IN THE SUPREME COURT OF FLORIDA

DWAINE WOODSON,

Petitioner, CASE NO.: SC04-56

v. FIFTH DCA CASE NO.: 5D03-0071

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent relies upon the following:

Petitioner was charged by three count information with one count of lewd or lascivious battery for penetrating the victim's vagina with his penis; one count of lewd or lascivious conduct for placing his penis in the face of the victim; and one count of contributing to the delinquency of a minor by providing or buying alcohol for the victim. (R75-77). On July 17, 2001, a plea agreement was reached, whereby Petitioner pled *nolo contendere* to lewd and lascivious battery and in return the State agreed to file a *nolle prosequi* on the other two counts, to recommend an adjudication of guilt as well as a downward departure sentence of fifty-one weeks in the county jail with 339 days credit for time served followed by three years sex offender probation.[1] (R86-87).

Also on July 17th, the trial court sentenced Petitioner in accord with the plea agreement. (R95-97,104). Petitioner signed a notice of the special conditions for sex offenders which included his submission to a polygraph as part of a treatment program and an HIV test at his own expense with the results to

[1]According to the scoresheet, Petitioner scored out a minimum of 144.4 months incarceration in the Department of Corrections. (R93) It should be noted that Petitioner's prior record included a conviction for a sexual assault out of Ocean County, New Jersey, in 1990. (R91).

be released to the victim and/or the victim's parents or guardians. (R101). Moreover, an order regarding collection court set forth the total amount of fines imposed at $568.00 and that a $30.00 monthly payment would be made toward that amount. (R103).

An affidavit of violation of probation was filed on August 22, 2002, alleging Petitioner had failed to pay his costs of supervision, actively participate in a sex offender treatment program, or submit to an HIV test. (R106). According to the violation of probation report, Petitioner was referred after an evaluation to the sex offender group on August 6, 2001. He was terminated from the group on May 30, 2002. (R109). Also according to the report, Petitioner initially agreed to pay twenty dollars a month toward his cost of supervision and signed a second agreement in December of 2001 agreeing to pay $23.23 dollars per month. Petitioner had made no payments toward this obligation as of July of 2002. The violation report reflects that Petitioner was delinquent in all areas, inclusive of the collections court's obligation. (R110).

On December 18, 2002, a hearing was held on the allegations of violation of probation. (T1). Petitioner's first probation officer (P.O.) explained that he had instructed Petitioner on all of his probation conditions, including sex offender

conditions, on July 31, 2001. (T5-6). Petitioner's first P.O. and Petitioner also discussed a payment schedule, and a payment plan was reached without objection from Petitioner. (T7-8). During the time he supervised Petitioner, there were no complaints by Petitioner regarding this payment schedule or regarding the HIV testing condition, although he only supervised Petitioner for a little over a month. (T8).

Petitioner was called to the stand and claimed he was unable to make the payments as he was working for a temporary employment agency. (T14-15). He stated that he had submitted to an HIV test in June or July, but failed to show proof to his P.O. (T15-16). He admitted receiving a letter from his P.O. directing him to have the results of his HIV test in his possession when he appeared for his next appointment with his P.O. (T16). Petitioner also admitted he had been terminated from his sex offender treatment program. (T17).

Sheila Jackson, Petitioner's successor probation officer, revealed that she began to supervise him in October of 2001. (T18,19). She mailed a letter to Petitioner (on May 21, 2002) to make it very clear what was required of him by their next appointment which had been set for June 5th. (T20;R109). Prior to June 5th, she observed him at his group session where he indicated he had received her letter. (T21). She informed him

that no excuses would be accepted if he failed to bring the documentation required of him as set forth in her letter. (T21). When Petitioner appeared on June 5th, he provided no proof of submission to an HIV test, no money payment, no DMV registration; merely excuses or no justification at all. (T20-22).

On cross examination, the P.O. indicated she had verified Petitioner's employment at the temporary employment agency and was advised by Petitioner that during one month he earned twelve hundred dollars and the next, thirteen hundred dollars. (T23,24). For months Petitioner promised to make payments, but never followed through on his promise despite the fact that she advised him that his failure to pay was a problem. (T25).

