IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2135

THE STATE OF FLORIDA,

Petitioner,

-vs-

SHELTON SCARLET,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

INTRODUCTION

The Petitioner, the State of Florida, was the Appellee below. The Respondent, the Shelton Scarlet was the Appellant below. The parties will be referred to as the State and the Defendant. The symbol “R.” will designate the record on appeal and the symbol “A.” will designate the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Defendant was placed on probation for a term of one year for burglary of an occupied dwelling. An affidavit of violation of probation was filed charging Defendant with committing the offense of trafficking in cocaine; failing to pay restitution; and failing to complete 100 hours of community service. The order of revocation of probation found Defendant guilty of all three violations. (A. 2).

The cocaine charge emanated from a traffic stop. On that charge, the trial court found the search to be without probable cause, without founded suspicion, and without a warrant or consent. Defendant alleged that the drugs were not his. At the probation violation hearing, however, the trial court admitted the seized cocaine on the ground that the exclusionary rule did not apply. The court revoked Defendant's probation and sentenced him to 54 months in state prison. (A. 2).

The Defendant appealed to the Third District. The Third District reversed finding that the evidence admitted at the revocation hearing was seized in violation of the Fourth Amendment. (A. 1). The Third District found that this Court has held that in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. *See State v.*

Cross, 487 So. 2d 1056 (Fla. 1986). It found that since then the United States Supreme Court has held that such evidence is admissible in parole revocation hearings. *See Pennsylvania Parole Bd. v. Scott*, 524 U.S. 357 (1998). The Third District then found parole revocation hearings and probation revocation hearings are very different proceedings. Thus, the Third District held that *Scott* does not overturn *Cross* and evidence discovered during an unlawful search is not admissible in a hearing to revoke probation. (A. 2-3).

The Third District then reversed and remanded for further proceedings, as it was not clear from the record that on the two remaining probation violation findings, the trial court would have revoked Defendant's probation or entered the same sentence. (A. 3).

The Third District then stayed its mandate. The Petitioner then timely invoked this Court's discretionary jurisdiction and this Court the accepted jurisdiction.

QUESTIONS PRESENTED

WHETHER THE UNITED STATES SUPREME COURT'S OPINION IN PENNSYLVANIA PAROLE BD. V. SCOTT, 524 U.S. 367 (1998), WHICH HOLDS THAT THE FOURTH AMENDMENT'S EXCLUSIONARY RULE IS INAPPLICABLE IN PAROLE REVOCATION HEARINGS MANDATES THAT THE EXCLUSIONARY RULE IS ALSO INAPPLICABLE TO PROBATION REVOCATION HEARINGS?

SUMMARY OF THE ARGUMENT

In the instant case, the Third District erroneously ruled that evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. The trial court correctly ruled that the exclusionary rule is inapplicable in probation revocation proceedings. Although there are differences between parole revocation proceedings and probation revocation proceedings, said differences do not require that the exclusionary rule be applicable in probation revocation hearing. Rather the legal principles which *Scott* is based upon are equally applicable to probation proceedings since both proceedings are not criminal trials and the defendant is granted supervised release as long as he obeys the law. To allow a probationer to commit another crime and then to exclude the evidence would allow the probationer to avoid the consequences of his noncompliance with his probationary terms. It would also be done at a great cost to the State since its use of probation might decrease.

ARGUMENT

THE UNITED STATES SUPREME COURT'S OPINION IN PENNSYLVANIA PAROLE BD. V. SCOTT, 524 U.S. 367 (1998), WHICH HOLDS THAT THE FOURTH AMENDMENT'S EXCLUSIONARY RULE IS INAPPLICABLE IN PAROLE REVOCATION HEARINGS MANDATES THAT THE EXCLUSIONARY RULE IS ALSO INAPPLICABLE TO PROBATION REVOCATION HEARINGS.

In the instant case, the Third District held that evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. In so doing, the Third District rejected the State's position that the United States Supreme Court's decision in *Pennsylvania Parole Bd. v. Scott*, 524 U.S. 357 (1998), which held that such evidence is admissible in parole revocation proceedings, has overruled this Court's decision in *State v. Cross*, 487 So. 2d 1056 (Fla. 1986). Instead the Third District found that *Cross*, which held that evidence obtained through an unlawful search is inadmissible in a probation revocation hearing, is still the controlling law since *Scott* dealt with parole and not probation. Thus, the Third District held that controlling precedent from the United States Supreme Court on the issue does not exit. Therefore, *Cross* is still controlling in Florida.

