IN THE SUPREME COURT OF FLORIDA

MYREN WAYNE LARSON,

Petitioner,

v.

CASE NO. 75,085

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

The petitioner, Myren Wayne Larson, was the defendant in the trial court, the appellant in the district court of appeal, and will be referred to in this brief as the petitioner or by his proper name. The respondent, State of Florida, was the prosecution in the trial court, the appellee in the district court of appeal, and will be referred to here as "State."

The record on appeal will be referred to by the symbol, "R," and the supplemental record by the symbol, "SR," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of the case and facts presented in Larson's brief on the merits with the following exceptions and additions.

EXCEPTIONS. In his brief, Larson states:

> Larson responded that he wished to withdraw his plea [R. 371. The trial court gave Larson the following alternatives: Larson could either let his plea of nolo contendere to the misdemeanor stand and be sentenced to one year in the county jail, or he could plead guilty to the felony charge of witness tampering and receive five years of probation [R 42-53].
>
> Larson then withdrew his plea to the misdemeanor and pleaded nolo contendere to the felony charge of witness tampering [R 551. The court withheld adjudication of guilt and placed Larson on five years of probation, orally imposing the following conditions of probation:
>
> > No contact with the victim. No contact with the witness who testified at [Larson's] bond hearing. Stay away from FSU campus under all circumstances; do this probation outside Leon County; do not come back to Leon County during the five year probation period. Under no circumstances will the residence be approved to come back to Tallahassee. Have a psychological evaluation; obtain psychological counseling on your release from custody; that you provide to the psychologist who is approved by your probation officer in Fort Myers a copy of this evaluation by Dr. Stimel. Court costs of $200; $20 to the Crimes Compensation Trust Fund, and $2 to the Law Enforcement Education Fund. [R 59-66]

(I.B. 2-3)

The above summary of the facts is misleading. It is true that on page 37, defense counsel did state, "[I]f the Court is

inclined to listen to the State, then I am going to request that our plea be allowed to be withdrawn due to the fact that this no longer is a joint recommendation." Larson omits from his summary of the facts the trial court's subsequent offer on four occasions to permit him to withdraw his plea and go to trial. The trial court stated:

> You want to withdraw the plea and go to trial on a felony count of tampering with a witness or you want to plead to a misdemeanor? (R. 39)
>
> I'm giving you an opportunity to withdraw. (R. 40)
>
> I don't want there to be any misunderstanding about if you want to withdraw this and go to trial on a felony tampering charge. (R. 41)
>
> If you want to be sentenced on this misdemeanor today, I'll sentence you. If you want to withdraw this plea -- if your lawyer feels he wants to withdraw the plea because of the State backing out on its plea agreement, we can go to trial on this. Whichever you want to do. (R. 47)

(R. 39, 40, 41, 47) Neither defense counsel nor Larson directly answered the trial court.

Larson's summary of the facts suggests that the trial court gave him only two options, but that is incorrect as is reflected in the above-quoted passages. The trial court also offered to permit Larson to withdraw his plea and proceed to trial on the original charge.

Larson has also omitted significant portions of the negotiated plea agreement as is reflected in the following excerpt from the transcript of the hearing:

DEFENSE COUNSEL: Your Honor, at this time, Mr. Larson is prepared to withdraw his plea of no contest to a misdemeanor and enter a plea of no contest to a felony conditioned upon him receiving five years probation with psychological counseling, a grace period of two weeks to leave Leon County and not to reside back in Leon County during the probationary period.

What else was there? Stay away from the victim. Stay off the campus. I believe those were the only conditions that were left.

COURT: Would you place the Defendant under oath. (WHEREUPON, THE DEFENDANT WAS SWORN.)

COURT: Mr. Larson, you understand what your lawyer just represented to the Court?

DEFENDANT: Yes, I do.

COURT: And is it your desire to withdraw your earlier entered plea of no contest to the lesser-included offense of misdemeanor tampering with a witness and at this time enter a plea of no contest as charged to tampering with a witness. Is that you --

DEFENDANT: According to those terms, yes, sir.

