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Petition of Joseph Williams, 22 St. Rptr. 192, 399 P.2d 732 (Mont. 1965)

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probable intent of the parties rather than to the practical necessity of the situation. They are not implied because they are *necessary* for the beneficial use of the property. In the instant case the apartments could be used as apartments regardless of the existence of a reciprocal negative easement.

The supreme court's opinion raised the question of whether implied easements of necessity exist in Montana. This problem was originally raised by counsel for the sole purpose of illustrating that not all the property rights, which were passed to plaintiffs in the purchase of the apartments, were expressly stated in the deeds.[52] The court must have been concerned with implied easements of necessity only as an aside. Any conclusion made on easements of necessity is *obiter dictum*. It follows that, if the court "overruled" *Simonson v. McDonald*[53] upon the facts of the instant case, then *Simonson* has not been overruled because the facts of the instant case did not concern easements of necessity.

The rule of *Simonson* also remains valid if the court overruled it on the facts in the instant case dealing with implied reciprocal negative easements. *Simonson* held only that easements of necessity may not be implied in connection with a right of way, if eminent domain proceedings are available.[54] *Simonson* explicitly limited its holding to the presence of those facts. Application of the rule of *Simonson* to implied easements other than easements of necessity is unjustified.

The decision of the instant case was made in the exercise of the court's equity jurisdiction[55] and it is submitted that while the existence of implied reciprocal negative easements in Montana must have been recognized by the court, it did not overrule *Simonson v. McDonald*.

JOHN R. GORDON

RAMIFICATIONS OF JAIL-BASED PROBATION UPON SUSPENDED IMPOSITION OF SENTENCE.—Petitioner pleaded guilty to grand larceny. At his request the court placed petitioner on the alcoholic rehabilitation program used in the First Judicial District, suspending the imposition of sentence and placing petitioner on probation.[1] The conditions of probation required

[52]See text and note 29 *supra*.
[53]Instant case at 440. "Under the facts and circumstances existing here that holding is expressly overruled."
[54]Simonson v. MacDonald, 131 Mont. 494, 501, 311 P.2d 982, 986 (1957).
[55]Instant case at 435. It is to be noted that cases of this type, decided in equity have generally been based in some measure on the courts finding an estoppel. See Bimson v. Butman, 3 App. Div. 198, 38 N.Y. 209 (1896). Argument on this particular point was raised by counsel from both sides, but apparently the court in the instant case considered it unnecessary for its decision. Brief for Appellant, pp. 52-55. Brief for Respondent, pp. 59-67. Reply Brief for Appellant, pp. 60-68. It is noted that paragraph three of the findings of the district court stated the existence of an estoppel. See note 25 *supra*.

[1]REVISED CODES OF MONTANA, 1947, § 94-7832 provides that whenever any person has been found guilty of a crime upon verdict or plea, the court may adjudge

the petitioner to refrain from the use of alcoholic beverages, to join Alcoholics Anonymous, to find employment, and to spend the hours not employed in the county jail. Petitioner spent twenty five days in the county jail before he was released to accept employment in another county.[2] Twenty five days after his release, the court revoked the probation, and sentenced petitioner to the state penitentiary. Petitioner contends this procedure violated article III, section eighteen of the Montana Constitution and the Fifth Amendment to the United States Constitution in that he was twice sentenced and twice punished for the same offense. *Held*: The probation order, its subsequent revocation, and the sentencing of petitioner did not violate his constitutional guarantee against being twice placed in jeopardy since a probation order is neither a judgment nor a sentence. *Petition of Joseph Williams,* 22 St. Rptr. 192, 399 P.2d 732 (Mont. 1965).

Probation has been defined as, "a procedure of social investigation and supervisory treatment used by courts for selected individuals convicted of law violations. During the period of probation, the offender lives a comparatively normal life in the community and regulates his conduct under conditions imposed by the court and subject to the supervision and guidance of a probation officer."[3] The purpose of probation is to rehabilitate the offender, and to protect society in the event the probation is not satisfactorily concluded.[4] Massachusetts passed the first statute regulating probation in 1878. Slowly, other states enacted similar legislation and by 1956 all states had probation legislation of one type or another.[5]

In most states probation usually results from either the suspended execution or suspended imposition of sentence.[6] Only certain offenders are eligible for probation;[7] and as to that class the courts have a broad discretion whether to grant probation. Probation is not a right of the

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as follows: (1) Release the defendant on probation; (2) Suspend the imposition or execution of sentence; (3) Impose a fine as provided by law for the offense; (4) Impose any combination of (1), (2), (3), or, (5) Commit the defendant to a conventional institution with or without a fine as provided by law for the offense. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.)