Petitioner's counselor from the sex offender treatment program verified that Petitioner was terminated from the program for lack of progress and failure to pay. (T31). Petitioner failed to complete his homework and refused to participate in the group sessions, sometimes sleeping instead. (T32,37-38). These problems were discussed with Petitioner who merely complained that it was difficult for him to participate. (T32-33). He was advised that it was difficult for many people, but that it was part of the treatment process. (T33). Petitioner was advised he was required to go through each module in order to

progress and complete the program. Id. Although the program's policy was to terminate someone more than $75.00 in arrears, the therapist worked with Petitioner and did not terminate him until he was $590.00 in arrears and failing to actively participate in the program. (T34). Finally, he described Petitioner as totally uninterested and unmotivated in the sex offender treatment. (T36).

Petitioner admitted not paying for his costs of treatment due to financial problems, but denied ever falling asleep during group. (T45-47). He claimed it was only his finances that interfered with his ability to complete his sex offender treatment, although he did complain about the amount of time the homework required. (T47). Petitioner also testified that he finished his first module but messed it up at work and he never finished the replacement. (T48). He also asserted that if he could afford it, he would have joined a new treatment program or would have continued with the program he had been attending. Id. His attorney submitted what was represented to be documentation of an HIV test, and the State objected since it had never been provided proof prior to the date of the hearing or given the opportunity to authenticate the document. (T49-50). During cross-examination, the State noted that the document did not reflect or reference any HIV testing. (T55).

Additionally, Petitioner admitted he did not pay rent to his mother, his daughter was self-sufficient and his income went toward paying his bills, including counseling, although he conceded he was in arrears with the treatment program. (T53-54). After considering closing argument and case law provided by the defense, the trial court found Petitioner to be in violation of his probation and held as follows:

> TRIAL COURT: This was a stipulated downward departure to sex offender probation. The special conditions of sex offender probation are quantitatively different than the conditions that apply to other probations because the special conditions that apply to sex offender probation are not made up by a judge, they're mandated by statute. They're considered and passed by the legislature.
>
> It's my finding that Mr. Woodson was informed, he had knowledge of the statutory requirements. The language chosen by the legislature for special condition 17 is: 'You will actively participate in and successfully complete sex offender treatment program.' It's my finding that Mr. Woodson did not actively participate in the program.
>
> Unlike alcohol treatment or drug treatment programs...the legislatively mandated treatment for sex offenders isn't something that, my finding, that the legislature intended for courts to wait until the end of the probationary period, whether they were in, they intended that the sex offenders participate in programs from the outset. That, in fact, participation in this program is the essence of the probation intended by the legislature.
>
> But the probation is an alternative to

being incarcerated and it was the legislative finding and the intent of the legislature that persons did not have to be incarcerated if society could be assured that they were being supervised and treated and actively participating in treatment. When they then fell out of the treatment it was time to impose incarceration....

Mr. Woodson accepted the benefit of a stipulated downward departure and part of his undertaking as part of that stipulated downward departure was his compliance with and actively participating in a treatment program and it is the testimony of the probation officers and the counselor here that he did not and they're the ones in best position to assess whether his treatment was active, which is another way of saying whether it was genuine participation or just going through the motions.

I find Mr. Woodson's violation to be both willful and substantial. With respect to the HIV test....the defendant was advised repeatedly that he had to comply with the terms of the statute and the intent of the legislature that the HIV test be taken and the results made available and there was a repeated refusal to do that. That is quantitatively different than not completing community service hours and a probation officer setting an arbitrary deadline....

I recognize that body of law regarding date setting and certainly it is better practice to give the defendant a date certain by which conditions of probation are to be complied with, but they are not applicable to the special - sex offender conditions which were set forth by legislative mandate.

And the repeated reminders by the probation officer did not amount to an arbitrary date setting but repeated advice

> that the defendant was not in compliance with the statute and being given a second chance and a third chance and a fourth chance to avoid the possibility of noncompliance which had already occurred. I find that violation to be both willful and substantial.
>
> As to the failure to pay costs, I find that the defendant had an ability to pay but not a willingness to pay. I find that violation to be less substantial than the others but I do find it to be further evidence of his willful noncompliance.

(T63-68)

Taking into consideration that Petitioner had credit for time served of a year and that the lowest permissible sentence was ten years in the Department of Corrections, the trial court imposed an eleven-year incarcerative sentence followed by four years sex offender probation. (T68)

In an opinion affirming the trial court's revocation of Petitioner's sex offender probation, the Fifth District Court of Appeal certified conflict with Young v. State, 566 So. 2d 69 (Fla. 2d DCA 1990), and noted possible conflict with Lawson v. State, 845 So. 2d 349 (Fla. 2d DCA 2003), and Lynom v. State, 816 So. 2d 1218 (Fla. 2d DCA 2002).

