STATE OF IDAHO)
County of KOOTENAI)ss

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AT_____ O'clock _____M
CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

TRAVIS WILLIAM PETERSON,

Defendant.

Case No. **CRF 2011 1799**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This case is before the Court on defendant Travis Peterson's (Peterson) "Motion to Dismiss *Notice of Hearing for Order to Show Cause*", filed June 5, 2013. (italics in original). On June 5, 2013, Peterson also filed his "Memorandum in Support of Motion to Dismiss *Notice of Hearing for Motion to Show Cause*". On June 13, 2013, the State filed its "Memorandum in Opposition to Defendant's Motion to Dismiss *Notice of Hearing for Motion to Show Cause*".

At no time has Peterson filed a Notice of Hearing on this Motion. By filing his Motion to Dismiss Notice of Hearing for Order to Show Cause, Peterson has requested action by the Court. I.C.R. 47. The matter is presently at issue before the Court.

The procedural history of this issue has been partially set forth by Peterson (and not disputed by the State):

> On June 6, 2011, Mr. Peterson was sentenced by the court for a fixed five year sentence for felony eluding a peace officer, and sent to prison on a period of retained jurisdiction. (Order Denying Def. Mot. for Restricted Driving Privileges, and Notice of Hearing on Order to Show Cause). On September 29, 2011, Mr. Peterson returned from his retained jurisdiction and the court ordered supervised probation. (Order Denying Def. Mot. for Restricted Driving Privileges, and Notice of Hearing on Order to Show Cause). December 5, 2012, [sic] Mr. Peterson was ordered supervised probation for a period of three and a half years upon his return from the CAPP program, and his prior sentence was suspended. (Retained Jurisdiction Disposition, 1). As a condition of his probation, Mr. Peterson was also ordered to serve ninety days discretionary time, which may be "served and imposed at the discretion of your probation officer and upon the written approval of the District Court." (Retained Jurisdiction Disposition, 2). On March 8, 2013, Mr. Peterson submitted his request to be considered to restricted privileges to the Court.
>
> On April 23, 2013, the Court ordered Mr. Peterson to serve eight days of discretionary jail time for the following reasons: 1) 1/9/13 positive for marijuana, 2) 1/14/13 positive for methamphetamine, 3) 1/20/13 missing four 12 step support meetings, 4) 2/24/13 arrested for DWP, and 5) 4/2/13 admitted using methamphetamine on 3/30/13 and 3/31/13. (Order of Incarceration, Apr. 23, 2013). On May 17, 2013, the Court denied Mr. Peterson's Motion for Restricted Driving Privileges and *sua sponte* ordered Motion to Show Cause based on the reasons set forth in the April 23, 2013 Order for Incarceration. (Order Denying Def. Mot for Restricted Privileges and Notice of Hearing on Order to Show Cause, 2, 3).

Memorandum in Support of Motion to Dismiss *Notice of Hearing for Motion to Show Cause*, p. 2.

At the May 22, 2013, hearing on the Court's Motion for an Order to Show Cause, the Court informed Peterson of the above five different allegations it was making against Peterson. Peterson asked that the matter be continued and rescheduled for an admit/deny hearing. The Court scheduled an admit deny hearing for July 24, 2013. Then, at the May 22, 2013, hearing, counsel for Peterson claimed that since his client had already served the discretionary jail time, he had been sanctioned and now faced "double jeopardy" if there were more consequences to follow the Order to Show Cause process. The Court stated that it had heard this very argument several times, but had never seen a party take the argument to hearing. The Court ordered Peterson to brief the issue by June

5, 2013, and the State of Idaho to respond by June 12, 2013. The above described briefs were timely filed. As mentioned above, Peterson did not notice his motion for hearing.

On May 24, 2013, Peterson was arrested by his probation officer using an Agent's Warrant because he had possessed "Spice", a type of synthetic marijuana. His probation officer requested this Court issue a bench warrant. On May 30, 2013, this Court issued a Bench Warrant.