[2]Usually, an individual placed on this program spends only his non-working hours in jail. In the instant case, however, petitioner was in total confinement until his release to accept employment.

[3]Best and Birzon, *Conditions of Probations An Analysis,* 51 GEO. L.J. 809 n.3 (1963).

[4]Powers v. Langlois, 89 R.I. 45, 153 A.2d 539 (1959). Probation evolved from practices intended to mitigate the severity of the penal codes, such as benefit of clergy, recognizance and bail. See, DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE (1959). In the United States probation began in 1841 when John Augustus, a Boston bootmaker, became interested in the rehabilitation of individuals convicted of minor crimes. The court permitted Augustus to go bail for individuals he thought capable of rehabilitation and released the offenders to his supervision on the proviso that their freedom would be revoked if they misbehaved.

[5]*Id.* at 21.

[6]R.C.M. 1947, § 74-7832; REV. CODES WASH. § 9.95.210; CAL. PENAL CODE § 1203.1.

[7]R.C.M. 1947, § 74-7821. Only those who have never before been imprisoned for a crime are eligible for probation. CAL. PENAL CODE § 1203 limits probation to those who have not been convicted of one of a number of crimes.

defendant.[8] To effectuate the rehabilitation of the offender, the courts may make the probation conditional, although the conditions courts may impose vary from state to state.[9] The length of the probation term is governed by either the time specified in the probation order or the time fixed by the statute;[10] or, in the absence of the latter two, by the maximum statutory period for which punishment could have been imposed.[11] During the term of the probation, the courts may at their discretion modify or revoke the probation order.[12] If the court does revoke probation, it may then impose sentence if the imposition was originally suspended, or order the probationer committed under the original sentence if the execution was suspended.[13]

There is a conflict of opinion and authority on the question of whether a court may condition probation upon serving a term in the county jail. Some legal writers argue imprisonment is irreconcilable with the basic premise that by granting probation the courts have deemed the probationer fit to re-enter society.[14] Earlier cases have recognized this principle, holding that without statutory authority the courts may not condition probation on serving a term in confinement.[15] However,

[8]Franklin v. State, 87 Idaho 291, 392 P.2d 552 (1964); People v. Williams, 93 Cal. App. 2d 77, 209 P.2d 949 (1949); See, R.C.M. 1947, § 94-7821 which provides that the court may grant probation "where it appears to the satisfaction of the court that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and where it may appear that the public safety does not demand or require that the defendant shall suffer the penalty imposed by law."

[9]R.C.M. 1947, § 94-7832 provides that a fine may be imposed as a condition to probation. CAL. PENAL CODE § 1203.1 specifically provides fine, reparation, imprisonment in the county jail, placement of the defendant on county work projects, the employment of the defendant and "other reasonable conditions as it [the court] may determine are fitting and proper to the end that justice may be done, that amends may be made to society for breach of law for an injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer." Federal Probation Act, 18 U.S.C. § 3651 (1964) and REV. CODES WASH. § 9.95.210 allow a term in the county jail as a condition to probation. Section 19-2601 IDAHO CODES and OHIO REV. CODES § 2951.03 (Page 1954) allow the courts to impose such orders relative to probation as they deem necessary and expedient.

[10]*E.g.* Federal Probation Act, 18 U.S.C. § 3651 (1964) limits the term of probation to five years.

[11]*Ex Parte* Howard, 72 Cal. App. 374, 237 Pac. 406 (1925).

[12]*E.g.* CAL. PENAL CODE § 1203.3; R.C.M. 1947, § 7821. An example of modification occurred in People v. Roberts, 136 Cal. App. 709, 29 P.2d 432 (1934). The court suspended the execution of sentence and placed defendant on probation on condition she spend the first year in the Home of the Good Shepherd. Defendant was unmanageable. Thereafter, the court modified the probation order, anulling this condition and instead imposing a condition requiring defendant to serve one year in the county jail.

[13]R.C.M. 1947, § 94-7821; CAL. PENAL CODE § 1203.2.

[14]Best and Birzon, *supra* note 3. Imprisonment as a condition to probation is a "violation of the spirit of probation. If the judge feels the defendant is a safe risk for probation, why does he incarcerate him? If he feels he is not a safe risk, why does he offer him probation at all?" DRESSLER, *op. cit. supra* note 4, at 175. "The practice is a contradiction in terms and in concept and is condemned. The purpose of probation is to avoid, where it is feasible, the impact of institutional life." Standard Probation and Parole Act § 2 (1955). See RUBIN, WEIHOFEN, EDWARDS, AND ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 186-89 (1963).

[15]*Ex Parte* Fink, 79 Cal. App. 659, 250 Pac. 714 (1926). People v. Mendosa, 178 Cal. 509, 173 Pac. 998 (1918); People v. Robinson, 253 Mich. 507, 235 N.W. 236 (1931).

a number of statutes do permit the courts to impose such a condition.[16] The advocates of this practice contend that imprisonment has a salutary effect and aids the rehabilitation of the offender.[17] In some states, without specific statutory authorization, courts have interpreted their statutes implicitly to include this condition. A recent Idaho case illustrates this approach.[18] There, the court suspended the imposition of sentence and granted defendant probation on the condition he spend the first sixty days in the county jail. The probation statute allowed the court to impose such orders relative to probation as it deemed necessary and expedient.[19] The court held that the language of the statute was sufficiently broad to permit confinement as a condition of probation. The majority of the court reasoned that a rule to the contrary would restrict the probationary powers of the court and consequently hamper its ability to bring about the rehabilitation of the offender. The court emphasized the need for liberal construction of probation statutes because of their humane objectives:

> While such a restriction [no confinement as a condition to probation] might have seemed reasonable twenty or thirty years ago, it is rapidly becoming apparent in this dynamic area of the law that probation signifies the employment of any reasonable means which may be used to effectuate the rehabilitation of the defendant.[20]

Other authority supports the view that the court should be allowed to impose conditions reasonably related to the rehabilitation of the probationer.[21] Two of the cases holding that the court could not impose confinements as a condition to probation may be reconciled with this view.[22] In one case the court required a convicted burglar to serve a period of confinement in the county jail as a condition to probation;[23] while in the other, the court required a similar condition of one convicted of negligent homicide.[24] No apparent connection exists between the rehabilitation of these individuals and confinement in the county jail. The third case reaching the same result seems untenable.[25] There, the appellate court held that a convicted felon could not be confined in the psychopathic ward as a condition to probation, although the required relationship between his rehabilitation and confinement seemed to exist.

[16]CAL. PENAL CODE § 1203.1; Federal Probation Act, 18 U.S.C. § 3651 (1964); REV. CODES WASH. § 9.95.210.

[17]See, Archer v. Snook, 10 F.2d 567, 570 (N.D. Ga. 1926).

[18]*Franklin v. State, supra* note 8. See also Tabor v. Maxwell, 175 Ohio St. 573, 194 N.E.2d 856 (1963).

[19]Section 19-2601 IDAHO CODES.

[20]*Franklin v. State, supra* note 8, at 562. The court split 3-2 on the confinement issue, the minority arguing that no confinement was possible without explicit statutory authorization.

[21]People v. Frank, 94 Cal. App. 2d 740, 211 P.2d 350 (1949). People v. Mauro, 41 Misc. 2d 847, 246 N.Y.S.2d 687 (1964).

[22]Note 15. *People v. Mendosa* and *People v. Robinson, supra* note 15.

[23]*People v. Mendosa, supra* note 15.

[24]*People v. Robinson, supra* note 15.

[25]*Ex Parte Fink, supra* note 15.

It is submitted that the Montana Probation Statute[26] permits the imposition of reasonable conditions to probation, even confinement, if these conditions tend to facilitate the rehabilitation of the probationer.

In the instant case the court attempted to rehabiliate an alcoholic by a jail-based probation. Whether the court had the power to impose such a program should depend on whether the conditions to probation were reasonably related to the probationer's rehabilitation. Since, in most cases, the court requires the probationer to pay for his room and board, many of these programs are self-supporting.[27] At the same time the probationer is able to support his dependents, acquiring self-respect and a sense of responsibility. Moreover, the probationer will have a job when the court releases him from custody. These programs also require the probationer to compensate those injured by his wrongful acts. But, perhaps, the greatest advantage of such a program is its apparent rehabilitative effect.[28] However, whether such confinement rehabilitates an alcoholic is questionable. Authorities argue the efficacy of enforcing an initial period of abstinence, reasoning that alcoholics will never learn they can function without alcohol if it can be readily obtained.[29] Most of these writers acknowledge the need for therapy and counseling during the initial period. Whether the alcoholic will receive such assistance in the county jail is doubted. The local officials are more likely to see the alcoholic in terms of his offense, and as a result their attitude will be more punitive than therapeutic.[30]

