IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

v. CASE NO. 95,605

JOHN HENRY CARTER,

RESPONDENT.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court, and will be referred to as respondent in this brief. Petitioner will be referred to as petitioner or the state, and its brief will be referred to as "PB." Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Carter v. State, 24 Fla. L. Weekly D1063 (Fla. 1st DCA April 30, 1999).

Counsel certifies that this brief is printed in 12 point Courier New font, and that this brief in WordPerfect 6.1 on a floppy disk has been submitted.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts set forth by petitioner.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that the position of the lower tribunal on this issue is correct. The lower tribunal was correct in holding that the failure to file one monthly report is not a substantial and material violation of probation. The Second District is in accord. The cases relied on by the state are not directly on point and are distinguishable. The failure to file one monthly report, in and of itself, is not a substantial and material violation of probation. This Court should adopt the position expressed by the First and Second Districts.

IV ARGUMENT

THE TRIAL COURT ERRED WHEN IT REVOKED RESPONDENT'S PROBATION AFTER HE FAILED TO FILE ONE MONTHLY REPORT.

The lower tribunal properly held that the trial court erred in revoking probation based solely upon respondent's failure to file only one monthly report, because such an omission is not a substantial and material violation. The revocation statute requires that the alleged violation be material:

> (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 or her probation or community control **in a material respect,** any law enforcement officer who is aware of the probationary or community control status of the probationer of offender in community control or any parole or probation supervisor may arrest or request any county or municipal law enforcement officer to arrest such probationer or offender without warrant wherever found and forthwith return him or her to the court granting such probation or community control. Any committing magistrate may issue a warrant, upon the facts being made known to him or her by affidavit of one having knowledge of such facts, for the arrest of the probationer or offender, returnable forthwith before the court granting such probation or community control. Any parole or probation supervisor, any officer authorized to serve criminal process, or any peace officer of this state is authorized to serve and execute such warrant. The court, upon the probationer or offender being brought before it, shall advise him or her of such charge of violation and, if such charge is admitted to be true, may forthwith revoke, modify, or continue the probation or community

control or place the probationer into a community control program. If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control. If such violation of probation or community control is not admitted by the probationer or offender, the court may commit him or her or release him or her with or without bail to await further hearing, or it may dismiss the charge of probation or community control violation. If such charge is not at that time admitted by the probationer or offender and if it is not dismissed, the court, as soon as may be practicable, shall give the probationer or offender an opportunity to be fully heard on his or her behalf in person or by counsel. After such hearing, the court may revoke, modify, or continue the probation or community control or place the probationer into community control. If such probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control.

* * *

(4) Notwithstanding any other provision of this section, a probationer or an offender in community control who is arrested for violating his or her probation or community control **in a material respect** may be taken before the court in the county or circuit in which the probationer or offender was arrested. That court shall advise him or her of such charge of a violation and, if such charge is admitted, shall cause him or her to be

> brought before the court which granted the probation or community control. If such violation is not admitted by the probationer or offender, the court may commit him or her or release him or her with or without bail to await further hearing. The court, as soon as is practicable, shall give the probationer or offender an opportunity to be fully heard on his or her behalf in person or by counsel. After such hearing, the court shall make findings of fact and forward the findings to the court which granted the probation or community control and to the probationer or offender or his or her attorney. The findings of fact by the hearing court are binding on the court which granted the probation or community control. Upon the probationer or offender being brought before it, the court which granted the probation or community control may revoke, modify, or continue the probation or community control or may place the probationer into community control as provided in this section.

§948.06(1) and (4), Fla. Stat. (1997); emphasis added.

The First and Second Districts have clearly held that the failure to file one monthly report is not a substantial and material violation. Sanders v. State, 675 So. 2d 665 (Fla. 2nd DCA 1996); Moore v. State, 632 So. 2d 199 (Fla. 1st DCA 1994); and Glenn v. State, 558 So. 2d 513 (Fla. 2nd DCA 1990).

In Sanders, the Second District stated:

> Finally, the appellant's failure to submit a monthly report does not support revocation in this case. The appellant's probation officer testified that the appellant failed to submit a monthly report for February 1995. The appellant admitted that he failed to file the report. **The technical omission of failing to submit one monthly report, by itself, is not a**

> **substantial violation that would support revocation of probation**. *Glenn v. State*, 558 So.2d 513 (Fla. 2d DCA 1990). Because the evidence presented at the revocation hearing fails to demonstrate a willful and substantial violation of probation, we reverse the order of revocation of probation.

Sanders v. State, 675 So. 2d at 666; emphasis added.

Likewise, the Second District in Glenn stated:

> **The technical omission of failing to submit one monthly report**, which Glenn eventually rectified, **by itself, cannot be deemed a substantial violation that would support the revocation of Glenn's probation**. See Hightower v. State, 529 So.2d 726 (Fla. 2d DCA 1988).

