withdrew its affidavit and orally moved to modify the probation to add five years, require completion and payment of a Mentally Disordered Sex Offender program, prohibit any police-type work or any job in which a police-type uniform is worn, and prohibit contact with the defendant's immediate family until they joined a program for family counseling. (T. 40-41).

The new conditions were suggested in a letter from the defendant's therapist which the probation officer presented to the court. (T. 35, 39, 40, 42). The letter indicated that the defendant "need[ed] to work harder in his sex offender therapy program and ... to be more honest about his MDSO problems," but did not state that the defendant was in violation of the treatment condition. (S.R. 41). Although not formally introduced into evidence, the letter was shown to the defendant and his counsel at the proceeding. The therapist was not present at the proceeding, and no testimony was presented. (T. 34-48).

Defense counsel objected that the defendant earned his living as a security guard and should not be denied his livelihood. (T. 42). The court replied that, to protect the children, the defendant should not appear to be in a position of authority. (T. 42-43).

Defense counsel then asked if there was any basis for adding five years to the term of probation. (T. 43). The court said that it appeared that the defendant was not doing as well as he should in the treatment program, and then explained that the new conditions were reasonable because the defendant could have

received a life sentence. (T. 43). The court stated:

> I didn't place you on probation; the previous Judge did and he did the right thing as all judges always do. But this is the type of case where I happen to agree whole heartily.
>
> I think it was reduced originally from a life sentence. I don't see any harm in modifying the probation with those conditions. This probation has restrictions. It's better than going to jail. It means that your life is limited. It means that there are a lot of things that you cannot do. One of the things you have to do is go to see Dr. Samek religiously.

(T. 43).

Mr. Lippman protested that he had indeed been complying with the requirements of the treatment program. (T. 44). The court agreed, stating that it was for that reason that the court would not have found him to be in violation of probation. (T. 44). The court explained:

> THE COURT: That's why I am not going to throw you in jail and that's why I wasn't going to violate you on the affidavit. But you are going to have to find another job. You didn't know that before. Now you know.
>
> THE DEFENDANT: She [the probation officer] never gave me a problem with it before and all of a sudden --
>
> THE COURT: That's why I am not throwing you in jail. You are right. You didn't know it before and that's the reason I am not doing it. But now I am adding that as a condition. It's only fair. You are going to have to find another job. That does not -- you cannot be a teacher. You cannot be a police officer. You cannot be a minister or be in the employment where you would have control over children. You just cannot. When your probation is over, if you get treatment, you will be an absolutely free man.

(T. 44).

The defendant's mother brought to the court's attention that the no-contact condition would impose a financial burden on the defendant because he could no longer stay at his parent's home, and asked how he was going to pay his rent. (T. 46). The court replied that he would have to find another job. (T. 46). The court then explained the no-contact condition as follows:

> Let me run this by: Any minor relative, any minor children for any reason he cannot see.
>
> Who is his mother and father? You look young.
>
> He can see you but not in the presence of children. It's hardship; absolutely. It's necessary; absolutely.
>
> If he violates it he is going to jail, just by seeing them, even if he doesn't touch them. Understood?
>
> Okay, Mr. Lippman, do what your probation officer tells you.

(T. 47-48).

The court ordered that the probation be extended by five years, and be further modified by adding the following conditions:

> 1) That he participate in, pay for, and successfully complete the MDSO Program with Dr. William Samek.
>
> 2) That he not hold any jobs or participate in any programs where he would be wearing a police type uniform or use any police type equipment (e.g. security guard, fireman, rescue worker, civil defense, crime watch, neighborhood watch, etc.)
>
> 3) That he have no contact (written or

> telephonic) with any minor children, including minor relatives unless approved by his therapists, his sibling's therapist, and his Probation Officer.

(R. 22).

Probation Revoked Based on Violation of New Condition

The order modifying probation was entered on May 26, 1988. (R. 22). Nearly seven months later, on December 14, 1988, the defendant's probation was revoked based on a finding that he had violated the added no-contact condition by being at his parent's house on some day in June of 1988. (R. 32; T. 113-115).

At the revocation hearing, the victim's grandmother, Hilda Nerone, and her adult daughter, Nisaint Nerone, testified that while they were visiting the home of the defendant's parents on a Saturday afternoon, they saw the defendant come to the phone. (T. 61-69, 75-78). There were several children at the house; some of the children came with the Nerones, others arrived with the defendant's parents. (T. 62, 64-65, 76-78). There was no testimony that the defendant had been seen by the children, or had seen them, or was otherwise in their presence. However, the court interpreted the no-contact condition to mean that the defendant could not be at his parents' house when children were there, whether or not he was actually in their presence, and found the defendant guilty of violating his probation. (T. 113-15).[4] The court revoked the probation, adjudicated the defendant guilty of

[4]The defendant and his parents testified that he had not been at the house at any time after the modification order. (T. 88, 96, 102).

the underlying offenses, and sentenced him to twelve years in prison. (R. 25, 27).

