

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2135

**THE STATE OF FLORIDA,**

Petitioner,

-vs-

**SHELTON SCARLET,**

Respondent.

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**BRIEF OF RESPONDENT ON THE MERITS**

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL OF  
FLORIDA, THIRD DISTRICT

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**BRIEF OF RESPONDENT ON THE MERITS**

**INTRODUCTION**

The Respondent, Shelton Scarlet, was the appellant in the district court of appeal and the defendant in the Circuit Court. The Petitioner, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal and the symbol "A" shall denote the appendix to the Petitioner's brief.

## STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts in the initial brief of Petitioner is accepted as a generally accurate account of the proceedings below, with the following addition:

The trial court made the following finding regarding the search of the vehicle:

The court finds that the search of the vehicle was without probable cause, without founded suspicion, without a warrant, and without consent. There are no lawful exceptions to the warrant requirement that apply to this case. Thus the search of the vehicle and the arrest of the Defendant were illegal under the Fourth Amendment to the United States Constitution and Article I, § 12 of the Florida Constitution.

(R. 27).

The court, however, admitted the tainted evidence at the probation violation hearing on the grounds that the exclusionary rule did not apply.

Although the Court has concluded that the search and arrest of the Defendant were illegal and that the spontaneous statements were the fruit of those illegalities, the inquiry does not end there. These findings have resulted in the exclusion of the evidence and statements in the underlying felony trafficking in cocaine trial. However, because the Court finds that the exclusionary rule does not apply to probation violation hearings, see *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), the motion is denied in this matter...

(R. 29).

The trial court revoked the defendant's probation, based on the narcotics that were seized from his car, and sentenced him to a 54 months in state prison (R.

31, 33).

### **SUMMARY OF THE ARGUMENT**

The United States Supreme Court's decision in *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998), did not overturn well-established Florida precedents holding that illegally seized evidence must be excluded from probation revocation hearings. In Florida, the exclusionary rule is not a judicial creation, but a constitutionally mandated remedy and thus not subject to change based on evolving judicial policies.

Under the rationale of *Soca v. State*, 673 So. 2d 24 (Fla. 1996), unless the United States Supreme Court's interpretation of the Fourth Amendment is directly on point with respect to a specific issue, Florida must rely on its own decisional law. There are constitutionally meaningful differences between parole revocation hearings, which are non-adversarial administrative procedures where indigent parolees are not entitled to appointed counsel, and probation revocation hearings, which are judicial and adversarial in nature. Moreover, the instant case is factually distinguishable from *Scott* because, *inter alia*, Scott was on parole and had executed a consent-to-search form as a condition of his release. Also, the search in *Scott* was conducted by parole officials, whereas in the instant case, the police illegally searched the respondent's car and were not acting within the regulatory



framework established for probation officers in Florida.

## ARGUMENT

### **FLORIDA’S CONSTRUCTION OF THE UNITED STATES SUPREME COURT’S DECISION IN *PENNSYLVANIA PAROLE BD. v. SCOTT*, 524 U.S. 367 (1998), IS MANDATORILY LIMITED TO PAROLE REVOCATION PROCEEDINGS, WHICH ARE NON-ADVERSARIAL AND ADMINIS-TRATIVE IN NATURE, AND MUST NOT BE EXTENDED TO PROBATION REVOCATION HEARINGS.**

The conformity clause of the 1982 constitutional amendment did not vitiate the principle of primacy of the Florida constitution. *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992) (“Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes...”). The rule of primacy, as interpreted by this Court in *Soca v. State*, 673 So. 2d 24 (Fla. 1996), requires that Florida follow the United States Supreme Court’s Fourth Amendment decisional law when its holdings are specifically controlling; however, “when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, we look to our precedent for guidance.” 673 So. 2d at 27 (citations omitted).