On June 6, 2013, Peterson's probation officer filed a Report of Probation Violation which contained eight different allegations that Peterson had violated his probation. Allegation number one accused Peterson of violating his probation by being arrested on February 24, 2013, for Driving Without Privileges, which was one of the events for which discretionary jail time was earlier requested by Peterson's probation officer and ordered by this Court. Allegation number four alleged that on January 14, 2013, Peterson had used methamphetamine, which was one of the events for which discretionary jail time was earlier requested by Peterson's probation officer and ordered by this Court. Allegation number seven alleged that on March 30, 2013, and March 31, 2013, Peterson possessed methamphetamine, which was one of the events for which discretionary jail time was earlier requested by Peterson's probation officer and ordered by this Court.

At the July 24, 2013, hearing, Peterson admitted to violating his probation as alleged in Allegation numbers one, four, and seven, and two other alleged violations that were not included in the events for which discretionary jail time was earlier requested by Peterson's probation officer and ordered by this Court. Thus, even though Peterson has not noticed up for hearing his "Motion to Dismiss *Notice of Hearing for Order to Show Cause*", the issues raised therein are clearly at issue. At no time during the July 24, 2013, hearing, did Peterson mention the pending motion. At the conclusion of that July 24, 2013, hearing,

this Court found Peterson had violated his probation as alleged in Allegation numbers one, four, and seven, and as admitted by Peterson. The Court then revoked Peterson's probation, imposed his previously suspended sentence, and sent Peterson to prison for a period of retained jurisdiction.

II. STANDARD OF REVIEW.

Constitutional issues "are questions of law over which [this Court exercises] free review." *Urban Renewal Agency of City of Rexburg v. Hart*, 148 Idaho 299, 300, 222 P.3d 467, 468 (2009).

III. ANALYSIS.

Peterson argues he has been placed in double jeopardy by completing eight days discretionary jail time and then facing a probation violation hearing for the same conduct. Memorandum in Support of Motion to Dismiss *Notice of Hearing for Motion to Show Cause*, pp. 1, 3-5. Peterson's argument is misplaced as it: 1) ignores the temporal aspect that double jeopardy applies much earlier than in the probation setting; 2) ignores the fact discretionary jail time is a probation term designed to aid in a defendant's rehabilitation, and is not the equivalent of Peterson having his sentence imposed because he was unsuccessful on probation; 3) misreads *Scraggins*; and 4) ignores the fact that there were also new allegations made to which Peterson admitted.

The Fifth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, protects individuals against double jeopardy, which includes multiple prosecutions and multiple punishments for the same offense. U.S. Const. amend. 5, 14; *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969); *State v. Avelar*, 132 Idaho 775, 778, 979 P.2d 648, 651, (1999). The multiple punishment component provides two protections: 1) "to ensure that the sentencing discretion of courts is confined

to the limits established by the legislature, and 2) prohibits punishments imposed in separate proceedings even when authorized by the legislature. *Avelar*, 132 Idaho 775, 778, 979 P.2d 648, 651 (quoting *Ohio v. Johnson*, 467 U.S. 493, 498-99, 104 S.Ct. 2536 (1984)). Double jeopardy protection is triggered by the attachment of jeopardy. *Id*.

In pleas that result in the commencement of a trial, jeopardy attaches once a jury has been empaneled and sworn. The United States Supreme Court held that, in state court as well as federal court, a defendant's Fifth Amendment right against double jeopardy attaches when a jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 38 (1978). The Court held that the rule when federal jeopardy attaches is not an arbitrary line: "It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury." *Id.*; *see also State v. Avelar*, 132 Idaho 775, 778, 979 P.2d 648, 651 (1998).

For guilty or nolo contendre pleas, jeopardy attaches when the court accepts the plea unless the request to set aside the plea was that of the defendant's. *U.S. v. Patterson*, 381 F.3d 859, 864 (9th Cir. 2004). However, when the defendant is the party that asks a court to set an accepted plea aside, the court can vacate the plea, and "double jeopardy is not implicated by his subsequently being recharged and tried on that same count." *Id.* (citations omitted).