The defendant appealed on the ground that the court's finding of a violation of probation was not supported by the evidence.[5] The Third District Court of Appeal affirmed the judgment and sentence, on February 20, 1990, in a per curiam decision without written opinion. Lippman v. State, 559 So.2d 1148 (Fla. 3d DCA 1990).

Denial of Post-Conviction Relief

On April 4, 1990, the defendant filed a motion for post-conviction relief, under Rule 3.850 of the Florida Rules of Criminal Procedure, claiming that the revocation of his probation, and, consequently, the conviction and sentence imposed pursuant to that revocation, were unauthorized and unlawful because the revocation was based on the violation of a special condition which the court added to the original terms of probation without statutory authority to do so and in violation of the guarantee against double jeopardy. (S.R. 21-36).

The court denied the motion on April 19, 1990, after a nonevidentiary hearing. (S.R. 8-20, 37-40). The defendant appealed.

On February 25, 1992, the Third District Court of Appeal affirmed the order denying post-conviction relief. Lippman v.

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[5]After the initial brief had been filed, and the case set for oral argument, the defendant moved in the district court of appeal for leave to file a supplemental brief raising the additional issue that subsequently became the post-conviction claim. The motion was denied. (S.R. 12-13).

State, 17 F.L.W. 569 (Fla. 3d DCA Feb. 25, 1992). (A. 1-10). The court held (1) that "the trial court had the statutory authority to add the proscription against contact by the defendant with the minor victim and minor siblings," (2) that the order adding the no-contact condition did not violate the guarantee against double jeopardy because it was a supervisory protective order, "not a new, additional, or enhanced punishment within the meaning of the double jeopardy clause," and (3) that the no-contact condition could also be "fairly viewed as a modification of an existing probation condition rather than the imposition of a new condition." Id. at 570. (A. 7-10).

The court certified that it had passed on two questions of great public importance:

> 1. Whether an order modifying probation by prohibiting contact between probationer and victim or victim's minor siblings (for the purpose of protecting the victim and siblings) constitutes an additional punishment proscribed by the double jeopardy clause?
>
> 2. Where a probationer is undergoing psychiatric treatment for a sexual offense as a condition of probation, does a probation modification order prohibiting contact between probationer and victim or victim's minor siblings constitute a modification of an existing probation condition or an additional punishment proscribed by the double jeopardy clause?

Id. at 571. (A. 10).

This petition for discretionary review follows.

QUESTION PRESENTED

WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE, THE ORDER WHICH ADDED THE CONDITION PROHIBITING CONTACT WITH THE DEFENDANT'S MINOR RELATIVES CONSTITUTED BOTH A SEVERE NEW RESTRICTION UPON HIS FREEDOM, AND A NEW PUNISHMENT WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE, AND, IN ENTERING THAT ORDER, THE COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED THE DEFENDANT'S LEGITIMATE EXPECTATION OF FINALITY IN THE SEVERITY OF HIS SENTENCE.

SUMMARY OF ARGUMENT

Petitioner entered a negotiated plea of nolo contendere to three counts of attempted capital sexual battery, in return for a withholding of adjudication and a sentence of two years probation with a condition that he undergo psychiatric treatment. Eight months later, a different judge granted the state's oral motion to triple the term and to add new special conditions, including a condition which deprived the defendant of his job, and a condition prohibiting contact with minor relatives. The no-contact condition prevented the defendant from being at his parents' home, where he had been living when probation was originally imposed, eight months before. This change in the terms of probation was effected without any finding that the defendant had done anything to violate the terms of his existing probation. Seven months later, probation was revoked based on a finding that the defendant had violated the no-contact condition by being at his parents home on one occasion within the month following modification. He was sentenced to twelve years in prison and adjudicated guilty of the underlying offenses. The Third District Court of Appeal affirmed the denial of post-conviction relief, certifying that it had passed on two questions of great public importance:

> 1. Whether an order modifying probation by prohibiting contact between probationer and victim or victim's minor siblings (for the purpose of protecting the victim and siblings) constitutes an additional punishment proscribed by the double jeopardy clause?
>
> 2. Where a probationer is undergoing psychiatric treatment for a sexual offense as a condition of probation, does a probation

> modification order prohibiting contact between probationer and victim or victim's minor siblings constitute a modification of an existing probation condition or an additional punishment proscribed by the double jeopardy clause?

Lippman v. State, 17 F.L.W. 569, 571 (Fla. 3d DCA Feb. 25, 1992).

The answer to the first certified question must be that an order placing a restriction upon a defendant's freedom as a condition of probation is a sentencing order, and constitutes punishment for purposes of the double jeopardy clause, regardless of its immediately protective or rehabilitative purpose. Because the no-contact condition was a sentence, it constituted a penalty, within the meaning of the double jeopardy clause, even if imposed for the purpose of protecting the defendant's minor relatives.