The United States Supreme Court’s holding in *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998), is not binding on Florida with

respect to the application of the exclusionary rule in probation revocation hearings for several reasons. First, there are substantive conceptual differences between parole and probation for Fourth Amendment purposes. Florida draws a sharp legal distinction between parole and probation and thus they must be interpreted under different analytical frameworks. In *Floyd v. Parole and Probation Commission*, 509 So. 2d 919 (Fla. 1987), this Court considered whether a parolee is entitled to court appointed counsel at a parole revocation proceeding. This Court concluded that the right to counsel did not exist because of the substantive differences between parole and probation.

Revocation of parole is not part of a criminal prosecution, and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. While there are similarities in probation and parole, there are also some significant differences.

Probation is under the jurisdiction of the courts, and it was in the exercise of our authority over the court system that we determined in [*State v. Hicks*, 478 So. 2d 22 (Fla. 1985)] that counsel must be furnished in all probation revocation hearings. Parole is administered by the Commission. Moreover, parole revocation proceedings are conducted by nonlawyers. Requiring that counsel be furnished in every case would inevitably lead to the use of counsel by the state. As noted in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)] the decision-making process would be prolonged and the financial cost to the state would be substantial. Finally, unlike probation revocation, parole revocation does not lead to a sentencing hearing which necessarily requires the appointment of counsel.

*Id.* at 920.

Under section 947.23, Florida Statutes, a parole revocation is determined in an

administrative, extra-judicial setting by non-lawyers. The hearing is not adversarial in nature, unlike probation revocation hearings. A commission, which usually consists of three or more commissioners, receive evidence and “[i]f the hearing was conducted by three or more commissioners, a majority of them shall enter an order determining whether the charges of parole violation have been sustained, based on the findings of fact made by them.” § 947.23(6)(a) FLA. STAT. (1999). In other words, a parole hearing is an administrative procedure presided over by commissioners, rather than a judge, the commissioners’ verdicts need not be unanimous, an indigent parolee does not have the right to appointed counsel, and he will not be sentenced (he will, instead, serve the remainder of his pre-determined sentence). Probation is a sentencing alternative whereas parole is an early release mechanism (now archaic in Florida) whereby the Department of Corrections ameliorates over-crowding through the grant of conditional, administrative release.

The Petitioner’s argument is predicated on a misconception concerning the status of the exclusionary rule in Florida as opposed to the federal version. The Petitioner writes:

The *Scott* opinion is based on the rationale that the State’s use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. Rather, a Fourth Amendment violation is fully accomplished by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can cure the invasion of the defendant’s rights which he has already suffered. *The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures.* As such, the rule does not proscribe

the introduction of illegally seized evidence in all proceedings or against all persons, but applies only in contexts where its remedial objectives are thought most efficaciously served. *Moreover, because the rule is prudential rather than constitutionally mandated, the Court has held it to be applicable only where deterrence benefits outweigh its substantial social costs.*

PETITIONER’S BRIEF at 7 (emphasis added).

In Florida, the exclusionary rule is not a judicial construct. The exclusionary rule is codified in Article I, Section 12 of the state Constitution and was preserved by the 1982 amendment. Therefore, the rule is not merely a “prudential” and prophylactic measure among a menu of other possible remedies, rather it is a constitutionally mandated remedy not subject to the shifting winds of judicial policies. This Court clarified the constitutional basis for the rule in *Dodd v. State*, 419 So. 2d 333 (Fla. 1982), rejecting the argument that the exclusionary rule should not apply in probation revocation hearings.

The exclusion from evidence of articles and information obtained in violation of article I, section 12 is constitutionally mandated rather than being a result of judicial policy ... A person's status as a probationer may be taken into consideration in determining whether a search or seizure is unreasonable for constitutional purposes, but in *Grubbs* this Court unequivocally repudiated the notion that the article I, section 12 exclusionary rule may simply be ignored at a probation revocation hearing.

*Dodd*, 419 So. 2d at 335 (citation and footnote omitted).

