IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,182

DCA CASE NO. 92-373

ANTHONY ROBERTS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER

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INTRODUCTION

The petitioner, Anthony Roberts, was the defendant in the trial court, and the appellant in the district court of appeal. The respondent, The State of Florida, was the prosecution in the trial court, and the appellee in the district court. This brief refers to the parties as the "defendant" and the "state." The symbols "R." and "S.R." denote the record and supplemental record on appeal. The symbol "A." denotes the appendix to this brief, consisting of the opinion of the district court of appeal.

STATEMENT OF THE CASE AND FACTS

On November 20, 1989, the defendant was charged by information with the second-degree felony of sale of cocaine. (Circuit Court Case No. 89-2314). (R. 5). He was convicted after a jury trial. (R. 19). On February 28, 1990, the court adjudicated him guilty, and sentenced him to a term of four years in prison, to be followed by six years probation. (R. 22-23, 25-30). The Third District Court of Appeal affirmed on August 14, 1990. (R. 40); *Roberts v. State*, 565 So. 2d 1359 (Fla. 3d DCA 1990).

On March 8, 1991, an affidavit of violation of probation was filed, alleging that the defendant had been arrested for the offenses of possession of cocaine with intent to distribute, and possession of marijuana. (R. 41).

A violation hearing was held on June 18, 1991, simultaneously with a jury trial on the new substantive offenses alleged in the affidavit of violation of probation. The jury found the defendant guilty of attempted possession of cocaine, and the court

adjudicated him guilty of that offense. (Circuit Court Case Number 91-286). The court then revoked probation in this case (Circuit Court Case Number 89-2314). (R. 51-52, 54).

The defendant was sentenced for the original offense based on a new sentencing guidelines scoresheet which included prior convictions that had not been scored when the defendant was originally placed on probation. (R. 53; S.R. 11-13). Defense counsel objected that the new scoresheet included additional prior convictions which "dramatically" increased the potential sentence from that indicated on the scoresheet used when probation was originally imposed. (S.R. 11-12). The scoresheet used on February 28, 1991, when the defendant was originally sentenced, scored 68 points for prior convictions. The scoresheet used on July 1, 1991, after revocation of probation, scored 114 points for prior convictions. (R. 53; S.R. 16-18). The result was a one-cell increase in the permitted guidelines range which could be imposed, over and above the one-cell bump-up for violation of probation. Defense counsel requested the trial court to sentence the defendant pursuant to the original scoresheet with a one-cell bump for the violation of probation. (S.R. 11). Instead, the court used the new scoresheet, and imposed a nine-year prison term--at the top of the new permitted range. (R. 53, 57; S.R. 12-13). The sentence was to run concurrent with a one-year sentence imposed for the misdemeanor of attempted possession of cocaine. (R. 58; S.R. 12-13).

The defendant appealed, arguing that the court's failure to use the original scoresheet resulted in a sentence which exceeded

the maximum allowed one-cell increase. (A. 2). The district court affirmed, certifying conflict with *Graham v. State*, 559 So. 2d 343 (Fla. 4th DCA 1990). (A. 1-3); *Roberts v. State*, 18 Fla. L. Weekly D125 (Fla. 3d DCA Dec. 29, 1992). This petition for review follows.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AFTER REVOCATION OF PROBATION BASED ON A GUIDELINES SCORESHEET WHICH INCLUDED PRIOR CONVICTIONS WHICH WERE NOT SCORED WHEN THE DEFENDANT WAS ORIGINALLY PLACED ON PROBATION.

SUMMARY OF ARGUMENT

In sentencing the defendant after revocation of probation, the court used a scoresheet which included prior convictions that had not been scored when the defendant was originally placed on probation. This was contrary to the requirements of the sentencing guidelines and violated the constitutional guarantee against double jeopardy.

The legislature has chosen to limit the sentence which can be imposed upon revocation to a range established at the time of original sentencing. Upon violation of probation a trial court may not impose a sentence exceeding the one cell upward increase permitted by rule 3.701(d)(14), and no further departure is allowed except for valid reasons which existed at the time the defendant was placed on probation. Accordingly, a probationer has a legitimate expectation that upon revocation of probation his sentence will not be increased more than one cell from the range established on the original scoresheet. That expectation of finality is protected by the double jeopardy clause.