Glenn v. State, 558 So. 2d at 514; emphasis added.[1]

In Moore, *supra*, the court stated:

> Appellant Keith Moore appeals the order of the trial court revoking his probation. At issue is whether the trial court abused its discretion in revoking appellant's probation solely for failure to file one monthly report with his probation officer. On the present facts, **we find appellant's failure to file one monthly report does not constitute a substantial violation of the terms of his probation.** We reverse and remand, directing the trial court to return appellant to probationary status. (emphasis added).

This is true even where the defendant admits that violation. Sanders v. State, *supra*. This is true even where the defendant files two reports late. Monroe v. State, 679

[1]Curiously, the state confessed error on authority of *Glenn* in *Jones v. State*, 615 So. 2d 724 (Fla. 3rd DCA 1993). The state should not be permitted to take inconsistent positions in the various appellate courts.

So. 2d 50 (Fla. 1st DCA 1996).

Petitioner cites Schwartz v. State, 719 So. 2d 965 (Fla. 4th DCA 1998), for the proposition that "The failure to file a single monthly report is a wilful and substantial violation of probation." (PB at 7). This statement is not entirely correct.

In Schwartz, the probationer failed to file a monthly report because he claimed he was incapacitated in an accident. The judge rejected this excuse. That is not what happened here. As the lower tribunal noted, none of the cases in Schwartz held that the failure to file only one monthly report, in and of itself, was a substantial and material violation of probation:

> We note, however, that none of the cases cited as authority in *Schwartz* holds that the failure to file a single monthly report by itself may be a proper basis for revocation. Each of the cited cases hold[s] that the **failure to file *more* than one monthly report** may constitute a sufficient ground for revocation. *See Thompson v. State*, 710 So. 2d 80, 81 (Fla. 4th DCA 1998), *Warren v. State*, 499 So. 2d 55, 56 (Fla. 4th DCA 1986), and *Davis v. State*, 474 So. 2d 1246, 1247 (Fla. 4th DCA 1985).

Appendix; bold emphasis added. Thus, Schwartz is distinguishable.

Likewise, petitioner also relies on Strunk v. State, 728 So. 2d 320 (Fla. 5th DCA 1999). Strunk held that the failure to file a monthly report, coupled with the failure to report to

the probation office, coupled with no explanation for these two omissions, constituted a willful violation. Strunk is distinguishable on its facts and does not stand for the broad proposition expressed by petitioner.

This Court should approve the holding of the First and Second Districts that the failure to file one monthly report, in and of itself, is not a substantial and material violation of probation.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court affirm the decision of the lower tribunal.

Respectfully Submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief of Respondent has been furnished to James W. Rogers and Karla D. Ellis, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, this ___ day of September, 1999.

_____
P. DOUGLAS BRINKMEYER

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APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

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Criminal law -- Probation revocation -- Failure to file single monthly report does not by itself constitute substantial violation of probation -- Conflict acknowledged

JOHN H. CARTER, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 98-2881. Opinion filed April 30, 1999. An appeal from the Circuit Court for Escambia County. Michael Jones, Judge. Counsel: Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Karla D. Ellis and Charmaine M. Millsaps, Assistant Attorneys General, Tallahassee, for Appellee.

(PER CURIAM.) John Henry Carter appeals an order revoking his probation. While several violations of the terms of probation were charged in the affidavit of violation of probation, the lower court found that appellant violated probation in only one respect -- his failure to file a single monthly report. We recognize that the failure to file a monthly report, combined with other aggravating factors, might be sufficient to establish a substantial violation of the terms of probation. This court has held, however, that the failure to file a single monthly report does not by itself constitute a substantial violation of the terms of probation. *See Moore v. State*, 632 So. 2d 199 (Fla. 1st DCA 1994); *see also Sanders v. State*, 675 So. 2d 665 (Fla. 2d DCA 1996). Thus, we reverse the order before us.

We acknowledge that our decision conflicts with *Schwartz v. State*, 719 So. 2d 965 (Fla. 4th DCA 1998). We note, however, that none of the cases cited as authority in *Schwartz* holds that the failure to file a single monthly report by itself may be a proper basis for revocation. Each of the cited cases hold that the failure to file *more* than one monthly report may constitute a sufficient ground for revocation. *See Thompson v. State*, 710 So. 2d 80, 81 (Fla. 4th DCA 1998), *Warren v. State*, 499 So. 2d 55, 56 (Fla. 4th DCA 1986), and *Davis v. State*, 474 So. 2d 1246, 1247 (Fla. 4th DCA 1985).

REVERSED. (BARFIELD, C.J., VAN NORTWICK AND PADOVANO, JJ., CONCUR.)