While a probationer does not enjoy the absolute liberty of every citizen, since his freedoms are statutorily restricted, Florida has recognized that probationers

possess certain basic rights to privacy. In *State v. Cross*, 487 So. 2d 1056 (Fla. 1986), this Court, reiterating its holding in *Grubbs v. State*, 373 So. 2d 905 (Fla. 1979), and *Dodd, supra*, refused to allow illegally seized evidence to be admitted in probation revocation hearings in the absence of a federal Supreme Court holding directly on point.

Respondent argues that our holding in *Dodd* should control unless the amendment affirmatively negates *Dodd*, and that the amendment refers not to a majority of federal law, but rather only to United States Supreme Court decisions as controlling. Respondent cites *Lavazzoli* [434 So.2d 321 (Fla.1983)]:

When faced with constitutional amendments not clearly expressing an intent to the contrary, this Court has repeatedly refused to construe the amendment to affect detrimentally the substantive rights of persons arising under the prior law.

*Id.* at 324.

The United States Supreme Court has not ruled on the issue presently before us. Therefore, it is not necessary to interpret the amendment to article I, section 12.

*Cross*, 487 So. 2d at 1057-1058.

The United States Supreme Court has not specifically ruled on whether illegally seized evidence is admissible in a *probation* revocation hearing. Under the strict construction rule governing the interpretation of Article I, section 12 of the

Florida Constitution,<sup>1</sup> *Scott* must be limited to parole revocation proceedings and thus, until the United States Supreme Court says otherwise, does not overturn *Grubbs, Dodd* and *Cross*.

Second, there are significant factual differences between *Scott* and the case *sub judice* which were determinative of the United States Supreme Court's ruling.

In Pennsylvania, a parolee – unlike a probationer in Florida – remains in the custody of the state:

[P]arole is first and foremost a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. *The prisoner on parole is still in the legal custody of the state ... and is under the control of the warden and other agents of the Commonwealth until the expiration of the term of his sentence.*

*Hendrickson v. Pennsylvania State Board of Parole*, 409 Pa. 204, 185 A.2d 581 (1962) (emphasis added).

In *Soca v. State*, 673 So. 2d 24, this Court held that a probation officer may search a probationer's premises when the search is "supported by 'reasonable grounds,'" but refused to allow the fruits of such searches into evidence in criminal proceedings. 673 So. 2d at 27. This Court reasoned that albeit the United States

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<sup>1</sup>It is a well settled principle of construction that "[s]tatutes authorizing seizures and search warrants should be strictly construed." *Leveson v. State*, 138 So. 2d 361, 365 (Fla. 3d DCA 1962) (citation omitted). *See also, Carter v. State*, 199 So. 2d 324, 332 (Fla. 2d DCA 1967) ("It has been uniformly held that these constitutional and statutory provisions regulating use of search warrants must be strictly construed. The statutory provisions must be rigidly followed and cannot in any case be extended or enlarged beyond the permissive provisions..." (citations omitted)).

Supreme Court, in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), approved the admissibility of evidence in a criminal trial which had been seized by a probation officer during a warrantless search, the federal holding was not controlling because the Wisconsin statute involved in *Griffin* “put probationers in the legal custody of the State Department of Health and Social Services and specifically rendered them ‘subject ... to ... conditions set by the court and rules and regulations established by the department.’” *Id.* (citation omitted). Finding no similar provision in Florida’s statutory scheme, *Soca* concluded that *Griffin* was inapplicable.

A Pennsylvania parolee – in contradistinction to a Florida probationer – executes a consent form agreeing to subject himself and his property to warrantless searches as a condition of release, thus waiving constitutionally protected expectations of privacy.

I expressly consent to the search of my person, property and residence without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items in the possession of which constitutes a violation of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

*Commonwealth v. Williams*, 547 Pa. 577, 582, 692 A.2d 1031, 1033 (1997);  
*quoted in Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 360 (1998).