Moreover, under the circumstances of this case, where the no-contact condition was added at the same time as a condition which deprived the indigent defendant of his livelihood, it could only be considered an increase in the severity of his sentence. After entering his negotiated plea, and serving eight months of probation without any mention of the possibility of such conditions, the defendant had a constitutionally-protected legitimate expectation that the severity of his probation would not be enhanced in this manner, absent misconduct on his part. The answer to the second certified question must be that, under the circumstances of this case, that legitimate expectation was not undermined by the existence of a condition of psychiatric treatment, and, the court's order constituted an enhancement of sentence, not merely a modification of an existing order of probation.

In Florida, a judge does not have the authority to enhance the terms of probation, by adding new conditions, without a formal charge that the original conditions have been violated, and without proof of the charged violation of probation. In view of the guarantee of due process of law, this jurisdictional limitation upon the power to alter a sentence of probation gives rise to a legitimate expectation that, once probation has begun to be served, the severity of its terms will not be enhanced, in the absence of misconduct on the part of the probationer. The guarantee of due process, and elementary notions of fair dealing, also give rise to a similar expectation that, where, as here, the probation was imposed as the result of a negotiated plea, and the probationer relied on the bargain to his detriment by entering the plea and beginning to serve his sentence, the conditions of probation will not be unilaterally enhanced, so long as he abides by its terms. Those legitimate expectations of finality are protected by the constitutional guarantee against double jeopardy.

Here, by adding substantial new restrictions upon the defendant's freedom, without a prior finding that he had violated his probation, the sentencing judge exceeded his statutory authority, and placed the defendant in double jeopardy. Because the modification was illegal, the revocation based on a violation of one of the illegally-imposed conditions, and the subsequent adjudication of guilt and imposition of sentence, were illegal as well. The district court of appeal's decision must be reversed, and the judgment and sentence vacated.

ARGUMENT

UNDER THE CIRCUMSTANCES OF THIS CASE, THE ORDER WHICH ADDED THE CONDITION PROHIBITING CONTACT WITH THE DEFENDANT'S MINOR RELATIVES CONSTITUTED BOTH A SEVERE NEW RESTRICTION UPON HIS FREEDOM, AND A NEW PUNISHMENT WITHIN THE MEANING OF THE DOUBLE JEOPARDY CLAUSE, AND, IN ENTERING THAT ORDER, THE COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED THE DEFENDANT'S LEGITIMATE EXPECTATION OF FINALITY IN THE SEVERITY OF HIS SENTENCE.

The petitioner, Timothy Bryan Lippman, was placed on two-year's probation, with a withhold of adjudication, in exchange for his negotiated plea of nolo contendere. (R. 18-19; T. 2, 4-6). Eight months after Mr. Lippman began serving his sentence, a different judge tripled the period of probation and added new conditions. (R. 22; T. 34-48). This was done at the state's request, and without any finding, or proof, that he had violated the conditions of his probation, or had otherwise engaged in any misconduct. Seven months later, probation was revoked based on a finding that, on one occasion within the month following modification, Mr. Lippman had violated one of the new conditions. (R. 32; T. 113-15). He was sentenced to twelve years in prison and adjudicated guilty of the underlying offenses. (R. 25, 27).

The case is before this Court upon a petition for discretionary review of the Third District Court of Appeal's decision affirming the denial of the defendant's motion for post-conviction relief. Lippman v. State, 17 F.L.W. 569 (Fla. 3d DCA Feb. 25, 1992). (A. 1-10).

The jurisdiction of this Court is invoked based upon the district court's certification that it had passed on two questions

of great public importance:

> 1. Whether an order modifying probation by prohibiting contact between probationer and victim or victim's minor siblings (for the purpose of protecting the victim and siblings) constitutes an additional punishment proscribed by the double jeopardy clause?
>
> 2. Where a probationer is undergoing psychiatric treatment for a sexual offense as a condition of probation, does a probation modification order prohibiting contact between probationer and victim or victim's minor siblings constitute a modification of an existing probation condition or an additional punishment proscribed by the double jeopardy clause?

Lippman v. State, 17 F.L.W. at 571. (A. 3).

As set forth below, the answer to the first certified question must be that an order placing a restriction upon a defendant's freedom as a condition of probation is a sentencing order, and constitutes punishment for purposes of the double jeopardy clause, regardless of its immediately protective or rehabilitative purpose. The answer to the second certified question must be that, under the circumstances of this case, adding a no-contact condition constituted a severe enhancement of the terms of probation, contrary to the defendant's legitimate expectation. The defendant had a constitutionally-guaranteed right to expect that the terms of the probation which he had begun to serve under the conditions of the plea bargain would not be unilaterally enhanced. By adding substantial new restrictions upon the defendant's freedom, without a prior finding that he had violated his probation, the sentencing judge exceeded his authority, placed the defendant in double jeopardy, and denied him the most elementary fair dealing.

The authority to increase the severity of the terms of probation has both jurisdictional and constitutional limits. A court's ability to increase the severity of probation is limited by the provisions of section 948.06, Florida Statutes, and by the protection which the double jeopardy clause affords to a probationer's legitimate expectations of finality in the terms of a probation which he has begun to serve.

