IN THE SUPREME COURT OF THE STATE OF FLORIDA

CARLOS SANCHEZ, Petitioner, Versus STATE OF FLORIDA, Respondent.	Case No. 72,389 DCA Case No. 87-2197

PETITIONER'S REPLY BRIEF

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TABLE OF CASES AND AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner adopts the Preliminary Statement made in previous Petitioner's and Respondent's filed Briefs.

STATEMENT OF THE CASE

Petitioner adopts the Statement of the Case made in previous Petitioner's and Respondent's filed Briefs.

STATEMENT OF THE FACTS

Petitioner Adopts the Statement of the Facts made in previous Petitioner's and Respondent's filed Briefs.

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ISSUE

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SUPPLEMENTAL MOTION TO TERMINATE/VACATE PROBATION ON THE BASIS THAT IT HAD NO JURISDICTION, NOR AUTHORITY, TO VACATE AND SET ASIDE AN ADJUDICATION OF GUILT, PREVIOUSLY ENTERED, BUT MOVED BEFORE THE TIME OF THE TERMINATION OF PROBATION.

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SUMMARY OF ARGUMENT

In response to the argument that motions to mitigate are not appealable, the instant case does not deal with the merits of such a motion, but rather with the trial courts assertion that it had no jurisdiction to rule upon the motion. It is well settled that jurisdictional or other fundamental errors may be appealed. McMillan v. Wiley, 33 So. 993 (Fla. 1903). Additionally, due to the conflict certified by both the First and Fourth Districts between State v. Beardsley and Thompson v. State, the case is reviewable by CARLOS SANCHEZ' petition for writ of certiorari.

Respondent's argument that Rule 3.800(b) extends jurisdiction for mitigations for only sixty days is inapplicable since the instant case is a probation case, and jurisdiction is thereby extended for the duration of the Order of Probation. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980), State v. Jones, 327 So.2d 18 on remand 330 So.2d 189 (Fla. 1976), Walker v. State, 461 So.2d 229 (Fla. 1st DCA 1984), Florida Statutes, Section 948.01, .05.

Respondent's assertion that the trafficking statute specifically forbids withdrawing an adjudication fails to consider the statute in its entirety. A clear exception is

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contained in Section 893.135(4) which controls those cases in which the State waives the provisions relied upon the Respondent, such waiver being present in the case at bar (R. 2).

The focal point of the inquiry at hand is the consideration of the legal significance of an adjudication of guilt. Thompson v. State, supra. An adjudication is clearly a sanction imposed as punishment, rather than a simple legal predicate with no practical ramifications. Treated as such, trial courts should know by this Court's opinion that they possess the authority to control the impact of this device, particularly when imposed in probation setting.

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ARGUMENT

In reply to Respondent's initial argument, that orders denying motions to mitigate are not appealable, Petitioner would assert that the trial court's denial was based not upon the merits of the motion itself, but upon its conclusion that it had no jurisdiction to decide the issue (R. 15). Jurisdictional or other fundamental errors of law may be noticed by an appellate court, even upon the appellate court's own initiative. McMillan v. Wiley, 33 So. 993 (Fla. 1903).

In addition, the conflict which has been certified by both the First and Fourth Districts, between State v. Beardsley, 464 So.2d 188 (Fla. 4th DCA 1985) and Thompson v. State, 485 So.2d 42 (Fla. 1st DCA 1986), is one which clearly compromises the right of a defendant to equal treatment under the laws of this State, said treatment now being dependent upon the district in which a case falls. This case is, therefore, reviewable by petition for writ of certiorari. See State v. Marsh, 497 So.2d 954 (Fla. 1st DCA 1986).

Respondent's second argument, that Florida Rule of Criminal Procedure 3.800(b) authorizes trial judge mitigation of legal sentences only within a sixty day period, is irrelevant because of the probation imposed in the instant