Because a probationer has a constitutionally-protected expectation, derived from duly-enacted sentencing provisions, that the original scoresheet will be used upon resentencing, the state cannot use revocation of probation to make up for its failure to apprise the court of the defendant's prior record at the time of original sentencing. Sentencing errors which do not result in an invalid sentence, and are due to factual omissions not attributable to the defendant, are not correctable to the defendant's detriment

after the sentence has begun to be served.

Until the decision of the Third District Court of Appeal in this case, this all appeared to be established law. Every other district court has consistently held that when sentencing a defendant after revocation of probation, a trial court must use the original scoresheet, and additions to the category of prior convictions are not permitted, unless it appears that the defendant affirmatively misrepresented his prior criminal history at the time of the original sentencing hearing. The Third District court's decision to the contrary effectively eliminates the sentencing guidelines' limitation on sentencing after revocation of probation. Under the Third District's approach, the state may correct at the time of resentencing any purported factual omission which might have been urged as a reason for imposing a longer original sentence. That approach is incompatible with the guidelines, and with the double jeopardy clause requirement that duly-enacted sentencing limitations must be respected by the courts. The district court's decision must be quashed and the cause remanded for resentencing using the original scoresheet.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AFTER REVOCATION OF PROBATION BASED ON A GUIDELINES SCORESHEET WHICH INCLUDED PRIOR CONVICTIONS WHICH WERE NOT SCORED WHEN THE DEFENDANT WAS ORIGINALLY PLACED ON PROBATION.

Mr. Roberts was originally sentenced for the second-degree felony of sale of cocaine. He was given a probationary split sentence: four years in prison to be followed by six years probation. (R. 22-23, 25-30). The conviction and sentence were affirmed on appeal. *Roberts v. State*, 565 So. 2d 1359 (Fla. 3d DCA 1990). After serving the incarcerative portion of his sentence, he began serving his probation. He was arrested for a new offense. (R. 41). His simultaneous trial and revocation hearing resulted in a conviction for the misdemeanor of attempted possession of cocaine, and in the revocation of his probation. (R. 51-52, 54). He was sentenced to one year incarceration for the misdemeanor, and to nine years in prison for the original offense, with the sentences to run concurrently. (R. 53, 57-58; S.R. 11-13).[1]

At resentencing, the court did not use the original scoresheet. Instead, over defense objection, a scoresheet was used which included numerous prior convictions which were not scored at the time of original sentencing, and gave a maximum permitted sentence of nine years. (R. 53; S.R. 11-13, 16-18). Using the original scoresheet, the maximum permitted sentence was seven

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[1]Mr. Roberts was placed on control release on March 31, 1992; however, such release is only conditional, *see Jasperson v. State*, 603 So. 2d 144, 145 (Fla. 2d DCA 1992).

years, even after applying the one-cell bump-up, and scoring the additional offense at conviction of attempted possession of cocaine. (S.R. 5, 16). As set forth below, the failure to use the original scoresheet was contrary to the requirements of the sentencing guidelines and violated the constitutional guarantee against double jeopardy. The district court of appeal's decision affirming the sentence must be reversed and the cause remanded for resentencing using the original scoresheet.

In the sentencing context, the double jeopardy clause applies to bar multiple punishment, i.e., punishment in excess of that permitted by law, and to protect 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, 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).

Not only must the punishment imposed be within the limits authorized by the legislature, once a defendant has begun to serve a lawful sentence, jeopardy has attached, and, as a general rule, the court may no longer increase that sentence. *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. In particular, sentencing errors which do not result in an invalid sentence, and are due to factual omissions not

attributable to the defendant, are not correctable to the defendant's detriment after the sentence has begun to be served. *See Goene* at 1308, *quoting Jones*, 722 F.2d at 637-38.

It is true that the double jeopardy clause does not absolutely bar the imposition of a harsher sentence upon a probationer who has been found guilty of violating the terms of his probation. *State v. Payne*, 404 So. 2d 1055 (Fla. 1981). Nevertheless, contrary to the opinion expressed by the Third District Court of Appeal in this case, double jeopardy concerns do "come into play" (A. 3) in the context of resentencing after violation of probation.