In Florida, a judge does not have the authority to enhance the terms of probation, by adding new conditions, without a formal charge that the original conditions have been violated, and without proof of the charged violation of probation. Clark v. State, 579 So.2d 109, 110 (Fla. 1991); Rock v. State, 584 So.2d 1110 (Fla. 1st DCA 1991); Weidmann v. State, 582 So.2d 1251 (Fla. 2d DCA 1991). See also Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989); Dover v. State, 558 So.2d 101 (Fla. 1st DCA 1990); Brenatelli v. State, 555 So.2d 1315 (Fla. 5th DCA 1990); Carmo v. State, 378 So.2d 850 (Fla. 4th DCA 1979). As this Court held in Clark,

> Section 948.06, Florida Statutes (1987), provides the sole means by which the court may place additional terms on a previously entered order of probation or community control. Before probation or community control may be enhanced, either by extension of the period or by addition of terms, a violation of probation or community control must be formally charged and the probationer must be brought before the court and advised of the charge following the procedures of section 948.06. Absent proof of a violation, the court cannot change an order of probation or community control by enhancing the terms thereof, even if the defendant has agreed in writing with his probation officer to allow such a modification and has waived notice and hearing.

Clark v. State, 579 So.2d at 110-111.

This jurisdictional limitation upon the power to alter a sentence of probation gives rise to a legitimate expectation that, once probation has begun to be served, the severity of its terms will not be enhanced, in the absence of misconduct on the part of the probationer. That legitimate expectation of finality is protected by the constitutional guarantee against double jeopardy.

The double jeopardy clause not only bars multiple punishment, i.e. punishment in excess of that permitted by law, it also protects a defendant's legitimate expectations of finality in the severity of his sentence. Goene v. State, 577 So.2d 1306, 1308 (Fla. 1991), interpreting United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 437-38, 66 L.Ed.2d 328 (1980)). Accord United States v. Fogel, 829 F.2d 77, 87-90 (D.C. Cir. 1987); United States v. Earley, 816 F.2d 1428, 1432 (10th Cir. 1987) (en banc); United States v. Jones, 722 F.2d 632, 638-39 (11th Cir. 1983). This protection of a defendant's expectation of finality follows from the underlying purpose of the double jeopardy clause, which is to protect those accused of crime from repeated embarrassment, expense, anxiety, and insecurity. Goene at 1308, citing Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223-24, 2 L.Ed. 2d 199 (1957); Fogel, 829 F.2d at 88. As stated in Fogel,

> [I]f a court can increase a defendant's sentence after service has begun, for any reason, or for no reason at all, then the interest in protecting a defendant from being compelled to live in a continuing state of anxiety is lost. This anxiety would seem to be the same as, or akin to, that which would follow from the knowledge that a defendant can

> be tried again. In each case, the underlying fear is that the defendant will receive punishment in addition to that which he had already received.

Fogel, 829 F.2d at 88.

The existence of a legitimate expectation of finality, and the point at which it becomes constitutionally protected, may depend on the statutory provisions which govern sentencing. See DiFrancesco, 449 U.S. at 139, 101 S.Ct. at 438. However, as a general rule, once a defendant has begun to serve a lawful sentence, jeopardy has attached, and the court may no longer alter that sentence in a manner prejudicial to the defendant, see Goene at 1308; Troupe v. Rowe, 283 So.2d 857 (Fla. 1973); United States v. Earley, 816 F.2d at 1432; Fogel, 829 F.2d at 87-90; Jones, 722 F.2d at 638-39.

The same constitutional protection is accorded to a defendant who is serving a term of probation. Probation is a sentence, Larson v. State, 572 So.2d 1368 (Fla. 1991), and constitutes punishment for purposes of applying the constitutional guarantee against double jeopardy, Kennick v. Superior Court of the State of California, County of Los Angeles, 736 F.2d 1277, 1281 (9th Cir. 1984); United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977); Oksanen v. United States, 362 F.2d 74 (8th Cir. 1966). Thus, in accordance with the general rule, the double jeopardy clause protects a probationer's legitimate expectations of finality in the severity of the terms of the probation that he has begun to serve. Fogel, 829 F.2d at 88; Jones, 722 F.2d at 638-39; Bynoe, 562 F.2d at 128. See Westover v. State, 521 So.2d 344, 345 (Fla. 2d DCA

1988); Anderson v. State, 444 So.2d 1109 (Fla. 3d DCA 1984); Nickens v. State, 547 So.2d 1289 (Fla. 4th DCA 1989).

A probationer's legitimate expectations of finality extend not only to the length of the probation which he must serve, e.g. Westover, but also to the nature and severity of the restrictions imposed upon his liberty, see, e.g., Anderson v. State, 444 So.2d 1109 (Fla. 3d DCA 1984) (adding no-gambling condition which deprived defendant of livelihood and was without record basis placed defendant in double jeopardy); Nickens v. State, 547 So.2d 1289 (Fla. 4th DCA 1989) (where trial court interpreted condition prohibiting sexual offender from residing in former neighborhood where his victims lived, as prohibiting all entry into neighborhood, this more restrictive interpretation was in effect the addition of a new special condition and violated guarantee against double jeopardy).