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case as opposed to a legal sentence. If, for example, a defendant is adjudicated guilty and a two year prison term is imposed, under Rule 3.800(b), a trial judge would be empowered to modify its sentence within sixty days (including a withholding of its previously imposed adjudication, under Thompson, but not under Beardsley). But if a defendant were placed on two years probation, with six months in jail and an adjudication of guilt, no sentence has been imposed. "Probation" and "sentence" are discreet, mutually exclusive concepts. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980). Terms and conditions which would normally be considered as sentences, such as incarceration, become mere elements in an overall plan with rehabilitation as its goal when probation is imposed. It is Petitioner's assertion that an adjudication of guilt is best considered an element of punishment, which, like incarceration, is subject to modification when imposed in conjunction with probation. The real conflict between the First and Fourth Districts lies not in their opposing constructions of Rule 3.800, but in their views of the legal and practical significance of an adjudication of guilt. As Judge Zehmer surmised in Thompson,

> The focal point of our inquiry, therefore, is whether the imposition or withholding of adjudication of guilt as authorized by the statute

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> is part of the punishment imposed in the sentencing process or merely the predicate for entry of a judgment of conviction and thus unrelated to the extent of punishment and sentence.

The imposition of adjudication is unquestionably a decision to punish an individual by conveying upon him the status of a convicted felon. Branded a "convict", the defendant is left to deal with a lifetime of discriminatory behavior from others, particularly by potential employers. This practical reality effectively precludes the construction that an adjudication is merely the legal predicate for a conviction. Thompson, supra.

Once the above conflict is resolved the ultimate issue in this case becomes clear. Any punishment imposed in conjunction with probation is simply a facet in the overall rehabilitative scheme. Just as a term of incarceration can be modified when imposed as a condition of probation, so should be an adjudication of guilt since both play the essentially similar role of punishment. And since an adjudication is a term or condition of probation, it can be modified at any time throughout the pendency of the Order of Probation. See Villery, supra, State v. Jones, 327 So.2d 18 on remand, 330 So.2d 189 (Fla. 1976), Walker v. State, 461 So.2d 229 (Fla. 1st DCA 1984), F.S. 948.01, 05. The Fourth District in Beardsley makes no mention of the sixty day jurisdictional extension, while the First District, in

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deciding that an adjudication may be withdrawn within sixty days, does not preclude such withdrawals outside the sixty day limit.

Respondent's next argument, that under Florida Statute Section 893.135(3) adjudications can never be suspended, is inapplicable due to the State's waiver of the mandatory minimum in this case (R. 2), Florida Statute 893.135 (4). The trial court clearly recognized that such a waiver gave it the authority to withhold adjudication, since it did in fact withhold its adjudication of co-defendant Leitner (See Appendix).

Subsection (3) of the trafficking statute states that " . . . adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld . . ." However, the very next subsection, (4), is clearly intended to define an exception to (3), specifically, "The state attorney may move the sentencing court to reduce or suspend the sentence of any person who . . ." Any logical reading of the two subsections in conjunction would dictate that if the State Attorney so moves, as occurred in the instant case, an adjudication can be withheld according to the discretion of the trial court. To say that subsection (4) does not specifically refer to "adjudications of guilt" but only "sentences" would be counter to Thompson, supra and to

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Petitioner's argument above that both play essentially similar roles in the criminal process.

In conclusion, public policy would clearly dictate that an adjudication of guilt be recognized for what it is: a severe sanction imposed by trial courts toward the purpose of punishment. As such, it should be treated as any other sanction, that is, when imposed in conjunction with probation it is intended to further the rehabilitation of a defendant. If, in the instant case, the trial court determines that it will further the rehabilitation of CARLOS SANCHEZ to withdraw his previously imposed adjudication - by helping him to proceed in the right direction - the trial court should know that it has the flexibility, and authority, to do so.

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CONCLUSION

WHEREFORE, the Petitioner respectfully requests, and urges, that this Honorable Court reverse the trial court's order denying the Supplemental Motion to Mitigate in this cause, and remand to the court for its consideration as to whether or not it is appropriate, under its discretion, to order the adjudication of guilt previously imposed in this cause to be withdrawn, and the Defendant to be left with no adjudication after the term of probation has expired.

Respectfully submitted,

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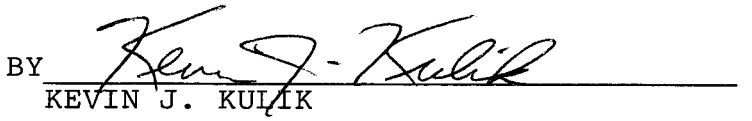
BY 
KEVIN J. KULIK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply brief was furnished to John Tiedemann, Esquire, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 9th day of August, 1988.

KEVIN J. KULIK

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