Keith M. Scott agreed to the aforementioned condition when he was paroled in 1993. *See Scott v. Pennsylvania Bd. of Probation and Parole*, 548 Pa. 418, 420, 698 A.2d 32 (1997). Scott, who resided with his mother after his release from

prison, was arrested at a local diner on February 4, 1994, for several technical parole violations, including possession of firearms. 698 A.2d at 33. While being transported to jail by parole supervisors, the agents stopped at Scott's residence where they waited for the arrival of his mother. When Scott's mother arrived, the agents informed her of their intention to search Scott's bedroom. After the search proved fruitless, the agents expanded their search to a sitting room where they uncovered several guns hidden under one of the sofas. The evidence was subsequently presented to the parole board which revoked Scott's parole.

As the Federal District Court for the Eastern District of Pennsylvania noted, in *Scott*, the United States Supreme Court's "dispositive consideration ... was neither defendant's status nor the circumstances under which law enforcement officials searched for and seized evidence, but rather the nature of the proceeding in which the evidence was to be introduced." *United States v. Dixon*, \_\_\_ F.Supp.2d \_\_\_, 1998 WL 408820 at 2, fn. 6 (E.D. Pa. 1998). The majority in *Scott* reached its conclusion based on the administrative, non-adversarial nature of parole revocation hearings. The Court put the matter this way:

The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation. Because parole revocation deprives the parolee not "of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions," *Morrissey v. Brewer*, [408 U.S. 471, 480, 92 S.Ct. 2593, 2600 (1972)], States have wide latitude under the Constitution to structure parole revocation proceedings. Most States, including Pennsylvania, *see*



[*Scott v. Pennsylvania Bd. of Probation and Parole*, 548 Pa. 418, at 427-428, 698 A.2d, 32, 36 (1997)]; *Rivenbark v. Pennsylvania Bd. of Probation and Parole*, 509 Pa. 248, 501 A.2d 1110 (1985), have adopted informal, administrative parole revocation procedures in order to accommodate the large number of parole proceedings. These proceedings generally are not conducted by judges, but instead by parole boards, "members of which need not be judicial officers or lawyers." *Morrissey v. Brewer*, 408 U.S., at 489, 92 S.Ct., at 2604. And traditional rules of evidence generally do not apply. *Ibid.* ("[T]he process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"). Nor are these proceedings entirely adversarial, as they are designed to be " 'predictive and discretionary' as well as fact-finding." *Gagnon v. Scarpelli*, 411 U.S. 778, 787, 93 S.Ct. 1756, 1762, 36 L.Ed.2d 656 (1973) (quoting *Morrissey v. Brewer*, *supra*, at 480, 92 S.Ct., at 2599-2600).

*Scott*, 524 U.S. at 365-366.

We have long been averse to imposing federal requirements upon the parole systems of the States. A federal requirement that parole boards apply the exclusionary rule, which is itself a " 'grud[g]ingly taken medicament,' " would severely disrupt the traditionally informal, administrative process of parole revocation. The marginal deterrence of unreasonable searches and seizures is insufficient to justify such an intrusion. We therefore hold that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.

*Scott*, 524 U.S. at 369 (citation omitted).

The opinion refers to parole boards and the informal, non-adversary nature of such proceedings and thus should be limited to that context. The Petitioner's brief, which completely ignores this Court's holding in *Soca*, espouses that this Court should expand the rationale of *Scott* to include probation revocation hearings, while

turning a blind eye to the salient differences between the instant case and the facts of *Scott*. The Petitioner also ignores that this Court in *Soca* made it perfectly clear that unless a United States Supreme Court Fourth Amendment ruling is directly on point, it cannot overturn Florida decisional precedents.

The Supreme Court's decision also relied on a critical distinction between *Scott* and the case at bar. Mr. Scarlet's car was searched by police officers who were completely unaware of his probationary status, whereas in *Scott* the search was conducted by Scott's parole officer. The Supreme Court theorized that the deterrence function of the exclusionary rule was limited in the context of the relationship between parole supervisors and parolees. Parole officers do not stand in an adversarial relationship to parolees, their principal purpose is not to investigate crime; rather, parole officers are comparable to counselors since they exercise a preventative and supervisory role.