At a minimum, the constitutional guarantee of due process of law entitles a probationer to expect that the terms of his probation will only be altered in accordance with the provisions of law. Because a court has no authority to enhance the terms of probation without finding a violation of probation, a probationer has a legitimate expectation that the severity of his probation will not be increased, absent some antecedent misconduct on his part, such as a violation of probation. See Clark v. State, 579 So.2d 109, 110 (Fla. 1991); Rock v. State, 584 So.2d 1110 (Fla. 1st DCA 1991); Weidmann v. State, 582 So.2d 1251 (Fla. 2d DCA 1991). See also Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989);

Dover v. State, 558 So.2d 101 (Fla. 1st DCA 1990); Brenatelli v. State, 555 So.2d 1315 (Fla. 5th DCA 1990); Carmo v. State, 378 So.2d 850 (Fla. 4th DCA 1979).

In addition, where, as here, the probation was imposed as the result of a negotiated plea, and the probationer relied on the bargain to his detriment by entering the plea and beginning to serve his sentence, the requirement of due process of law, and elementary notions of fair dealing, give rise to a legitimate expectation that the conditions of probation will not be unilaterally enhanced, so long as he abides by its terms. See Woods v. Angel, 556 So.2d 820, 821 n. 1 (Fla. 5th DCA 1990); Carrandi v. State, 560 So.2d 245 (Fla. 3d DCA 1990); Carmo v. State, 378 So.2d 850 (Fla. 4th DCA 1979).

In short, a probationer can legitimately expect that the government will be bound by the law and by its word. Once a defendant has begun to serve a sentence of probation imposed in accordance with a negotiated plea, he is guaranteed by statute, by the double jeopardy clause, by the due process clause, and by elementary considerations of fair dealing, that the restrictions upon his liberty will not be made more onerous, as long as he complies with the conditions originally imposed.

In this case, the court added new, more restrictive conditions to the defendant's probation without complying with the requirements of section 948.06, Florida Statutes. This enhancement of the terms of probation exceeded the court's authority under the statute, denied him the most elementary fair dealing, and violated

his legitimate expectations of finality in the severity of his sentence.

Mr. Lippman entered a negotiated plea of nolo contendere to three counts of attempted capital sexual battery, in return for a withholding of adjudication and a sentence of two years probation with a condition that he undergo psychiatric treatment. (T. 1-7). The prosecutor announced in open court that these were "the entire conditions of the plea in this case." (T. 2).

Eight months after the defendant had begun serving the probation imposed under the plea bargain, the court granted the state's oral motion to triple the term and to add new special conditions. (R. 22; T. 34-48).

This change in the terms of probation was effected without any finding that the defendant had done anything to violate the terms of his existing probation. Indeed, the court expressly recognized that there was nothing before it which would justify such a finding (T. 34-38, 43-44). The court agreed with the defendant's assertion that he was complying with the condition of psychiatric treatment, stating, "That's why I am not going to throw you in jail and that's why I wasn't going to violate you on the affidavit." (T. 44). Because there was neither a finding, nor a basis for finding a violation of the original terms of probation, adding the new conditions was an unauthorized enhancement of the defendant's probation, Clark; Weidmann; Rock, and placed the defendant in double jeopardy.

The modification order increased the probationary term from

two to seven years, and added three special conditions:

> 1) That he participate in, pay for, and successfully complete the MDSO Program with Dr. William Samek.
>
> 2) That he not hold any jobs or participate in any programs where he would be wearing a police type uniform or use any police type equipment (e.g. security guard, fireman, rescue worker, civil defense, crime watch, neighborhood watch, etc.)
>
> 3) That he have no contact (written or telephonic) with any minor children, including minor relatives unless approved by his therapists, his sibling's therapist, and his Probation Officer.

(R. 22).

The order increased the severity of the defendant's sentence not only by its addition of five years to the probationary period, see, e.g., Fogel; Westover, but also by the addition of conditions which deprived the defendant of his job while simultaneously cutting him off from his family.

The second special condition meant that the defendant would have to give up his job, and could not hold a similar job in the future. A condition of probation which deprives the defendant of his livelihood is clearly a "penalty" for purposes of the double jeopardy clause. See Anderson v. State, 444 So.2d 1109 (Fla. 3d DCA 1984) (adding no-gambling condition which deprived defendant of livelihood and was without record basis placed defendant in double jeopardy).

The third special condition, which was ultimately the basis

for revoking probation, meant that he could not stay at his parents' home, where he had been living at the time probation was imposed. (T. 3). Indeed, as interpreted by the trial court (seven months after the modification order, on the occasion of revoking probation), this condition meant that the defendant could not even visit his parents' home at any time when children were also there, regardless of whether he was ever actually in the children's presence. (T. 113-14).