Because 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, a probationer does not have a legitimate expectation that his sentence will not be increased if his probation is revoked, *see DiFrancesco*, 449 U. S. at 137; *Payne*. However, he does retain a legitimate expectation that the increase will not surpass the limits set by the legislature. *Cf. DiFrancesco; cf. also Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983) (federal double jeopardy clause does "no more than prevent the sentencing court from prescribing greater punishment than the legislature intended").[2]

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[2]Florida's clause, Art. I, §9, Fla. Const., offers similar protection against the imposition of punishment in excess of that intended by the legislature. *See State v. Smith*, 547 So. 2d 613 (Fla. 1989). However, its protection of expectations of finality is stronger than that of the federal clause, at least in the context of successive trials. *See Burr v. State*, 576 So. 2d 278 (Fla. 1991). Since the underlying purpose of the protection is the

The double jeopardy clause requires (at least) that the courts respect the limits upon their sentencing discretion imposed by the legislature, and the corresponding legitimate expectations of finality to which those limits give rise. *See Goene* at 1308. Although the constitution does not determine where the limits are placed, it does require that they be respected once they are in place.

In Florida, the limitations upon the court's sentencing discretion include those imposed by the sentencing guidelines. *Poore v. State*, 531 So. 2d 161, 165 (Fla. 1988) (stressing that "the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation").

The sentencing guidelines set an upper limit on the sentence which can be imposed upon revocation of probation, and that limit is expressly linked to the guidelines ranges established at the time that the sentence was originally imposed. Upon violation of probation a trial court may not impose a sentence exceeding the one cell upward increase permitted by rule 3.701(d)(14), and no further departure upon violation of probation is allowed except for valid reasons which existed at the time the defendant was placed on probation. *See State v. Johnson*, 585 So. 2d 272 (Fla. 1991); *Williams v. State*, 581 So. 2d 144 (Fla. 1991); *Ree v. State*, 565 So. 2d 1329, 1331 (Fla. 1990); *Franklin v. State*, 545 So. 2d 851,

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same, *see Goene*, 577 So. 2d at 1307; *Fogel*, 829 F.2d at 88, this stronger protection of finality should also come to bear in the context of resentencing.

853 (Fla. 1989); *Lambert v. State*, 545 So. 2d 838, 842 (Fla. 1989).

Florida Rule of Criminal Procedure 3.701(d)(14), provides:

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

There can be no doubt that "the next higher cell" means the cell above the "original cell" on the original scoresheet. The plain language of the rule demands this conclusion. If there is any latent ambiguity present, that ambiguity must be resolved in favor of the defendant. *Lambert*, 545 So. 2d at 841 ("Where a criminal statute is susceptible to different interpretations, it must be construed in favor of the accused.").

It follows that, in Florida, a probationer has a legitimate expectation that upon revocation of probation his sentence will not be increased more than one cell from the range established on the original scoresheet. That expectation remains legitimate even if the original scoresheet erroneously omitted scorable prior convictions, so long as the error is attributable to the state, rather than to an affirmative misrepresentation on the part of the defendant. *See Goene*. That legitimate expectation is no different from that in any other case where the state has failed to apprise the court of circumstances which might justify a longer sentence. It derives from a legislative pronouncement regarding the intended punishment of violators of probation. The court is bound to use

the original sentencing ranges. Fla. R. Crim. P. 3.701(d)(14). Since those ranges were established at a sentencing hearing which has concluded, any omissions are no longer correctable to the defendant's detriment. *See Troupe; Goene.*[3]

With the exception of the decision of the Third District Court of Appeal in this case, the district courts have uniformly held that when sentencing a defendant on a violation of probation, a trial court must use the original scoresheet, and, although the scoresheet can be updated to reflect convictions for events occurring subsequent to the original sentencing, additions to the category of prior convictions are not permitted, unless it appears that the defendant affirmatively misrepresented his prior criminal history at the time of the original sentencing hearing. *E.g., Tito v. State*, 593 So. 2d 284, 285-86 (Fla. 2d DCA 1992), *jurisdiction accepted in* 601 So. 2d 553 (Fla. 1992), and 601 So. 2d 554 (Fla. 1992); *Harris v. State*, 574 So. 2d 1211 (Fla. 2d DCA 1991); *Holloman v. State*, 600 So. 2d 522 (Fla. 5th DCA 1992); *Pfeiffer v. State*, 568 So. 2d 530 (Fla. 1st DCA 1990); *Braddy v. State*, 593 So. 2d 1225 (Fla. 4th DCA 1992); *Graham v. State*, 559 So. 2d 343 (Fla. 4th DCA 1990).

The Third District finds that result unacceptable because it

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[3]Florida Rule of Criminal Procedure 3.800(a) authorizes a trial court to correct at any time "an incorrect calculation made by it in a sentencing guidelines scoresheet." Accordingly, a defendant has no legitimate expectation of finality that a sentence based on such miscalculation will not be subsequently corrected. *See Cheshire v. State*, 568 So. 2d 908, 913 (Fla. 1990); *DiFrancesco*, 449 U.S. at 137-39. There is no authority, however, for the correction of errors based on factual omissions attributable to the state.

gives the defendant the benefit of "the largesse of a judicial error." (A. 2). That "largesse," however, is the result of legislative policy, and the constitutional requirement that the government respect the limits that it has set upon itself. The prosecutor's failure to timely apprise the court of circumstances which might justify a longer original sentence is not a sufficient reason to defeat the defendant's legitimate expectation of finality in that sentence. *Cf.* Fla. R. Crim. P. 3.800(a). Under Florida's present sentencing regime, the revocation of probation does not furnish an opportunity for the state to make up for its original negligence. The legislature has chosen to limit the sentence which can be imposed upon revocation to a range established at the time of original sentencing, Fla. R. Crim. P. 3.701(d)(14). It has placed upon the state the obligation to prepare the scoresheet. Fla. R. Crim. P. 3.701(d)(1). Factual omissions not attributable to the defendant are not correctable after the sentence has begun to be served. *See Troupe; Goene;* Fla. R. Crim. P. 3.800(a). Accordingly, a probationer who has begun to serve his sentence retains a legitimate expectation of finality as to the original sentencing baseline. *See Tito; Harris; Holloman; Pfeiffer; Braddy; Graham.*

The Third District also noted that since the defendant was being sentenced both for the original offense and for a new substantive offense, using the original scoresheet would permit him "to escape the punishment meted out by the law." (A. 3). The court apparently was concerned that because only a single scoresheet can

be used for all offenses pending before the court for sentencing, *see Clark v. State*, 572 So. 2d 1387 (Fla. 1991); *see also State v. Stafford*, 593 So. 2d 496 (Fla. 1992), the defendant's full prior history would not be scored when sentencing for either the original or the new offense.

In this case, however, the issue of whether a single scoresheet should be used for the two offenses was not before the court. The new offense was a misdemeanor, and, therefore was not pending for sentencing *under the guidelines*, and did not require the preparation of a new scoresheet. *See Silliker v. State*, 598 So. 2d 133 (Fla. 5th DCA 1992).[4]

In cases where a defendant actually is being sentenced under the guidelines for both the original offense and a new substantive offense, there is a better solution to the problem than that of ignoring the probationer's legitimate expectation that the sentence imposed for the original offense will not be greater than that established by the "next higher cell" on the original scoresheet. In such circumstances, the state has a legitimate interest in having the defendant's full prior record considered when sentencing for the new offense. However, it has no right to expect that its own blundering with respect to the original offense will be corrected at the expense of the defendant's legitimate expectation of finality. Both the state's and the defendant's legitimate

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[4]The defendant did in fact receive the maximum incarcerative sentence of one year permitted for the misdemeanor. (R. 58; S.R. 12-13).

interests can be accomodated by using a new scoresheet showing all prior convictions to establish the overall range within which the total sentence must fall, but using the original scoresheet, updated to reflect the new conviction, to establish the maximum sentence for the original offense. This solution accomodates the legitimate interests involved and does not violate either the rules or this Court's holdings in *Clark*, *Stafford*, *Johnson*, *Williams*, *Franklin*, and *Lambert*.