Two Idaho cases are particularly instructive with regards to the issue of double jeopardy in the context of discretionary jail time and probation revocations: *State v. Chapman*, 111 Idaho 149, 721 P.2d 1248 (1986) and *State v. Scraggins*, 153 Idaho 867, 292 P.3d 258 (2012). In *Chapman*, the question resolved by the Idaho Supreme Court was whether the district court erred in considering the defendant's background in deciding whether to revoke probation. 111 Idaho 149, 150, 721 P.2d 1248, 1249. In answering that question, the Idaho Supreme Court held double jeopardy does not preclude the district

court from considering evidence. *Chapman*, 111 Idaho 149, 154, 721 P.2d 1248, 1253. Whether the individual can or cannot be rehabilitated depends on the particular individual. *Id*. Deciding to grant probation is a "sign that society has not given up on an individual and that a criminal is still a member of that society." *Id*. Probation is properly viewed as a "valuable tool to be used by the state in a battle against recidivism." *Id*. In that same vein, the Idaho Supreme Court also expressly held that revocation of probation is not "multiple punishment" under double jeopardy because it does not involve additional punishment. *Chapman*, 111 Idaho 149, 155, 721 P.2d 1248, 1254. Instead, the revocation of probation "involves only the enforcement of conditions *already imposed*." *Id*. (emphasis added).

In *Scraggins*, the question at issue was whether a court's revocation of probation, based on violations for which a probationer has already serve discretionary jail time, violates the due process clause of the Fourteenth Amendment. 153 Idaho 867, 869, 22 P.3d 258, 260. The defendant in *Scraggins* admitted to probation officers that he had violated terms of probation and accordingly, "in lieu of filing a report of violation," the defendant was jailed and served ten days of the discretionary jail time previously authorized by the district court. *Id*. First, it is important to note the Idaho Supreme Court took care to take note that the district court had concluded that "this is not a situation of double punishment or double jeopardy. And the fact that discretionary jail time can be imposed does not preclude the filing of the same charge as a probation violation if the probation officer determines that that is appropriate." *Scraggins*, 153 Idaho 867, 870, 292 P.3d 258, 261.

The defendant in *Scraggins* conceded the lack of relevant case law in Idaho on the issue of due process regarding discretionary jail time and probation violations. *Id*. However, he argued the "fundamental unfairness" of punishing a defendant by revoking

probation after the imposition of discretionary jail time for the same probation violations. *Id*. He argued there was an "implied promise" that when a defendant is placed on probation, any violations will result in a punishment of discretionary jail time or revocation of probation, but not both. *Id*.

The Idaho Supreme Court pointed to its decision in *State v. Dana*, 137 Idaho 6, 43 P.3d 765 (2002) for guidance. *Scraggins*, 153 Idaho 867, 871, 292 P.3d 258, 262. In *Dana*, the Idaho Supreme Court decided the issue of whether time spent in jail as a condition of probation should be credited toward a defendant's jail sentence when probation is revoked. *Dana*, 137 Idaho 6, 9, 43 P.3d 765, 768. The Court held that probation time served "arose independently as a [probation] condition, and not under Idaho Code [criminal punishment statutes]," thus "time served is not a part of a probationer's sentence." *Id*. In so holding, the Court made clear its policy behind the decision:

> The purpose of probation is rehabilitation, which is facilitated by giving the defendant a strong motivation to comply with the law by holding conditions over him. If the *Banks* rational were not followed, that would of course reduce that motivation of a defendant who was on probation to comply with the law by decreasing the severity of the consequences for noncompliance.

Dana, 137 Idaho 6, 8, 43 P.3d 765, 767 (internal citations omitted).

Based on its decision in *Dana*, the Idaho Supreme Court held in *Scraggins* that "a revocation of probation, based on violations for which the probationer has already served discretionary jail time, is not a violation of due process. That is because no case – federal or state – has identified any such due process right." 153 Idaho 867, 872, 292 P.3d 258, 263. Further, the Court addressed the policy concerns, stating that finding a new due process right in the case would likely "eventuate our concerns from *Dana*, where care was taken to avoid 'reduc[ing] the motivation of a defendant who was on probation to comply with the law by decreasing the severity of the consequences for noncompliance.'" *Id*.

(quoting *Dana*, 137 Idaho 6, 8, 43 P.3d 767, 767. The Court stated if the district court in *Scraggins* was unable to revoke probation after the defendant violated its terms, it would "significantly decrease the consequences". *Id*. Further, the Court pointed out that its holding in *Scraggins* preserved the flexibility of the district court. *Id.* The Court concluded by stating:

> In sum, the probation officer imposed jail time per the discretion previously granted in the probation order, and the district court revoked Scraggins' probation per the terms of the order. Neither course of action was contrary to the terms of Scraggins' probation, and neither affected any articulable due process right. Therefore, we hold that a revocation of probation, based on probation violations that have already led to discretionary jail time, does not violate a probationer's due process rights.