However, even if the court had the power to confine the probationer, a subsequent revocation of probation and sentencing may place him twice in jeopardy. The Fifth Amendment to the United States Constitution incorporates the guarantee against twice being placed in jeopardy for the same offense: "Nor shall any person be subjected for the same offense to be twice put in jeopardy of life or limb."[31] The same or similar provisions are found in nearly all the state constitutions, and

[26]R.C.M. 1947, § 94-7832. See *supra* note 1.

[27]Similar work release programs were self-supporting in four out of five California counties. Grupp, *Work Release and the Misdemeanant*, 29 FED. PROB. 6, 10 (1965). (1965).

[28]A recent study indicated that this program in the First Judicial District had a 25% success rate. This rate is highly satisfactory when one considers that most of the individuals placed on the program are alcoholics with records of anti-social behavior. In North Carolina reports indicate that the success rate for a similar program, although not necessarily confined to alcoholics, was as high as 94%. *Ibid.* n. 33.

[29]Selzer, *Alcoholism and the Law. The Need for Detection and Treatment*, 56 MICH. L. REV. 237 (1957). Sixty-three per cent of California psychiatrists favor a law to commit alcoholics. Hayman, *Current Attitudes to Alcoholism of Psychiatrists in Southern California*, 12 AM. J. PSYCHIATRY 485 (1956).

[30]Rubington, *The Alcoholic and the Jail*, 24 FED. PROB. 30 (1965).

[31]The constitutional guarantee against twice being placed in jeopardy is found on the common law pleas of *autrefois acquit* and *autrefois convict*. 4 BLACKSTONE COMMENTARIES* 335, 336 (Lewis ed. 1897).

> [P]lea of *autrefois acquit*, or a formal acquital, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.
>
> [T]he plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by benefit of clergy or other causes), is a good plea in a defense to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.

where the guarantee is not there enunciated, the common law of those states secures it to the individual.[32] The prohibition against double jeopardy represents two distinct policies: that one should not be punished more than once for the same offense; and that an individual should not be harassed by successive prosecutions for a single wrongful act.[33] The court in *Ex Parte Lange* stated the reasons for the prohibition against double punishment.[34]

> For what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it, that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the danger guarded against by the constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on this criminal, he can be again sentenced on that conviction to another or different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not the intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument seems to us irresistable, and we do not doubt that the constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.[35]

Persuasive authority exists for applying the federal double jeopardy standard to Montana, thereby prohibiting two punishments or two sentences for the same offense.[36]

"Sentence" and "punishment" are distinguishable. A sentence is the court's declaration of the legal consequences of the defendant's guilt, while the punishments are the consequences, themselves.[37] The Montana Supreme Court has held that if the court grants probation on suspended execution of sentence, the defendant is actually serving his sentence while on probation, although he is not confined within prison walls.[38] However, when the court grants probation on the

[32] *E.g.*, Bennington v. Warden of Md. House of Correction, 190 Md. 752, 59 A.2d 779; State v. Toombs, 326 Mo. 981, 34 S.W.2d 61; Holt v. State, 160 Tenn. 366, 24 S.W.2d 886.

[33] Note, 65 YALE L. REV. 339 (1956).

[34] 85 U.S. 163, 173 (1873).

[35] See, Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Talinois and Abbate v. United States*, 14 W. RES. L. REV. 700, 713 (1963):

> The underlying reasoning for protection against multiple punishment is that if multiple punishment is allowed there can be no rule of law. A rule of law presupposes that each defendant will receive the punishment established according to certain standards and limitations which cannot be superceded. . . .If multiple punishment were allowed, these limitations could be transgressed at the will of the judge by giving more than one punishment for the same crime. A prohibition against multiple punishment is a necessary element in any legal system which claims to be based upon the concept of a rule of law.

[36] Gomez v. Superior Court, 50 Cal.2d 640, 328 P.2d 976(1958) held the double jeopardy provision of the California Constitution to be almost precisely the same as found in the federal Constitution. The double jeopardy provisions of the Montana and California Constitutions are very similar (Cf. MONT. CONST. art. III, § 18 with CAL. CONST. art. I, § 13).

[37] See 24 C.J.S. *Crim. Law* § 1556 (1961); and 24B C.J.S. *Crim. Law* § 1974 (1962).

[38] State *ex rel.* Wetzel v. Ellsworth, 143 Mont. 54, 387 P.2d 442 (1963); *Ex Parte* Sheehan, 100 Mont. 244, 49 P.2d 438 (1935); State *ex rel.* Bottomley v. District Court, 73 Mont. 541, 273 Pac. 525 (1925).

suspended imposition of sentence, a more difficult question arises because the court has expressly deferred the sentencing.

One line of authority holds that a probation order in either form constitutes a sentence.[39] In *Korematsu v. United States* the Supreme Court of the United States declared the difference to be one of trifling degree, reasoning that probation on suspended imposition of sentence just as effectively curtails the defendant's freedom by subjecting him to the court's surveillance and to the possibility of modification or revocation.[40] The court went on to say that this type of probation is a final judgment, and can be appealed. Other courts take the opposite view, concluding that probation on suspended imposition of sentence, even when coupled with confinement, is not a sentence.[41] These courts reason that it is not the court's intention to sentence the defendant since the order expressly defers sentence. Any conditions the court imposes are not penalties for defendant's crime, but merely conditions to his probation. Furthermore, this type of order lacks finality since the court may still sentence the defendant. Following somewhat similar reasoning, the great majority of the courts hold that the consequences of a probation order are not a punishment.[42]

However, other cases reach a different result, and it is submitted that these are the better reasoned cases. The *Korematsu* case[43] and *Cooper v. United States*[44] described the consequences of a probation order as a mild and ambulatory punishment. The courts reasoned that the probationer was not a free man, but one whose liberty has been abridged in the public interest, and who is subject to surveillance and such restrictions as the court might impose. Even a probation combined with a work release program fulfills the traditional functions of punishment, namely, retribution, deterrence, and rehabilitation.[45]

Substantial authority holds that if the court grants probation on suspended imposition of sentence and on condition of confinement, the subsequent revocation and sentencing of defendant does not place him twice in jeopardy.[46] However, most of these cases tacitly assume that

[39] *E.g.*, Korematsu v. United States, 319 U.S. 432, 435 (1943); Corey v. United States, 375 U.S. 169 (1963); Nix v. United States, 131 F.2d 857 (5th Cir. 1942).

[40] *Ibid.*

[41] *Franklin v. State, supra* note 9; Johnson v. Rhay, 266 F.2d 530 (9th Cir 1959); *Ex Parte* Hays, 120 Cal. App. 2d 1030, 260 P.2d 17; *Ex Parte* Martin, 82 Cal. App. 2d 16, 185 P.2d. 645 (1947).

[42] *E.g.* cases cited note 41 *supra.*

[43] *Supra* note 39.

[44] 91 F.2d 195 (5th Cir. 1937).

[45] Grupp, *supra* note 27. Some cases hold that a confinement in a hospital or clinic, by judicial order is neither a punishment nor a sentence. People v. Eckert, 179 Misc. 181, 39 N.Y.S.2d 79 (1942); Pope v. United States, 298 F.2d 507 (5th Cir. 1962); State v. Newton, 30 N.J.Super. 382, 104 A.2d 851 (1954). One must distinguish between these cases and the instant case. Petitioner was not confined in a hospital or clinic, but in a county jail. He was not treated by trained medical personnel; rather he was supervised by correctional officers. Undoubtedly the petitioner was incarcerated, rather than hospitalized.

[46] *Franklin v. State, supra* note 8; *Johnson v. Rhay, supra* note 41; People v. Bennett, 120 Cal.App.2d 835, 262 P.2d 59 (1953).

because their statutes provide for confinement as a condition of probation, the sentencing procedure does not constitute double jeopardy. In *Johnson v. Rhay,* the court granted probation upon suspended imposition of sentence and, as a condition of probation, the defendant served the first eight months in the county jail.[47] After his release, the court revoked his probation and sentenced him for the statutory maximum of twenty years. The defendant had to serve twenty years and eight months in confinement. This seems contrary to the *Lange* decision[48] for the probationer is required to serve longer than the maximum allowable punishment. In the *Lange* case the court sentenced defendant to pay a fine and serve a term in jail, although the statute allowed only imprisonment *or* a fine. The Supreme Court held that after payment of the fine, incarceration of defendant violated his guarantee against double jeopardy.