In all cases, whether revocation is based upon a technical violation of probation or upon the commission of a new substantive offense, the Third District's rule allowing the original scoresheet to be corrected for factual omissions invites abuse and eliminates, as a practical matter, the sentencing guidelines' attempt to limit sentencing enhancement after revocation of probation. Although this case involves the omission of prior convictions, the district court's approach would allow the state to correct at the time of resentencing the purported omission of <u>any</u> fact which was not mentioned at the original sentencing but which can be urged as justifying a longer original sentence. That approach is incompatible with the guidelines, and with the double jeopardy clause requirement that duly-enacted sentencing limitations must be respected by the courts. The double jeopardy clause precludes a court from evading or eliminating those limitations in this fashion. The district court's decision must be quashed, and the cause remanded for resentencing using the original scoresheet.

CONCLUSION

Based on the foregoing argument and authorities, the defendant requests this Court to quash the decision of the district court of appeal, to reverse the sentence, and to remand for resentencing using the original sentencing guidelines scoresheet.

Respectfully submitted,

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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 10th day of March, 1993.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

ANTHONY ROBERTS, **

Appellant, **

vs. ** CASE NO. 92-373

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed December 29, 1992.

An Appeal from the Circuit Court for Monroe County, Richard Payne, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Barbara Arlene Fink, Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and NESBITT and GODERICH, JJ.

NESBITT, J.

Anthony Roberts appeals the sentence imposed following a violation of probation. We affirm.

Originally, after a jury trial, the defendant was convicted of selling cocaine, and sentenced to four years in prison followed by

six years probation under a scoresheet which mistakenly omitted a number of prior convictions. After appeal, this court affirmed the judgment and sentence. Roberts v. State, 565 So.2d 1359 (Fla. 3d DCA 1990).

Thereafter, the defendant violated his probation and, after a hearing, the court sentenced him to nine years in prison. Because the subsequent scoresheet contained the correct number of prior convictions, the sentence imposed upon the defendant was bumped up three cells. The defendant argues that both the Florida Rules of Criminal Procedure as well as the Florida Supreme Court allow for a maximum one-cell increase in a defendant's sentence upon a violation of probation. Fla. R. Crim. P. 3.701(d)(14); see also State v. Pentaude, 500 So.2d 526 (Fla. 1987). Thus, according to the defendant, the court's failure to use the original scoresheet resulted in a sentence which exceeded the maximum allowed one-cell upward increase.

The defendant cites to Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990) for the proposition that a trial court is without power to consider a new scoresheet, over objection, containing prior convictions completely omitted from the original. The contention then is that the defendant be sentenced under a scoresheet that is simply not based upon the truth. Consequently, we do not agree with Graham because to follow it literally, the defendant receives the benefit of being sentenced under a scoresheet which mistakenly omits prior convictions. Neither the rules nor the substantive law justifies a defendant receiving the largesse of a judicial error. Since only one guidelines

scoresheet may be used for each defendant covering all offenses pending before the court at sentencing, Fla. R. Crim. P. 3.701(d)(1); accord Lambert v. State, 545 So.2d 838, 841 (Fla. 1989), following the defendant's argument permits him to escape the punishment meted out by the law.

Furthermore, since the defendant's violation of probation triggered the resentencing, the defendant is not being sentenced for "precisely the same conduct," and double jeopardy concerns do not come into play. State v. Payne, 404 So.2d 1055, 1058 (Fla. 1981)(citing Williams v. Wainwright, 493 F.Supp. 153, 155-56 (S.D. Fla. 1980).

In the instant case, using the original scoresheet, the court could have imposed a maximum sentence of two and one-half to five and one-half years incarceration after the probation violation. Had the defendant originally been sentenced under a correct scoresheet, however, the trial court could have incarcerated him for a maximum of twelve years after his probation violation. Allowing the inaccurate scoresheet to stand unjustly benefits the defendant by allowing his prior convictions to pass unnoticed merely because they were mistakenly omitted the first time.

We certify to the supreme court the apparent conflict between our decision and that of Graham v. State, 559 So.2d 343 (Fla. 4th DCA 1990).

Accordingly, the sentence under review is affirmed.