The State submits that the Third District's decision is based on an overly narrow interpretation of the *Scott* opinion. This interpretation should be rejected by this Court and this Court should adopt the Fourth District's decision in *Johnston v State*, 768 So.2d 504 (Fla. 4th DCA 2000), and hold that the exclusionary rule is inapplicable in probation revocation hearings.

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 its deterrence benefits outweigh its substantial social costs. *Scott,* 524 U.S. at 362-63.

Based on the underlying rationale of the exclusionary rule the Supreme Court's held that the exclusionary rule is inapplicable in parole revocation hearings. The Court's reasons for rejecting the applicability of the exclusionary rule in parole revocation hearings are completely compatible with probation revocation hearings and may be summarized as follows:

> 1. The rule does not extend to proceedings other than criminal trials.
>
> 2. Application of the rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings.
>
> 3. Application of the rule in parole revocation proceedings would provide only minimal deterrence benefits; application of rule in the criminal trial context already provides significant deterrence of unconstitutional searches.
>
> 4. The use of the rule to preclude the admission of evidence establishing a violation of parole would hamper a State's ability to ensure compliance with the conditions of parole

by permitting a parolee to avoid the consequences of his noncompliance.

5. The social costs of using the rule to allow a parolee to avoid the consequences of his violation are compounded by the fact that parolees, particularly those who have already committed parole violations, are more likely to commit future criminal offenses than are average citizens.

6. The rule is incompatible with the traditionally flexible, administrative procedures of parole revocation.

7. A 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 compliance with special parole restrictions; and, thus, the States have a wide latitude under the Constitution to structure their own revocation proceedings and may thus adopt informal, administrative parole revocation procedures in order to accommodate the large number of parole proceedings.

8. Application of the rule in parole revocation proceedings would significantly alter the informal and flexible administrative process and could require extensive litigation to determine whether particular evidence must be excluded.

9. The financial costs of applying the rule in parole revocation proceedings, with resulting adversarial proceedings, could reduce a State's incentive to extend parole in the first place, as one purpose of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee.

10. The fact that an officer performing a search knows that the subject of his search is a parolee does not provide any basis for applying the rule in parole revocation proceedings; the rule need not apply in every circumstance in which it might provide marginal deterrence.

11. Any additional deterrence from applying the rule in parole revocation proceedings if the searching officer knows of the parolee's status

would be minimal; if the person conducting search is a police officer, the officer's focus is not upon ensuring compliance with parole conditions or obtaining evidence for introduction at administrative proceedings, but upon obtaining convictions of those who commit crimes.

12. Any additional deterrence benefits from applying the rule in parole revocation proceedings if the officer performing the search is a parole officer and knows of the parolee's status are limited; in contrast to police officers, parole agents are not engaged in the often competitive enterprise of ferreting out crime, and have as their primary concern whether their parolees should remain free on parole.

13. Although the supervisory relationship between parole officers and parolees does not prevent parole officers from ever violating the Fourth Amendment rights of their parolees, it does mean that the harsh deterrent of exclusion of evidence in parole revocation proceedings is

> unwarranted, given other deterrents such as departmental training and discipline and threat of damages actions.
>
> 14. Although in some instances parole officers may act like police officers and seek to uncover evidence of illegal activity, they are undoubtedly aware that any unconstitutionally seized evidence that could lead to indictment would be suppressed in the criminal trial and, thus, the application of the rule in parole revocation proceedings would have limited effect.

Scott, 524 U.S. at 363-69.

The State submits that probation revocation proceedings are substantially similar to parole revocation proceedings. Thus the legal principles on which *Scott* is based are equally applicable to probation proceedings.

The grant of probation rests within the broad discretion of the trial judge. It is a matter of grace, rather than right, extended to the offender usually on the basis that he is not likely to repeat his conduct and could be rehabilitated while at liberty under supervision. The offender is not entitled to remain at large on probation if he persists in criminal

tendencies. *State ex rel. Roberts v. Cochran*, 140 So.2d 597 (Fla. 1962). The underlying concept of probation is rehabilitation rather than punishment. *Bernhardt v. State*, 288 So. 2d 490 (Fla. 1974).

A probation revocation hearing, like a parole revocation hearing, is not a criminal proceeding. The purpose of the revocation hearing is to determine whether the terms of the probation for the prior offense has been violated. *Green v. State*, 463 So.2d 1139 (Fla. 1985). A revocation hearing is not a criminal trial, rather it is a deferred sentencing proceeding. *State v. Payne*, 404 So.2d 1055 (Fla. 1981); *State v. Jones*, 425 So.2d 178 (Fla. 1st DCA 1983).