Similarly, the court in the instant case subjected petitioner to the danger of twice being punished for the same offense. Petitioner spent twenty five days in the county jail pursuant to the court's probation order. This confinement constituted a punishment that could have lasted for one year, the statutory minimum for grand larceny.[49] Thus, the confinement subjected the petitioner to one punishment for the offense of grand larceny and placed him once in jeopardy. Thereafter, the revocation of probation and the sentencing of petitioner to the state penitentiary, subjected him to a second punishment for the same offense, placing him twice in jeopardy.[50]

The probationer's consent to probation and its conditions might be significant. The rule is generally stated that a probationer may refuse probation if he considers its terms more onerous than a sentence;[51] but if he does accept the terms of probation, he may not complain upon its subsequent revocation.[52] No cases were found holding that acceptance of probation and its conditions waived the probationer's guarantee against twice being placed in jeopardy, although the right being personal, it has been held that the defendant could waive it.[53] However, such a right must be competently and intelligently waived,[54] and the courts will indulge in every reasonable presumption against a waiver.[55]

Therefore, it is submitted that the Montana probation statute per-

[47]*Supra* note 41.

[48]*Supra* note 34.

[49]R.C.M. 1947, § 94-2706.

[50]This result would not be possible in Montana if the court granted probation on suspended execution of sentence. In such a case, the Montana courts have held that any time elapsing between suspended execution and revocation must be deducted from the original sentence imposed, regardless of whether or not the time was spent in confinement. See cases cited note 38 *supra.*

[51]*People v. Frank, supra* note 21; *Franklin v. State, supra* note 8; *Contra, Cooper v. United States, supra* note 44.

[52]*Tabor v. Maxwell, supra* note 18; *Franklin v. State, supra* note 8; *Ex Parte Martin, supra* note 41.

[53]State *ex rel.* Stranahan v. District Court, 58 Mont. 684, 194 Pac. 308 (1920); Morlan v. United States, 230 F.2d 30 (10th Cir. 1956).

[54]Green v. United States, 355 U.S. 184 (1957). Cf. Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel).

[55]Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

mits the imposition of any conditions reasonably related to the rehabilitation of the offender.[56] While the confinement of an alcoholic in the county jail serves no apparent rehabilitative purpose, such confinement when combined with a work release program might facilitate the alcoholic's rehabilitation. This program, however, does punish the probationer. He is not a free man, but rather, one deprived of his liberty by judicial decree. He will undoubtedly suffer the stigma of imprisonment. When this program follows the suspended *imposition* of sentence, a subsequent revocation and sentencing of the defendant places him twice in jeopardy.

Holding that the petitioner is twice placed in jeopardy may be an unsatisfactory result because probation on suspended imposition of sentence has much to commend it. For instance, no civil disabilities attach unless the probationer does not successfully complete the probation term.[57] Furthermore, the fact the probationer does not know the nature of his sentence may induce him to make greater efforts to comply with the conditions of probation. However, such a procedure does possess an aura of uncertainty and may be a denial of the probationer's right to a speedy trial. [58] Moreover, a very definite possibility of double jeopardy exists if the probationer should ever be sentenced.

A possible solution would be to allow those individuals eligible for probation a choice between probation on suspended execution or imposition of sentence. If the probationer chooses the latter course, his guarantee against double jeopardy should be expressly and completely waived.[59] In this way the courts may retain the control over the petitioner so vital to his rehabilitation. The court should clearly explain the alternatives and their consequences so that the probationer may intelligently exercise his volition. Another solution, exclusive of waiver, might require the court to deduct any time spent in confinement, as a condition to suspended imposition of sentence, from the sentence subsequently imposed. Then, the unconstitutional aspects of a case such as *Johnson v. Rhay* would be avoided because the maximum sentence that the court could impose would be the statutory maximum for that particular crime less any time spent in confinement.

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[56]R.C.M. 1947, § 94-7832. See *supra* note 1.

[57]This is the procedure followed in the First Judicial District.

[58]This question was raised in *Cooper v. United States, supra* note 48. The court held that suspending the imposition of sentence for five years did not deny the defendant a speedy trial. This problem becomes more pronounced in jurisdictions such as California which allow a court to suspend the imposition of sentence for as long as the court could originally have sentenced the defendant.

[59]Although this question of waiver was not treated in the instant decision, the court of the First Judicial District does as a matter of course expressly inform the probationer that if the probation is ever revoked, it may then sentence him. (Whether the probationer's subsequent consent constitutes a waiver of double jeopardy is too broad a question for this article.)

[60]*Supra* note 41.