Even when the officer performing the search is a parole officer, the deterrence benefits of the exclusionary rule remain limited. Parole agents, in contrast to police officers, are not "engaged in the often competitive enterprise of ferreting out crime," *United States v. Leon*, [468 U.S. 897, 914, 104 S.Ct. 3405, 3416, 82 L.Ed.2d 677 (1984)]; instead, their primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial. *Griffin v. Wisconsin*, 483 U.S. 868, 879, 107 S.Ct. 3164, 3171, 97 L.Ed.2d 709 (1987). It is thus "unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer." *Morrissey v. Brewer*, *supra*, at 485-486, 92 S.Ct., at 2602. Although this relationship does not prevent parole officers from ever violating the Fourth Amendment

rights of their parolees, it does mean that the harsh deterrent of exclusion is unwarranted, given such other deterrents as departmental training and discipline and the threat of damages actions.

*Scott*, 524 U.S. at 368-369.

The Petitioner fails to address the difference between administrative searches performed by parole/probation officers acting in compliance with regulatory requirements, as opposed to police officers acting unconstitutionally. In *Soca*, this Court took significant notice of the fact that the search of Soca's trailer was performed in accordance with Department of Corrections procedures which had codified *Grubbs*, 373 So. 2d 905.

For instance, the DOC manual states, "An administrative probation or parole revocation hearing is different from a criminal trial to determine the guilt of a violation charge. *Evidence may be presented at a revocation hearing that could not be admissible in a trial.*" CCIM at 41 (emphasis added). Moreover, the DOC specifically notes that the authority to search a probationer's residence under *Grubbs* is limited to correctional probation officers and supervisors:

***Evidence obtained by search by an officer – is admissible at a revocation hearing even though there was no search warrant. The courts have held that the search of a probationer's person or residence by his probation officer without a warrant is reasonable and absolutely necessary for probation supervision. However, granting such authority to law enforcement officials is not permissible.... Evidence conducted at such searches may be used at revocation hearings.***

*Id.* at 43. Finally, the DOC requires that its probation staff follow a procedure consistent with *Grubbs* when conducting a probationary

search like the one in this case:

*c. No officer shall make a planned search of an offender's residence, car or person unless he has specific approval of his supervisor. Before making any planned searches, the officer shall document and review the plan with the supervisor, indicating reasons and risks involved. Upon approval, a search warrant may be requested and law enforcement assistance obtained if the situation warrants such action.* Probation and parole staff shall avoid "raids" on probationer's [sic] houses. *d. It is necessary to have another officer or supervisor present when conducting searches that are not routine and searches shall be carried out with the assistance of local law enforcement officers where possible.... If a search warrant has not been procured by local law enforcement, any seized evidence can only be used for revocation of supervision.*

*Id.* at 45.

*Soca*, 673 So. 2d at 26, fn. 2 (emphasis added).

The DOC document, which this Court cited, specifically asserts that there is a significant difference between a search conducted by a probation officer following specific departmental guidelines and a police officer acting on his own authority. If this Court were to adopt the state's argument, police officers would have carte blanche to illegally and arbitrarily search the conveyances and premises of probationers.

In conclusion, the Third District Court of Appeal correctly held that the rationale of *Soca*, *supra*, is controlling in the case *sub judice*. Hence, the substantive differences between parole and probation, in addition to other significant facts distinguishing this case from *Scott*, *supra*, requires that Florida

limit the interpretation of *Scott* to administrative parole revocation proceedings and preserve intact Florida's long-standing precedent excluding illegally seized evidence from probation violation hearings.

### **CONCLUSION**

Based upon the foregoing arguments and authorities, Respondent respectfully requests that this Court affirm the decision of the Third District Court of Appeal in *Scarlet v. State*, 766 So. 2d 1110 (Fla. 3d DCA 2000).

Respectfully submitted,

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**CERTIFICATION OF FONT**

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellant has been forwarded to Assistant Attorney General, Michael J. Neimand, at the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, this 19<sup>th</sup> day of April, 2001.

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