* * *

COURT: I'll order that your probation be transferred to Fort Myers. Then it will be up to your probation officer to approve a change of residence. Under no circumstances, will the residence be approved to come back to Tallahassee.

DEFENDANT: That's fine.

COURT: And you won't come back to Tallahassee during this five-year period.

DEFENDANT: I don't like Tallahassee. ... I just have friends here, and I would hope to stay here and see my friends, but that's fine.

(R. 55-56, 61)

True, the trial court did impose the conditions of probation as summarized in the initial brief, but Larson neglects to mention that he agreed to most of these conditions as part of his negotiated plea.

ADDITIONS. At the plea hearing held on December 22, 1987, Larson pled no contest to the lesser included offense of misdemeanor tampering with a witness. (SR. 9) Larson understood that the maximum penalty he faced was one year in the county jail and that any joint sentencing recommendation made by the lawyers was not binding on the court. (SR. 9-10) He further indicated that the only promise made to him was that the State would recommend a probationary sentence. (SR. 9-11)

At this same hearing, Larson stipulated to the facts provided in the probable cause affidavit, which states the following:

> Myren Wayne Larson was arrested and charged with trespass. He appeared before Judge Jay R. Rosman in the Lee County Court. He was released with a condition of his bond that he have no contact with Annette M. Driscoll. Mr. Myren Wayne Larson ignored the Judge's instructions and continued to harass Ms. Driscoll by phone and in person. His goal was to convince Ms. Driscoll not to testify against him at his court hearings. Ms. Driscoll reported his actions to the Lee County Court. A hearing is scheduled for later this month before Judge Rosman to show why Larson should not be held in contempt of court. Ms. Driscoll then returned to FSU to continue her college education. Myren Wayne Larson followed Ms. Driscoll to Tallahassee and has continued to harass, follow and cal Ms. Driscoll, trying to convince her not to testify.

> On 8-20-87, Ms. Driscoll was in the FSU Post Office when Myren Wayne Larson struck her lightly on the back of her head. Ms. Driscoll walked away with Larson following. Larson was asking her not to get him in any additional trouble. Ms. Driscoll walked to the FSU Police Department, about a 1/2 mile walk. Larson followed to within 100 yards of the Department then fled the area.

(SR. 11; R. 3) At this same hearing, the prosecutor also provided the following factual basis to support the charge:

> Mr. Larson was on probation for trespass out of Lee County, involving trespassing on property owned by Annette Driscoll. Ms. Driscoll was a student at FSU and on the day alleged in the information she was at the post office there and Mr. Larson approached her and started talking about the case in Lee County, asking her not to proceed against him in that case. She turned and left and started walking toward the FSU Police Department and Mr. Larson followed her there until she arrived at the police department and she reported the incident at that time. She felt that Mr. Larson had harassed and intimidated her, not only here, but primarily in Lee County. And there's a long history in this case. I'm sure there's dispute about the facts, but there is a history and Mr. Larson is on probation out of Lee County.

(SR. 11-12) After accepting Larson's plea to the misdemeanor, the trial court deferred the imposition of a sentence until a presentence investigation could be conducted. (SR. 12) The trial court also modified the conditions of Larson's bond "to provide that there will be no contact, direct or indirect, either by telephone or in person or writing or any other way with Annette Driscoll and that [Larson] stay away from the Florida State University (FSU) campus until sentencing in this case." (SR. 13)

On January **16, 1988,** at **2:00** a.m., Officer McSweyn observed Larson driving his vehicle in a westwardly direction on the FSU campus approximately a hundred yards from Gilchrist Hall. (SR. **36)** The vehicle was stopped and Larson placed under arrest. **(SR. 37)**

Andrea Davidson is a student at FSU and resides on campus in Gilchrist Hall, which is the same dormitory in which Annette Driscoll also resides. (SR. **24-25)** On January **22, 1988,** Ms. Davidson saw Larson in the lobby of the dormitory, and when he saw her, he turned away and ran. (SR. **26)** She caught up with Larson, who then asked her not to tell Ms. Driscoll of his presence there and claimed that he was there for another reason. (SR. **26-27)** Ms. Davidson believed Larson and did not mention the incident, which she viewed as being unimportant, until she accidentally heard about the pending bond revocation hearing. **(SR. 33-34)**

At the bond revocation hearing, without objection and in response to comments from defense counsel, Sergeant Taylor recited two other incidents where Ms. Driscoll reported seeing Larson. (SR **78** One was at Wendy's across the street from campus, and the other one was when Ms. Driscoll exited the Diffenbaugh Bui ding which is located next door to the FSU Police Department. (SR. **78)** Sergeant Taylor contacted Larson and his attorney relating to these incidents. (SR. **79)**

The prosecutor informed the court that Ms. Driscoll had been very reasonable in this case and that it was only after the

latest trespass that bond revocation proceedings were initiated. (SR. 80) Larson's bond was subsequently revoked. (SR. 80-81)

On March 3, 1988, a plea and sentencing hearing was held at which the prosecutor withdrew his original sentencing recommendation and in explanation stated:

> The change came about because (Larson) violated the conditions of the bond on two occasions. If he had abided by the terms of agreement and the terms of the bond condition, I would not have withdrawn my recommendation at all, but it would have been ridiculous for me to get up and recommend probation after I filed a motion to revoke his bond to get him back to jail.

(R. 40) The prosecutor recommended that the maximum sentence of a year in the county jail be imposed. (R. 37)

During this hearing, the trial court stated in pertinent part the following:

> When your plea [to the misdemeanor] was taken back in December, you were ordered to go to Parole and Probation Services for a PSI interview. You went there and you talked to Mr. Kendrick.
>
> At that time, Mr. Kendrick told you that you should have absolutely no contact with this woman or you'd be in some serious trouble. You turned right around around [sic] ignored what he told you. You ignored what the Court had told you as a condition of the bond and you went right back out there and you continued to harass this woman.

(R. 44-45) The court further stated:

> The Court is concerned there has not been sufficient impression made upon you about the severity of what you're been doing and the consequences for doing it.

(R. 43)

As mentioned earlier, four times during this hearing, the trial court asked Larson if he wanted to withdraw his plea to the misdemeanor and proceed to trial on the felony count of tampering with a witness (R. 39, 40, 41, 47), to which Larson never gave a direct answer. Twice the trial court asked Larson if he needed additional time to consider the court's alternative plea and sentencing suggestion. (R. 49-50, 54-55) After a brief recess, Larson withdrew his plea of no contest to the lesser included misdemeanor offense and pled no contest to the felony charge under the conditions set out above. (R. 55-56, 61)

Conditions 11, 14, 17, 18, and 19 of the amended probation order state the following:

> (11) Your probation is to be served outside Leon County, Fl.
>
> (14) You are to stay out of Tallahassee, FL, during the term of your probation.
>
> (17) You will submit to mental health counseling as directed by your Probation Officer.
>
> (18) You are to undergo psychological evaluation and if deemed necessary become involved in and satisfactorily complete counseling as directed by your Probation Officer.
>
> (19) You are to provide a copy of Dr. Stimmels [sic] report to the psychiatric doctor that does your evaluation.

(R. 29-30)

SUMMARY OF ARGUMENT

The First District Court of Appeal was correct in holding that a contemporaneous objection is required to preserve for appeal a challenge to the conditions of probation.

This court has recently held that a contemporaneous objection is required to preserve any sentencing error which does not result in an illegal sentence. Noncompliance with mandatory sentencing provisions and scoresheet errors resulting in de facto departure sentences are examples of errors which make a sentence illegal. In the former, the entire sentence is illegal, and in the latter, only the length of the sentence is illegal. By contrast, when a condition of probation is deemed to be improper, neither the entire probation order nor the length of the probation is affected. Therefore, a mere error in one of the conditions of probation does not transform the probation order into an illegal sentence.

There are many values underlying the contemporaneous objection rule, the most important of which is judicial economy. This Court has recently certified the need for twenty-eight additional judgeships and has acknowledged the tremendous crisis facing the entire criminal justice system due to an excessive workload. Requiring a defendant to challenge the conditions of his probation in the trial court will diminish the number of unnecessary appeals while at the same time guaranteeing the defendant his right to fundamental fairness.

ARGUMENT

ISSUE

WHETHER A CONTEMPORANEOUS OBJECTION TO CONDITIONS OF PROBATION IS NECESSARY TO PRESERVE THE ISSUE OF THE PROPRIETY OF THOSE CONDITIONS FOR APPELLATE REVIEW.

Citing dicta in State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984), Larson contends that the contemporaneous objection rule serves only one purpose; i.e., to ensure that objections are made when the recollections of witnesses are freshest. However, there are many values underlying the contemporaneous objection rule, which have been aptly summarized by an appellate court in Oregon:

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to: that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result: and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. **The principal rationale, however, is judicial economy.** There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and the public would be spared the expense of an appeal.

State v. Applegate, 591 P.2d 371, 373 (Or. App. 1979) (emphasis supplied)

The need for judicial economy in the State of Florida is not to be taken lightly. Recently this Court certified the need for twenty-two circuit court judges and six county judges, and although no request was made for additional appellate judgeships, it expressed concern that the appellate judges would be unable to thoroughly review their cases and announced its intention to carefully reevaluate next year the need for additional appellate judgeships. In re Certification of Judicial Manpower, 15 F.L.W. S145 (Fla. March 16, 1990). More recently, this Court has acknowledged the tremendous crisis facing the entire criminal justice system due to an excessive caseload at all levels of the system. In re: Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defenders, 15 F.L.W. S278 (Fla. May 3, 1990); Hatten v. State, 15 F.L.W. S282, (Fla. May 3, 1990). As further evidence of this crisis, for the past two years, the Public Defender's Office in Tallahassee has received permission to withdraw from 150 cases and 100 cases respectively due to its excessive caseload. Terry v. State, 547 So.2d 712 (Fla. 1st DCA 1989) and Grube v. State, 529 So.2d 789 (Fla. 1st DCA 1988). No comparable relief was afforded the Attorney General's Office, and consequently it bore the burden of handling the cases that had been reassigned to private attorneys, in addition to handling its regular caseload.

In relying on Rhoden, Larson has overlooked State v. Whitfield, 487 So.2d 1045 (Fla. 1986), which clarified Rhoden. In Whitfield, this Court stated:

> [T]he district court was apparently troubled, and rightly so, by the implications of a rule of law which treats failure to advise the sentencing judge of error as of no consequence . . . .
>
> Rhoden, Walker, and Snow all concern instances where the trial court sentenced in reliance on statute but failed to make the specific findings which the statutes in question mandatorily required as a prerequisite to the sentence. An alternative way of stating the ground on which Rhoden, Walker, and Snow rest is that the absence of the statutorily mandated findings rendered the sentences illegal because, in their absence, there was no statutory authority for the sentences. Thus, as the district court surmised, Snow makes clear that Rhoden is grounded on the failure to make mandatory findings and not on the proposition that contemporaneous objections serve no purpose in the sentencing process. Our Rhoden dicta that the purpose of the contemporaneous objection rule is not present in the sentencing process does not apply in every case. It is true that sentencing errors can be more easily corrected on appeal than errors in the guilt phase, but it is still true that all errors in all phases of the trial should be brought to the attention of the trial judge particularly where there is a factual issue for resolution. Sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal.

Id., at 1046.

As is stated above, noncompliance with mandatory sentencing provisions and scoresheet errors resulting in de facto departure

sentences are examples of errors which make a sentence illegal. In the former, the entire sentence is illegal, and in the latter, only the length of the sentence is illegal. By contrast, when a condition of probation is deemed to be improper, neither the entire probation order nor the length of the probation is affected. Therefore, a mere error in one of the conditions of probation does not transform the probation order into an illegal sentence.

Larson also contends that a purely legal issue may be raised for the first time on appeal. He apparently has overlooked Dodd v. State, 232 So.2d 235 (Fla. 4th DCA 1970). There, the court stated:

> The function of an objection is to signify to the trial court that there is an issue of law and to give notice of the terms of the issue. Wigmore on Evidence, (3d Ed.) p. 322.

Id., at 238 (emphasis supplied).

In further support of his argument, Larson relies on his judicial and statutory right to appeal from an order granting probation. Rule 9.140(b)(1)(B), Fla.R.App.P.; section 924.06(1)(b), Florida Statutes (1987). The State does not dispute a defendant's right to appeal from an order granting probation; however, this right does not address the contemporaneous objection rule.

A defendant also has the right to appeal from a final judgment of conviction. Rule 9.140(b)(1)(A), Fla.R.App.P.; section 924.06(1)(a), Florida Statutes (1987). Section

924.06(2), Florida Statutes (1987) provides that "[a]n appeal of an order granting probation shall proceed in the same manner and have the same effect as an appeal of a judgment of conviction." If Larson's contention were correct, then a defendant would also be able to appeal all errors relating to his final judgment of conviction, irrespective of whether a contemporaneous objection was raised in the trial court.

This Court has made it clear that unobjected-to trial errors are not reviewable on appeal, even when the issue relates to the sufficiency of the evidence to sustain the verdict of guilty. State v. Barber, 301 So.2d 7 (Fla. 1974). In Barber, the defendant was convicted of two counts of breaking and entering with intent to commit grand larceny, and on appeal, for the first time, he contended that the evidence was insufficient as to the value of the property involved in the larceny. The First District Court of Appeal held that the evidence was insufficient to sustain the conviction, reversed, and remanded for a new trial. This Court quashed the district court's opinion, stating:

> [U]nless the issue of sufficiency of the evidence to sustain a verdict in a criminal case is first presented to the trial court by way of an appropriate motion, the issue is not reviewable on direct appeal from an adverse judgment. No such appropriate motion having been made in the trial court in this cause, the question of sufficiency of the evidence was not open to appellate review.

Id., at 9. On rehearing denied, this Court observed that the defendant had been afforded counsel for the purpose of raising ineffective assistance of counsel in a post-conviction

proceeding. Surely the need to strike improper conditions of probation is no more compelling than the need to reverse a conviction based on insufficient evidence.

A defendant who fails to object to the conditions of his probation is not without a remedy. Challenges to allegedly impermissible probation conditions may be undertaken in a variety of procedural settings: e.g., a motion to rescind condition of probation [section 948.03(8), Florida Statutes (1989)]; and a motion for post-conviction relief alleging ineffective assistance of trial counsel [Rule 3.850, Fla.R.Crm.P.].

The position taken by Larson reveals a deep and fundamental misunderstanding of the proper roles of trial and appellate courts which, if accepted, would subvert the jurisdictional provisions of Article V of the Florida Constitution, of Florida Rule of Appellate Procedure 9.030, and of Florida Statutes. A Florida circuit court judge is not a special master or magistrate functioning as a mere fact-finder for appellate courts. Further, petitioner's expansive concept of the role of appellate courts in treating issues raised for the first time is deeply inimical to the well-being of Florida's judicial system. The degree to which "exceptions" are created, or have been created, goes a long way toward explaining the difficulties that appellate public defenders, appellate criminal lawyers for the state, and the appellate courts themselves have in handling their workloads. See In re Certification of Judicial Manpower, supra: In re: Order on Presentation of Criminal Appeals by the Tenth Judicial

Circuit Public Defender, supra; Terry v. State, supra: and Grube v. State, supra. The state urges the Court to not only reject Larson's argument to create still another exception to the contemporaneous objection rule but to do so in a manner which makes clear that all issues of law and fact must be presented to trial courts.

* * * * *

Larson requests this court to rule solely on the issue relating to the absence of a contemporaneous objection and then remand the case to the district court for a determination of the propriety of the challenged conditions. The State respectfully disagrees. Even if this Court holds that no contemporaneous objection is required to raise for the first time on appeal the propriety of conditions of probation, that would not resolve the issue presented in this case.

Not only did Larson not challenge the conditions of his probation in the trial court, but he affirmatively agreed to them as part of his negotiated plea. The following colloquy took place at the sentencing hearing:

> DEFENSE COUNSEL: Your Honor, at this time, Mr. Larson is prepared to withdraw his plea of no contest to a misdemeanor and enter a plea of no contest to a felony conditioned upon him receiving five years probation with psychological counseling, a grace period of two weeks to leave Leon County and not to reside back in Leon County during the probationary period.
>
> What else was there? Stay away from the victim. Stay off the campus. I believe those were the only conditions that were left.

COURT: Would you place the Defendant under oath. (WHEREUPON, THE DEFENDANT WAS SWORN.)

COURT: Mr. Larson, you understand what your lawyer just represented to the Court?

DEFENDANT: Yes, I do.

COURT: And is it your desire to withdraw your earlier entered plea of no contest to the lesser-included offense of misdemeanor tampering with a witness and at this time enter a plea of no contest as charged to tampering with a witness. Is that you --

DEFENDANT: According to those terms, yes, sir.

At least two district courts of appeal have held that when a condition of probation is part of a negotiated plea agreement, the defendant is not entitled to have it stricken. G. H. v. State, 414 So.2d 1135 (Fla. 1st DCA 1982); Pollock v. Bryson, 450 So.2d 1183 (Fla. 2d DCA 1984). This Court has held, in a related area of the law, that a defendant may waive his right to be sentenced within the recommended sentencing guidelines range as part of a negotiated plea agreement. White v. State, 531 So.2d 711 (Fla. 1988). Assuming that a probationer has certain rights relating to restrictions on his freedom, then White clearly stands for the proposition that those rights may be waived as part of a negotiated plea agreement.

It is abundantly clear that in the instant case the trial court would never have agreed to place Larson on probation without the conditions that he stay out of Leon County and undergo psychological counselling. The trial court stated:

> I would like to have a period of supervision of you for five years where you would be counseled by a psychologist and where you would stay out of Leon County where this victim is residing and going to school. If I had that, I wouldn't give you any more jail time, but you've pled to a misdemeanor.
>
> You can withdraw that plea and plea to a felony, if you want to. If you pled to the felony, I'd withhold adjudication of guilt and impose that period of probation under those conditions, but me having only the option of sentencing you to county jail for a year or placing you on probation for a year, I don't have the ability to have counseling for you which I think you need and to have you under Court order to stay away from this witness for five years.
>
> If you want to be sentenced on this misdemeanor today, I'll sentence you. If you want to withdraw this plea -- if your lawyer feels he wants to withdraw the plea because of the State backing out on its plea agreement, we can go to trial on this. Whichever you want to do.

(R. 46-47)

Larson received the benefit of his bargain, and he now seeks to gain even more by having certain conditions stricken.

Assuming, arguendo, that a defendant has the right to challenge conditions of his probation for the first time on appeal and assuming, arguendo, that a defendant has the right to challenge conditions of his probation to which he agreed as part of his negotiated plea, the State will address the merits of the two conditions mentioned in Larson's brief. (I.B., p. 8, fn 3)

CONDITIONS 11 AND 14 OF AMENDED PROBATION ORDER

Conditions 11 and 14 of the amended probation order state the following:

(11) Your probation is to be served outside Leon County, Fl.

(14) You are to stay out of Tallahassee, FL, during the term of your probation.

(R. 29-30)

Citing Article I, section 5 of the Florida Constitution and a general reference to the federal constitution, Larson contends that the challenged condition deprives him of his right to petition the Florida Legislature and the executive branch of the government for redress of his grievances and that the condition is not reasonably related to the offense to which he pleaded. The State respectfully disagrees.

Section 948.03(1)(d), Florida Statutes (1987) authorizes the trial court to require the probationer to serve his probation in a specified place. If Larson's contention were correct, this provision would be unconstitutional, and a court would never be able to require a probationer to serve his probation in any place that was outside Leon County, the seat of state government.

It must be remembered that a "probationer does not enjoy the same status as an ordinary citizen," State v. Heath, 343 So.2d 13 (Fla. 1977), cert. denied, Heath v. Florida, 434 U.S. 893, 98 S.Ct. 269, 54 L.Ed.2d 179 (1977), and he "is allowed to live outside of confinement as a matter of judicial grace," State v Mangam, 343 So.2d 599 (Fla. 1977). See also Bentley v. State, 411 So.2d 1361 (Fla. 4th DCA 1982) (en banc), rev. denied, 419 So.2d 1195 (Fla. 1982). That being said, it, nevertheless, appears that the conditions of probation must reasonably relate

to the rehabilitation of the defendant. Bodden v. State, 411 So.2d 1391 (Fla. 1st DCA 1982).

When the present crime occurred in the case at bar, Larson, who is thirty-two years old (SR. 68), was on probation in Lee County involving trespassing on property owned by Annette Driscoll. Not only was Ms. Driscoll the victim in that case, but she was also the witness with whom Larson tampered after following her to Tallahassee. (R. 3; Sr. 11-12) It was while Larson was out on bond on a contempt of court charge with the special condition that he have no contact with Ms. Driscoll that he committed the present offense of witness tampering. (R. 3; SR. 11-12) Larson was again released on bond awaiting sentencing on the witness tampering offense with the condition that he stay away from the witness and that he stay off the Florida State University campus. (SR. 13) Larson again violated the special condition of his bond by returning to the campus and specifically to Ms. Driscoll's dormitory. (SR. 24-34, 37) In addition, Larson was barred from admission to the Florida State University, and he planned to move to Gainesville to go to school there. (SR. 61) Based on these facts, the State respectfully submits that the trial court's conditioning Larson's probation on his remaining outside of Tallahassee where Ms. Driscoll (victim and witness) was attending school was reasonably related to his rehabilitation and to the protection of society, in particular Ms. Driscoll.

Larson's reliance on Rodriguez v. State, 378 So.2d 7 (Fla. 2d DCA 1979) is misplaced. The special condition in Rodriguez

related to the defendant's right to marry and procreate, whereas, in the instant case, the condition is specifically authorized by statute and relates to the place where the probation is to be served. In Rodriguez, the prohibition against procreation and marriage was unnecessary in light of another condition prohibiting the defendant from having custody of children. Here, however, the requirement that Larson serve his probation outside Tallahassee is necessary to diminish his opportunity to commit other crimes against this same victim, which is highly probable, considering his prior criminal conduct towards her. In the event the victim completes her schooling and moves away from Tallahassee, Larson is certainly free to move to have the condition rescinded.

CONDITIONS 17, 18, AND 19 OF AMENDED PROBATION ORDER

Conditions 17, 18, and 19 of the amended probation order state the following:

> (17) You will submit to mental health counseling as directed by your Probation Officer.
>
> (18) You are to undergo psychological evaluation and if deemed necessary become involved in and satisfactorily complete counselling as directed by your Probation Officer.
>
> (19) You are to provide a copy of Dr. Stimmels [sic] report to the psychiatric doctor that does your evaluation.

(R. 29-30)

Citing Hutchinson v. State, 428 So.2d 739 (Fla. 2d DCA 983) and Holterhaus v. State, 417 So.2d 291 (Fla. 2d DCA 1982), Larson

contends that the above conditions unlawfully delegate judicial authority to an officer of the executive branch. The State respectfully disagrees, for these two cases are distinguishable. In Hutchinson and Holterhaus, the probation officer directed the defendant to participate in an alcohol or drug rehabilitation program, and as authority for this directive relied upon condition 8 of the probation order which required the defendant to comply with all instructions from his probation officer. By contrast, in the present case, the trial court specifically ordered Larson to submit to mental health counselling, provided that a mental health professional deemed it necessary. Obviously, in order for counselling to be available, a therapist must deem it necessary. With respect to the "as directed by your Probation Officer" language contained in the special condition, this merely relates to the ministerial functions of the probation officer. Langston v. State, 551 So.2d 1268 (Fla. 1st DCA 1989).

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to approve the opinion of the First District Court of Appeal or, alternatively, to affirm Larson's probation order on the ground that he agreed to the challenged conditions or that the challenged conditions are proper.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief on the merits has been furnished by U.S. Mail to Lawrence M. Korn, Assistant Public Defender, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 11th day of June, 1990.

Carolyn J. Mosley
Assistant Attorney General