A probationer does not enjoy the same status as an ordinary citizen, but, just like parolees, he is entitled to some but not all due process rights. These rights include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross examine adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole. *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

A probation revocation hearing is not a traditional adversary criminal trial but is only a final evaluation of any contested relevant facts and consideration of whether the facts warrant revocation. *Singletary v. State*, 290 So. 2d 116 (Fla 4th DCA 1974). Thus, revocation of the probationary status is not circumscribed by the panoply of strict procedural requirements with which the presumption of innocence and other constitutional rights surround an individual initially accused of a crime. *Morning v. State*, 416 So.2d 844 (Fla. 4th DCA 1982).

Thus, the strict rules of evidence are not required to be observed in probation revocation hearings and evidence which may not be admissible in an adversary criminal trial is admissible in probation proceedings. The evidence must be sufficient to satisfy the conscience of the court that a condition of probation has been violated. *Bernhardt v. State*, 288 So. 2d 490 (Fla. 1974). In order to prove a violation of probation, the state's burden of proof is the greater weight of the evidence or by the preponderance of the evidence, rather than proof beyond a reasonable doubt. *McPherson v. State*, 530 So.2d 1095 (Fla. 1st DCA 1988)(greater weight of the evidence); *Amador v. State*, 713 So.2d 1121 (Fla. 3d DCA 1998) (preponderance of the evidence). Evidence that would not be admissible at trial, such as letters, affidavits, and other documents which are relevant, is

admissible at a probation revocation hearing. The only caveat is that proof of the violation of probation can not be based solely on hearsay. *McCarrick v. State*, 553 So.2d 1373 (Fla. 2d DCA 1989). Based on the informality of probation revocation hearings, fair play and justice require that a defendant in a probation revocation hearing is entitled to reasonable discovery. *Cuciak v. State*, 410 So.2d 916 (Fla. 1982).

There is no constitutional requirement for the appointment of counsel in all probation revocation hearings. However, this Court held that counsel is required in all probation revocation hearings and this was based on the ground that a uniform rule will result in a more orderly and uniform administration of the criminal justice system. *State v. Hicks*, 478 So.2d 22 (Fla. 1985). This rule was not extended to parole revocation hearing, where the right to counsel is determined on a case-by-case basis. The basis for this rule is that in probation revocation hearings the state has counsel and it would be unfair not to provide counsel to the probationer, while in parole revocation the state is not represented by counsel. Thus, to require counsel for all parolees facing revocation would require the state to have counsel and would prolong the decision-making process and the financial cost to the state would be

substantial. *Floyd v. Parole and Probation Commission*, 509 So.2d 919 (Fla. 1987).

A probationer's Fifth Amendment privilege against self incrimination is not infringed when upon specific request and periodic intervals, he is required to identify himself and provide all necessary information for his supervision, including his place of residence, his employment and to explain his non-criminal conduct. The privilege only pertains to new crimes committed while on probation. *State v. Heath*, 343 So.2d 13 (Fla. 1977). Moreover, when a probationer refuses to testify concerning compliance with the terms of probation relevant to residence, the trial judge may consider this silence as a factor in revoking probation and may properly infer from the probationer's silence non-compliance with the residence condition of probation. *State v. Mangam*, 343 So.2d 599 (Fla. 1977). In addition, a probationer is not entitled to *Miranda* warnings when questioned by his probation officer concerning crimes he committed while on probation and thus unwarned statements admitting criminal activity are admissible in revocation hearings. *Cleveland v. State*, 557 So.2d 959 (Fla. 4th DCA 1990); *Evans v. State*, 356 So.2d 1355 (Fla 1st DCA 1978).

In addition to the foregoing, probationers at revocation hearings are not accorded a host of other procedural rights. A second revocation hearing based on the filing on another affidavit alleging the same violation is not barred by double jeopardy where the first order revoking probation was reversed on the ground that the order was based solely on hearsay. *Tuff v. State*, 338 So.2d 1335 (Fla. 2d DCA 1976). There is no right to a speedy trial. *Gonzalez v. State*, 447 So.2d 381 (Fla. 3d DCA 1984)(speedy trial rule); *Young v. State*, 305 So.2d 307 (Fla. 3d DCA 1974)(constitutional right to speedy trial). There is no due process right to have the affidavit dismissed for a delay in arresting the probationer after affidavit has been filed. *Hall v. State*, 512 So.2d 303 (Fla. 1st DCA 1987). Finally, there is no right to statement of particulars. *Kane v. State*, 397 So.2d 1169 (Fla. 3d DCA 1981).

In accordance with the foregoing, the trial judge who prescribes probation in lieu of immediate imprisonment is allowed a broad judicial discretion to determine whether the conditions of the probation have been violated, and, therefore, whether the revocation of probation is warranted. This discretion is broad and extensive in order that the interests of society may be protected against a repeating offender or one who disregards the conditions stipulated for his remaining at large.

State ex rel. Roberts v. Cochran, 140 So. 2d 597 (Fla. 1962). The costs of excluding reliable, probative evidence are, like in parole revocation proceedings, particularly high in the context of probation revocation proceedings. The exclusion of evidence establishing a probation violation hampers the State's ability to ensure compliance with the terms of probation by permitting the probationer to avoid the consequences of his noncompliance.

The State submits, as the foregoing establishes, that the legal analysis of *Scott* is equally applicable to probation proceedings and the exclusionary rule has no place in said proceedings. The Third District, however, found that the exclusionary rule is applicable in probation revocation proceedings because it is different from parole revocation hearings. The court observed that a parole revocation hearing is not part of a criminal prosecution, but is an administrative proceeding conducted by non-lawyers in a non-judicial setting where traditional rules of evidence do not apply and that probation revocation hearings occur under a court's jurisdiction. The Third District found that these limited factors establish that parole revocation hearings and probation revocation hearings are very different proceedings and thus *Scott* does not overturn *Cross*.

In *United States v. Armstrong*, 187 F.3d 392 (4th Cir. 1999),the court rejected a similar position. In *Armstrong*, the defendant was on supervised release when he was arrested for possession of cocaine. The defendant successfully suppressed the cocaine on the ground that his stop violated the Fourth Amendment. Thereafter, the United States filed a petition seeking revocation of Armstrong's supervised release. Armstrong contended that the exclusionary rule should prevent the government from revoking his supervised release. Armstrong contended that the reasoning of *Scott* was inapplicable in that *Scott* involved a parole revocation proceeding, whereas the instant case involves a supervised release revocation proceeding.

The court rejected this position. The court found that parole and supervised release are analogous contexts. The court found that Congress designed supervised release as the successor to parole in the federal criminal system, because it believed that the parole system provided inadequate supervision. Thus, for purposes of the rule established in *Scott,* the court found, parole and supervised release are not just analogous, but virtually indistinguishable. The court found that the costs and benefits of applying the exclusionary rule to revocation proceedings are almost identical in the parole and supervised

release contexts. Although supervised release revocation proceedings, unlike parole revocation proceedings, do take place before a judge, they are characterized by the same flexibility that the Supreme Court found significant in *Scott.* As in parole revocation proceedings, findings of fact are made under a preponderance-of-the-evidence, rather than reasonable-doubt, standard; the traditional rules of evidence are inapplicable; and the full panoply of constitutional protections afforded a criminal defendant is not available. The court held that the reasoning of *Scott* applies equally to supervised release revocation proceedings as to parole revocation proceedings, and *Scott* requires that the exclusionary rule not be extended to federal supervised release revocation proceedings.

Although probation revocation hearings are more adversarial than parole revocation hearings, probation revocation hearings are still designed to be predictive and discretionary as well as factfinding. Thus, to apply the exclusionary rule to probation revocation proceedings would transform the proceeding from one designed to promote the best interests of the probationer and society into trial-like proceedings less attuned to the interests of the probationer. *Miller v. State*, 444 So.2d 523 (Fla. 1st DCA 1984)(Probation hearings should not be turned into non-jury criminal trials). Therefore, the State submits, as the

foregoing establishes, that the principles of law upon which *Scott* is based is equally applicable to probation proceedings.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully prays that this Court reverse the Third District's decision herein and hold that the exclusionary rule is inapplicable in probation revocation hearings and reverse the order granting the motion to suppress.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF ON THE MERITS** was furnished by mail to **MANUEL ALVAREZ**, Attorney for Respondent, 1320 N.W. 14th Street Miami, Florida, 33125, on this ____ day of March, 2001.

MICHAEL J. NEIMAND
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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the typeface used in this brief is 12 point Courier New.

MICHAEL J. NEIMAND
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