Because this new restriction on the defendant's freedom was imposed under an order of probation, it constituted a sentence, and a "penalty" within the meaning of the double jeopardy clause. The answer to the district court of appeal's first certified question must be that an order modifying probation by prohibiting contact between the defendant and his minor relatives constitutes an additional punishment proscribed by the double jeopardy clause, even though the purpose of the order is the protection of those minor relatives.

Probation is a "sentence." Larson v. State, 572 So.2d 1368, 1370 (Fla. 1991). As such, it is, by definition, a judgment imposing punishment for the commission of a crime. Florida Rule of Criminal Procedure 3.700(a) provides:

> The term sentence means the pronouncement by the Court of the penalty imposed upon a defendant for the offense of which he has been adjudged guilty.

The term is similarly defined in Black's Law Dictionary 1222 (5th ed. 1979):

> **Sentence** The judgment formally

> pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted. Judgment formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to this meaning.

The primary purpose of sentencing is punishment. See Fla. R. Crim. P. 3.701(b)(2) ("The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.")

Accordingly, the restrictions upon the defendant's freedom imposed by an order of probation constitute punishment, for purposes of the double jeopardy clause, regardless of the rehabilitative, protective or remedial goals they serve. Kennick v. Superior Court of the State of California, County of Los Angeles, 736 F.2d 1277, 1281-82 (9th Cir. 1984) (even though probation is intended as a rehabilitative measure, a probation order unquestionably imposes legal penalties, albeit mild ones, and constitutes punishment within the meaning of the double jeopardy clause). See also Breed v. Jones, 421 U.S. 519, 530 n. 12, 95 S.Ct. 1779, 1786 n. 12, 44 L.Ed.2d 346 (1975) ("'The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken.'"), quoting Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973), cert. denied, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975); Korematsu v. United States, 319 U.S. 432, 435, 63 S.Ct. 1124, 1126, 87 L.Ed. 1497 (1943) ("[a] probation order is 'an authorized mode of mild and ambulatory punishment, the

probation being intended as a reforming discipline.'"), quoting Cooper v. United States, 91 F.2d 195 (5th Cir. 1937).

In this case, the prohibition against contact with minor relatives was an additional restriction upon the defendant's freedom, and was imposed under an order of probation, that is, under a sentencing order. See Larson at 1370 (probation is a sentence). Accordingly, it was both a "penalty" for purposes of the double jeopardy clause, see Kennick, 736 F.2d at 1281-82; Nickens v. State, 547 So.2d 1289 (Fla. 4th DCA 1989), and an enhancement of the terms of probation requiring compliance with the procedures of section 948.06, Florida Statutes, see Brenatelli v. State, 555 So.2d 1315 (Fla. 5th DCA 1990).[6]

The district court of appeal's holding to the contrary is based on an analysis which fails to take into account the fact that, whatever else it might be, an order of probation is a sentence. In the district court's opinion, the order imposing the no-contact requirement was merely a supervisory order intended to protect the defendant's minor relatives, and, because it was not intended by the judge as a sanction, the no-contact condition was neither a "penalty" for purposes of the double jeopardy clause, nor an enhancement of the terms of probation for purposes of applying the requirements of section 948.06, Florida Statutes. See Lippman, 17 F.L.W. at 570. (A. 8-9). In the district court's

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[6]See also Ayala v. State, 585 So.2d 483 (Fla. 2d DCA 1991) (adding three months of probation and condition of no contact with victim to original sentence of six months incarceration violated double jeopardy clause).

words,

> It is self-evident that the order prohibiting contact with the minor victim and minor victim's siblings is not a new, additional, or enhanced punishment within the meaning of the double jeopardy clause. It is a supervisory order entered for the protection of the victim and victim's siblings. It was plainly not imposed as a sanction but on the contrary to safeguard those in need of protection. A provision of a modification order which protects a victim from contact by a probationer is not a penalty for purposes of double jeopardy analysis and is not prohibited by the double jeopardy clause.

Lippman, 17 F.L.W. at 570. (A. 8-9).

The district court's analysis fails to consider the crucial fact that the substantial restriction upon the defendant's liberty imposed by the order in question was in fact a condition of probation, and was therefore part of a sentence. The order imposing that condition was not merely protective or supervisory, it was a sentencing order, rendered pursuant to the court's sentencing function. As such, this new, judicially-imposed restriction on the defendant's freedom was essentially a punishment inflicted for the commission of a crime, regardless of the immediate protective, rehabilitative, or remedial goal which the court may have had in imposing it. See Kennick, 736 F.2d at 1281-82. See also Fla. R. Crim. P. 3.700(a), 3.701(b)(2); Breed v. Jones, 421 U.S. at 530 n. 12, 95 S.Ct. at 1786 n. 12.

Acceptance of the district court's suggestion that the judge's immediate purpose for imposing a condition should determine whether that condition increases the severity of the sentence, would render meaningless the provisions of section 948.06, Florida Statutes, and

would exempt virtually all modifications of probation from the requirements of the double jeopardy clause. After all, every condition of probation, like probation itself, is required to serve the purpose of rehabilitating the defendant or protecting the public. See Coulson v. State, 342 So.2d 1042 (Fla. 1977). In this case, the extension of the probationary term by five years, the no-contact condition, and the condition depriving the defendant of his job, were all recommended by the defendant's therapist, and were all surely intended to contribute to the defendant's rehabilitation. The condition which deprived the defendant of his job as a security guard, and prevented him from holding any remotely-similar job in the future, also had the same protective purpose as the no-contact condition; it, too, was imposed in order "to protect the children." (T. 42). No principled distinction can be made between these conditions, or between the no-contact condition imposed in this case and the similar conditions considered in Nickens and Brenatelli, based on whether the sentencing judge had a rehabilitative or protective purpose in mind when he imposed the new condition. Conditions of probation, if they are valid, are generally imposed for a rehabilitative or protective purpose. They are all, nevertheless, judicially-mandated limitations upon liberty, imposed under an order sentencing the defendant for the commission of a crime. They are all, therefore, essentially "punitive," for purposes of applying the double jeopardy clause, and of triggering the requirements of section 948.06, Florida Statutes.

In addition, the district court's analysis completely ignores the actual circumstances in which the no-contact condition was imposed, and the "punitive" effect which that condition had under those circumstances. When the state hauled the defendant into court for the purpose of revoking or "modifying" his probation, the defendant, though indigent, had both a job and a place to stay. When he emerged from the courtroom, he was not only out of a job, he was subject to a no-contact condition which prohibited him from staying with his parents while he contemplated how he was going to earn a living. This created an obvious problem. In the words of the defendant's mother: "He can't be with other children, so he can't be at home. How does he pay his rent?" (T. 46). The court acknowledged that, under the circumstances, the no-contact condition was "hardship; absolutely" (T. 47), but had no solution to suggest to this judicially-created dilemma. Adding the no-contact condition under these circumstances, and in this manner, imposed a severe burden upon the defendant and can only be considered as an increase in the severity of the sentence.

The district court's opinion also suggests, however, that the defendant could have had no legitimate expectation that a no-contact condition would not be added to his probation, because he was undergoing psychiatric treatment for a sexual offense as a condition of probation. According to the district court, the no-contact condition is fairly viewed as a modification of the existing probation condition of psychiatric treatment, rather than as the imposition of a new condition. Lippman, 17 F.L.W. at 570.

(A. 9-10). The second certified question asks whether that should always be the case where a probationer is undergoing psychiatric treatment for a sexual offense as a condition of probation. The answer should be no, not always. Where, as here, the circumstances give rise to a legitimate expectation that the severity of the sentence would not be enhanced in this way, adding the condition contrary to that expectation is a violation of the guarantee against double jeopardy.

The fact that a treatment program imposed as a condition of probation is a sentence implies certain limits on the court's power to transform a therapist's treatment recommendations into mandatory requirements of probation. If the recommended modification entails a further restriction of the defendant's freedom, the fact that the therapist thinks it is a good idea is not conclusive: The question remains whether, under the circumstances, the defendant had a legitimate expectation that such a new restriction would not be imposed.

Whatever might be true in other cases, the record in this case demonstrates that the defendant did not know, and could not reasonably be expected to know, that the condition of psychiatric treatment entailed a possible no-contact requirement. Neither at the time that the probation was imposed--in exchange for the defendant's plea of nolo contendere--nor at any time during the subsequent eight months, was any mention made of such a requirement. During this period, the treatment condition required weekly attendance at therapy sessions, but did not include the

provisions, later added at the therapist's suggestion, that the defendant be required to stay out of his parents' home, give up his job as a security guard, and submit to five more years of treatment. As the trial court expressly recognized, at the time it modified the probation, these were all entirely new conditions, previously unknown to the defendant. (T. 36, 44).

They were also conditions which, under the circumstances, he could not reasonably be expected to anticipate would be added under the condition of treatment. To the contrary, since they had not been mentioned at the time of original sentencing, or during the subsequent eight months, the defendant could legitimately expect that they were not going to be part of his probation.

The probation was originally imposed after an in-chambers consultation with a doctor, and after a plea colloquy in which the defendant informed the court that he was living at his parents' home. (T. 2-3). It was obvious that the defendant was counting on his parents' home as a place to stay--after all, that is where he was living--and that a no-contact condition, by making his residence in the home impossible, would impose a serious burden upon him. It was also clear that in entering his plea, under circumstances where the state was unable to go forward with the prosecution (R. 20; T. 2), the defendant must have considered whether he could comply with the terms of the probation offered to him, or whether he was essentially pleading himself into prison. Moreover, the nature of the crime, the identity of the victim, and the fact that the defendant's other minor siblings lived at the

parents' home, were all circumstances which were known to the court and to the state at that time. If the no-contact condition which prevented him from being at his parents' home were part of the condition of treatment, surely that fact would have been mentioned at that time, or very shortly thereafter. But, in fact, it was not mentioned then, or at any time during the initial eight months of probation.