Id.

Peterson argues *Scraggins* is clearly distinguishable from his case as the discretionary jail time for Peterson was court-ordered, while Scraggins' discretionary jail time was via the probation officer. Memorandum in Support, p. 6. This distinction is not persuasive, as there is no indication in case law that court-ordered discretionary jail time should be treated any different from discretionary jail time utilized by the probation officer.

The Idaho Supreme Court expressly held in *Chapman* that revocation proceedings are not punishment under double jeopardy. In *Scraggins*, the Court held use of discretionary jail time and revocation of probation for the same probation violations was not a violation of due process. It is reasonable to find the holdings of the two cases can be combined to stand for the notion that use of discretionary jail time and revocation of probation (already not punishment) would not fall under double jeopardy. Double jeopardy applies to double punishment; if probation revocation proceedings are not punishment, then double jeopardy similarly cannot apply. Peterson's argument fails under this logic.

As there is no case law exactly on point regarding use of discretionary jail time and revoking probation and double jeopardy, this Court has gone to other jurisdictions for further guidance. The most on-point case this Court could find comes from Wisconsin in an unpublished opinion. *State v. Memmer*, 249 Wis.2d 488, 639 N.W.2d 223 (Ct.App. 2001). While it is an unpublished opinion, and therefore holds no precedential value, this Court finds the Wisconsin Court of Appeals' reasoning persuasive. In *Memmer*, the issue presented was exactly the same as the one in this case and the reasoning of the Wisconsin Court of Appeals is instructive. In *Memmer*, the defendant argued it was double jeopardy to both serve jail time and have her probation revoked, when both occurred as a result of the same probation violations. *Memmer*, 249 Wis.2d 488, 639 N.W.2d 223. The Wisconsin Court of Appeals reasoned:

> Ordinarily, the term "jeopardy" applies to criminal prosecution and proceedings to invoke criminal punishment for the vindication of public justice, and a proceeding is considered to be criminal if it imposes a sanction intended as punishment. *Parole and probation revocations are not punishment*. The purposes of probation are rehabilitation of offenders and protection of the community interest. Incarceration as a condition of probation is for the purpose of rehabilitation and to protect society. Memmer cites no case law holding that either sanctions for probation violations or revocation of probation are generally considered to be punishment for the original criminal conduct or for the acts that violated probation. Therefore, in light of earlier case law, we reject the argument.

Id. (emphasis added).

The question of whether revocations are "punishment" has been addressed in Idaho, as noted above in *Scraggins*. In addition, the Ninth Circuit Court of Appeals has also held revocation is not a criminal penalty for violating the terms of parole [or probation]. *Moor v. Palmer*, 603 F.3d 658, 660 (9th Cir. 2010); *United States v. Soto-Olivas*, 44 F.3d 788, 789 (9th Cir. 1995).

Similar to the Wisconsin Court of Appeals in *Memmer*, this Court holds probation revocations are not punishment, under *Scraggins*, *Moor* and *Soto-Olivas*, and as double jeopardy applies to multiple "punishments", probation revocations do not fall under double jeopardy. Under this logic, Peterson's argument fails.

Finally, on July 24, 2013, Peterson admitted to violating his probation as alleged in Allegation number five (testing positive for methamphetamine on February 21, 2013) and Allegation number six (possessing marijuana on February 28, 2013). Neither of these allegations were included in the April 23, 2013, Progress Report, wherein Peterson's probation officer requested the use of discretionary jail time. Thus, from simply a factual standpoint, Peterson's double jeopardy argument fails.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, there is no merit to Peterson's argument that the either 1) this Court on May 22, 2013, announcing to Peterson its reasons for setting a Motion for Order to Show Cause, or 2) the June 6, 2013, filing of the Report of Probation Violation by Peterson's probation officer, violate double jeopardy simply because this Court had previously signed an order on April 23, 2013, ordering the use of eight days discretionary jail time.

IT IS HEREBY ORDERED THAT TRAVIS WILLIAM PETERSON's Motion to Dismiss is **DENIED**.

DATED this 29th day of July, 2013

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2013 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Lynn Nelson
Prosecuting Attorney -

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy