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**FILED**

SID J. WHITE

DEC 27 1993

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,746

THE STATE OF FLORIDA

Petitioner/Appellee,

vs.

DENNIS MARSHALL HALL,

Respondent/Appellant.

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ON PETITION FOR DISCRETIONARY REVIEW

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REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The Petitioner, THE STATE OF FLORIDA, was the appellee in the court below and the prosecution in the Circuit Court. The Respondent, DENNIS MARSHALL HALL, was the Appellant in the District Court and the defendant in the trial court. The parties will be referred to, in this brief, as they stand before this court. The symbol "R" will be used, in this brief, to refer to the Record on Appeal before the District Court, the symbol, "SR" will identify the Supplemental Record on Appeal before that court, the symbol "T" will be used to designate the transcript of lower court proceedings and the symbol "App." will be used to designate the appendix to the Initial Brief of Petitioner on the Merits in this case. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner, THE STATE OF FLORIDA, through its undersigned attorneys, hereby readopts, realleges and incorporates by reference the Statement of the Case and Facts contained in its Initial Brief as though fully set forth herein.

ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT COULD CONSIDER NEW CHARGES IN AN AMENDED AFFIDAVIT OF PROBATION VIOLATION WHERE THE ORIGINAL AFFIDAVIT WAS TIMELY FILED, BUT THE AMENDED AFFIDAVIT WAS NOT FILED UNTIL AFTER THE PROBATIONARY PERIOD HAD EXPIRED BECAUSE THE DEFENDANT COMMITTED THE ALLEGED VIOLATION AT, OR NEAR, THE END OF HIS PROBATIONARY PERIOD?

### SUMMARY OF THE ARGUMENT

The trial court should be able to violate a defendant's probation, based on an affidavit of violation which was amended shortly after the end of the probationary period in order to add a substantive violation which was committed on the last day of probation. Such an interpretation of the law is not only supported by current caselaw, but is the only way that a probationer can be expected to serve the entire probationary period within the restrictions contemplated by the court which entered the probation order.

Therefore, this court should answer the question certified by the district court in the affirmative and permit such amendments to an existing affidavit of violation within a reasonable time after a violation has been committed.

## ARGUMENT

THE TRIAL COURT COULD CONSIDER NEW CHARGES IN AN AMENDED AFFIDAVIT OF PROBATION VIOLATION WHERE THE ORIGINAL AFFIDAVIT WAS TIMELY FILED, BUT THE AMENDED AFFIDAVIT WAS NOT FILED UNTIL AFTER THE PROBATIONARY PERIOD HAD EXPIRED BECAUSE THE DEFENDANT COMMITTED THE ALLEGED VIOLATION AT, OR NEAR, THE END OF HIS PROBATIONARY PERIOD.

The Respondent's position is, in essence, that a defendant is not really placed on probation for the entire period that the probation order indicates, but for that period of time less the amount of time it takes to inform his probation officer of a probation violation, prepare an affidavit of violation and file it. (Respondent's Brief, 6-12). Thus, pursuant to this reasoning, if a probationer's Probation Officer goes on vacation near the end of his probation period, his probation is over, for all practical purposes, the day his Probation Officer leaves on vacation. If it ends on the last day of a four-day weekend, it really ends on the first day of the weekend, and so forth. So long as he is close enough to the end of his probation to make it impractical to inform his probation officer and to prepare and file an affidavit of violation, his probation is over. It is respectfully submitted that this should not be the law.

The Respondent attempts to distinguish the reasoning of Powell v. State, 606 So. 2d 486, 488 (Fla. 5th DCA 1992) by inferring that a period of community control is not



jurisdictional but a period of probation is. (Respondent's Brief, 8-9). However, he fails to explain why such a distinction should exist. Indeed, given the similar language concerning these programs in F.S. §948.06(1991), such a distinction would seem unlikely.

However, the Respondent informs us that the statute just referred to, 948.06(1991), establishes strict jurisdictional parameters which are applicable to this case. (Respondent's Brief, 9). He has been unable to cite to any statutory language, however, which establishes such jurisdictional limits. The statute concerned does provide:

(1) Whenever within the period of probation or community control there are reasonable grounds to believe that a probationer or offender in community control has violated his probation or community control in material respect, any parole or probation supervisor may arrest or request any county or municipal law enforcement officer to arrest such probationer or offender . . . (F.S. §948.06(1)(1991)).

However, this language would not appear to support Respondent's argument where, in this case, the grounds to believe that the Respondent had violated clearly arose during the probationary period (albeit on the last day of the period) and the affidavit of violation was filed within a reasonable period thereafter.

The fact is, if a period of probation is to last for the entire period that the trial court ordered, then the question certified by the district court should be answered in the

affirmative,<sup>1</sup> the exception in Fryson v. State, 559 So. 2d 377 (Fla. 1st DCA 1990) should apply to this situation and this court should hold that an affidavit of violation may be amended within a reasonable time to add a violation which was committed too near the end of the probation period to permit the filing of such an affidavit during the period concerned.

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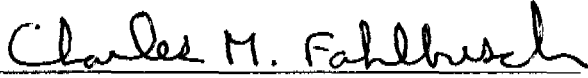
WHETHER THE TRIAL COURT COULD CONSIDER NEW CHARGES IN AN AMENDED AFFIDAVIT OF PROBATION VIOLATION WHERE THE ORIGINAL AFFIDAVIT WAS TIMELY FILED, BUT THE AMENDED AFFIDAVIT WAS NOT FILED UNTIL AFTER THE PROBATIONARY PERIOD HAD EXPIRED BECAUSE THE DEFENDANT COMMITTED THE ALLEGED VIOLATION AT, OR NEAR, THE END OF HIS PROBATION PERIOD? (App. 3).

CONCLUSION

Based on the arguments and authorities contained above, the question certified by the district court should be answered in the affirmative.

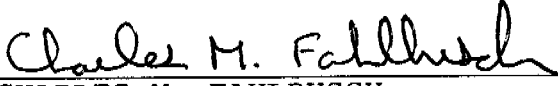
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF was furnished by U.S. mail to HARVEY J. SEPLER, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 22nd day of December, 1993.

  
CHARLES M. FAHLBUSCH  
Assistant Attorney General