OA 2-7-96

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,284

JUAN SOCA,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

The probation regulatory scheme established two decades ago, which appropriately accommodates the competing interests of the "special need" to regulate probationers with respect to their probation, but does not diminish their expectation of privacy at large or encourage a subterfuge of warrantless intrusions into such privacy to establish new criminal cases, *Grubbs v. State*, 373 So. 2d 905 (Fla. 1979), has worked well and no basis whatsoever has been shown to dismantle it. The Respondent, while of course seeking the same outcome as that reached below, has presented an ever-shifting analysis which substantially dispenses with or jettisons the analysis employed by the lower court with as much alacrity as the lower court manifested in jettisoning *Grubbs*.

The State asserts that each of three cases, two of which have very little to do with this case, is controlling: *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 83, 4 L. Ed. 2d 668 (1960); *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987); and *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). (Brief of Respondent at 9, 13, 20, respectively.)

Burger has little to do with this case because it involved a warrantless administrative search, *pursuant to authorizing statute*, of *commercial property* (an automobile junkyard), in which there was recognizedly a significantly diminished expectation of privacy as compared to a residence. In this case, the search was not

based on statutory authorization,[1] and was of the residence of both the defendant and his parents, an area entitled to the highest degree of recognition of privacy interests.

Abel has little to do with this case, at least not in the "controlling" sense urged by the Respondent, both because it did not involve rights of probationers, *see State v. Cross*, 487 So. 2d 1056 (Fla. 1986), *cert. dismissed*, 479 U.S. 805 (1986); because the search by law enforcement (FBI) officers of Abel's hotel room followed an arrest *pursuant to administrative [INS] warrant*, the validity or constitutionality of which had not been challenged, 362 U.S. at 230-31, 80 S. Ct. at 692-93; and because the evidence supported, unlike here, a finding that the FBI had not improperly instituted the action by INS or been improperly motivated but, to the contrary, both agencies were "branches of a single Department of Justice" with a duty to coordinate functions. 362 U.S. at 229, 80 S. Ct. at 692. The court specifically distinguished an intrusion involving INS and the Bureau which had occurred at a time "when the immigration service was a branch of the Department of Labor and was acting not within its lawful authority but as the cat's paw of another, unrelated branch of the Government." 362 U.S. at 229-30, 80 S. Ct. at 692.

The distinction is compelling herein. It is the pertinent principle of *Abel* that "The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts."

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[1] By noting this, the Petitioner does not in the slightest suggest that the search was not authorized for purposes of probation compliance only; that it was so authorized is the direct holding of this Court in *Grubbs*, which it is the Petitioner's desire, although not the Respondent's, to give due recognition to.

362 U.S. at 226, 80 S. Ct. at 690. A fortiori is that the case as to a new substantive charge where there is neither warrant nor probable cause.

As stated in *Abel*, "[t]he test is whether the decision to proceed administratively . . . was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." 362 U.S. at 230, 80 S. Ct. at 692. The record therein supported the finding it had not been. *Id.* In this case, unlike in *Abel*, there is a candid, direct acknowledgment by the state attorney's investigator, who, as acknowledged by the Respondent, indeed wound up at the search site, that after being unable to make a criminal case against the defendant and not having a sufficient basis to obtain a warrant, the involvement of and ensuing search by probation officers was by design initiated by the state attorney's office. (T. 15-18, 20-21.) The Petitioner does not contend, as has been incorrectly construed (Brief of Respondent at 21), that the search by probation officials was unlawful for purposes of probation compliance. Regardless of the reason for or motivation of the probation search, it need not have been based on probable cause or warrant under *Grubbs,* as long as its fruits were utilized for probation revocation purposes and no other.

The lower court's decision placed no reliance on *Abel* or *Burger*, indeed did not even mention them, and the apparent purpose for which *Abel* has been advanced by the Respondent is to evade the clear implication that if *Griffin* signifies what the lower court concluded it does (which it does not), then *Perez v. State*, 620 So. 2d 1256 (Fla. 1993), should be revisited. By trying to muster (however irrelevantly or

unpersuasively) pre-1983[2] Supreme Court cases, the Respondent anomalously urges that it was not the (Wisconsin-law-interwoven) decision in *Griffin* which nullified *Grubbs*, it was the effective implementation of Article I, § 12 itself which did so.

The fatal flaw in this part of the Respondent's argument, of course, is that this Court has properly construed Article I, § 12 to have no effect upon an extant decision of this Court in the absence of a U.S. Supreme Court decision which is *on point*. *State v. Cross*, *id.* at 1057-58. Since neither *Abel* nor any other pre-1983 U.S. Supreme Court decision qualifies to nullify *Grubbs*, that part of the Respondent's analysis is readily disregarded and resolution must depend upon an analysis of whether (a) *Griffin* has negated *Grubbs* under Article I, § 12, which the Petitioner contends it has not, and (b) if *Griffin* has indeed done so, whether that is one more reason for revisitation of *Perez*.

The central problem with the Respondent's argument that *Griffin* nullifies *Grubbs* is that *Griffin* was integrally dependent upon the Wisconsin scheme itself, holding that it was the statutorily based regulatory scheme itself which satisfied constitutional requirements, and that whether the scheme had been satisfied in the particular case was for the Wisconsin Supreme Court to determine *as final arbiter of Wisconsin law*. *Griffin*, 107 S. Ct. at 3169, 3171 n.8.

Contrary to the lower court's creative law-making exercise herein, it is neither statute nor administrative regulation which establishes, as required by *Griffin*, the basis

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[2] The effective date of the Article I, § 12 amendment was January 4, 1993.

for authorized warrantless searches of probationers, it is this Court's own decision in *Grubbs* which does so. Absent such a statutory regulatory framework, *Griffin* does not authorize warrantless searches of probationers' residences. *See Commonwealth v. Pickron*, 634 A. 2d 1093, 1096 (Pa. 1993) (*Griffin* probation-supervision "special needs" exception to warrant requirement for residential searches "applies only to a specific statutory or regulatory [search] framework; consequently, because Pennsylvania does not have such a regulatory framework, the *Griffin* exception does not apply.").[3]

Thus, to borrow a term from conflicts law, the State's argument presents a classic instance of *renvoi*, that is, mutual and pointless circular reference. A conclusion that warrantless searches of probationers are permissible in Florida for purposes of criminal as distinct from revocation proceedings depends upon a nullification of *Grubbs* by *Griffin* under Article I, § 12, which constitutes a logical *ne exeat*[4] inasmuch as it is *Grubbs* itself which is the precise authority in Florida for such searches, the results of which may be used in revocation proceedings but not in

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[3] In Pennsylvania, as in Florida, the signing of a supervision form which authorizes warrantless searches is irrelevant to the analysis. *See Commonwealth v. Walter*, 655 A. 2d 554 (Pa. Super. Ct. 1995); *Grubbs, id.* at 907, 909-10. In this respect the lower court's analysis, relying on a form authorizing even less, *Soca v. State*, 656 So. 2d 536, 540 (Fla. 3d DCA 1995), is also in error.

[4] Any acceptance of the circularity presents but one more persuasive reason for revisitation of *Perez*. The privacy rights of the citizens of this State, and the administration of justice, ought not turn on such vague, opaque or unascertainable decisional development.

substantive criminal proceedings. *Grubbs, id.* at 907, 909.

The probation regulatory scheme established in Florida for nearly two decades has worked well, and the lower court's decision constitutes an unwarranted and unauthorized departure from it. The decision should be quashed on authority of *Grubbs*.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Michael J. Neimand, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 25th day of January, 1996.

BRUCE A. ROSENTHAL
Assistant Public Defender