Under these circumstances, it must be concluded that the reason such an important provision was not mentioned was because it was not part of the negotiated terms of probation. Elementary principles of fair dealing, and of due process, demand the conclusion that eight months after the defendant had detrimentally-relied upon the bargain by entering his plea and serving his probation, he was entitled to expect that his probation would not require him either to quit his job, or to stay away from his parents' home, or to serve an additional five years of probation. Having elected not to impose any limitation on the defendant's contact with his family at the time of the original sentence, the court lacked authority to do so eight months later. Brenatelli. By that time the defendant's expectations of finality had crystallized, and it was fundamentally unfair to defeat them, based only on a reevaluation of the same circumstances which had been before the court at the time of the original sentencing. See Woods v. Angel, 556 So.2d 820, 821 n. 1 (Fla. 5th DCA 1990); Carrandi v. State, 560 So.2d 245 (Fla. 3d DCA 1990); Carmo v. State, 378 So.2d

850 (Fla. 4th DCA 1979).[7]

Finally, assuming that the prohibition of the defendant's presence in his parents' home was as absolutely necessary as Judge Moreno believed it to be, and leaving aside the fact that the judge who had presided at the defendant's original sentencing had obviously come to a different conclusion regarding that necessity, the circumstances in which that condition was imposed unnecessarily enhanced the severity of the defendant's sentence beyond any reasonable expectation. The reason that the no-contact condition was burdensome, and severely restrictive of the defendant's freedom, was because it was added at the same time that the court was depriving the defendant of his livelihood, and because both conditions were to take effect immediately. There was no pressing need for this.

The trial court's explanation of why it was "fair" to extend the term, and impose the new conditions, reveals the fundamental misconception at the heart of this fundamentally unfair proceeding, namely, the view that a mentally disordered sex offender cannot have any legitimate expectations of finality in his sentence, or even any legitimate expectation of fair dealing, because probation

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[7]The fact that a different judge had imposed the original probation did not entitle the court to reweigh the circumstances which were before it when probation was originally imposed and to aggravate the probation based on those same circumstances. See Colvin v. State, 549 So.2d 1137 (Fla. 3d DCA 1989) (because of constitutional prohibition against double jeopardy, where community control which represented downward-departure sentence was subsequently revoked by a different judge, the second judge could not reconsider the facts which were before the original sentencing judge, and determine, based on those facts, that an upward departure was proper).

is much less than the punishment he truly deserves. The court did not attempt to justify the modification on the ground that the no-contact condition did not severely increase the sentence, or that it was simply a modification of the condition of psychiatric treatment. To the contrary, the court explicitly recognized that the modification was a "hardship" (T. 47), and added conditions which the defendant had no reason to believe were part of his probation (T. 36, 44). The reason that the modification was fair, according to the court, was that the defendant had originally been charged with a crime that carried a life sentence (T. 43), and which was so serious that "it's only because the supreme court says we can't put someone to death that we don't" (T. 45).

That asserted justification is not only erroneous[8], it ignores the fundamental fact that there are statutes and constitutional provisions which guarantee, even to a mentally disordered sex offender, the minimal requirements of fair dealing and due process of law, and the right not to twice be punished for the same offense. In acting to remedy what it considered to be a defect in the original sentence, the court was constitutionally-required to consider those rights. Its failure to do so was fundamental error.

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[8]The trial court was surely in error in believing that it could enhance the defendant's probation based solely on his having been charged with a more serious crime than the offense to which he pled nolo contendere. Cf. Padgett v. State, 497 So.2d 724, 725 n. 1 (Fla. 1st DCA 1986) (court may not rely upon facts surrounding charges which were dropped as part of a plea bargain as a basis for departure sentence). The defendant pled not guilty to the offense originally charged (R. 4), and the nature of the crime charged was one of the circumstances before the court at the time probation was originally imposed pursuant to the negotiated plea.

The defendant had a constitutionally-guaranteed right to expect that the terms of the probation which he had begun to serve under the conditions of the plea bargain would not be unilaterally enhanced. By adding substantial new restrictions upon the defendant's freedom, without a prior finding that he had violated his probation, the sentencing judge exceeded his statutory authority, and placed the defendant in double jeopardy. Because the modification was illegal, the revocation based on a violation of the illegally-imposed no-contact condition, and the subsequent adjudication of guilt and imposition of sentence were illegal as well. The decision of the district court of appeal must be reversed, and the judgment and sentence entered in this cause must be vacated. See Clark; Weidmann; Rock; Anderson; Nickens; Brenatelli; Carmo.

CONCLUSION

Based on the foregoing argument and authorities, the petitioner requests this Court to reverse the decision of the district court of appeal, and to direct that the judgment and sentence be vacated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, Criminal Division, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 29th day of April, 1992.

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