This Court has postponed a decision on jurisdiction pursuant to an order issued on January 21, 2004.

SUMMARY OF ARGUMENT

This Court should not take jurisdiction of this case and should let stand the Fifth District Court of Appeal's opinion affirming the trial court's revocation of probation. Woodson, infra, does not expressly and directly conflict with the opinion in Young and there is no possible conflict with either Lawson or Lynom. Additionally, Petitioner's advocation of a per se rule that the trial court can never find a willful and substantial violation for failing to actively participate in a sex offender treatment program where a portion of the probationary period remains is not in accord with Florida law.

Finally, it is apparent that Petitioner is not amenable to treatment or supervision, his violations of statutorily mandated conditions of sex offender probation were willful and substantial, and the trial court did not abuse its discretion by revoking his probation based on the willful and substantial violation. The Fifth District Court of Appeal properly found that Petitioner's unwillingness to abide by the statutorily mandated conditions constituted a valid basis for violation.

ARGUMENT

POINT OF LAW

THERE IS NO CONFLICT BETWEEN WOODSON, INFRA, AND THE CASES LISTED THEREIN; REGARDLESS, THE FIFTH DISTRICT COURT OF APPEAL PROPERLY FOUND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REVOKING PETITIONER'S SEX OFFENDER PROBATION.

In Woodson v. State, 864 So. 2d 512 (Fla. 5th DCA 2004), the Fifth District Court of Appeal (DCA) concluded that a trial court has the discretion to find a willful and substantial violation of probation even where a trial judge has not set time parameters for a probationer to comply with the statutorily mandated terms of sex offender probation. Id. at 517. Further, a probationer must undertake compliance with each condition as soon as he or she is placed on probation and if a probationer fails to do so, a trial court has the discretion to revoke probation, even where a probationer claims he or she is willing to comply within the remaining probationary period. Id. In this same vein, the trial judge also has the discretion to permit a probationer additional opportunities where a probationer evidences a willingness to try again. Id.

The Fifth DCA certified conflict with Young v. State, 566 So. 2d 69 (Fla. 2d DCA 1990), and noted possible conflict with Lawson v. State, 845 So. 2d 349 (Fla. 2d DCA 2003), and Lynom v.

State, 816 So. 2d 1218 (Fla. 2d DCA 2002). This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The asserted conflict centers around the finding that sex offender probation, as it is statutorily mandated pursuant to section 948.03(5), Florida Statutes, can be willfully and substantially violated when a probationer fails to actively participate in a sex offender treatment program and refuses to submit to an HIV test or supply the results of such a test to the victim. Woodson, 864 So. 2d at 516. This is so even where the date of completion or the number of attempts at compliance was not specified or the defendant is willing to undertake another attempt at compliance within the probationary period. Id.

In Young, supra, the district court reversed the trial court’s finding of a willful and substantial violation, because Young expressed a willingness to complete MDSO counseling and the trial court’s order was nonspecific regarding the number of chances or the amount of time he was given to complete this

condition. Id. at 70. Young's counselor had also indicated that he would accept Young back into the program. Id. at 69.

Here, unlike the appellant in Young, there is no evidence that Petitioner was willing to complete counseling or that the counselor was amenable to accepting Petitioner back into the program. The standard of review on appeal for a finding of a willful and substantial violation is an abuse of discretion.[2] Based on the material factual differences between Young and Woodson, there is no express and direct conflict between the Second DCA's finding in Young that the trial court had abused its discretion, and with that of the Fifth DCA that the trial court in Woodson did not abuse its discretion by finding a willful and substantial violation.

Notably, when Young was ordered to complete a MDSO program, sex offender probation as it is today did not exist. In 1987, section 948.001, Florida Statutes, contained only definitions of community control and probation. §948.001(1) & (2), Fla. Stat. (1987). Section 948.03(6), Florida Statutes, required the trial court to order a diagnosis and evaluation for treatment where a probationer pled to, *inter alia*, a lewd and lascivious assault or sexual battery against a child, as the probationer did in Young and herein. The section also provided that when the trial

[2]State v. Carter, 835 So. 2d 259 (Fla. 2002).

court determined treatment was required, such counseling was required to be obtained from specific sources. Id. This provision exists today. See § 948.03(4), Fla. Stat. (2003).

Effective October 1, 1995, the Legislature amended section 948.03 to include subsection (5) which consists of several mandatory conditions for sex offenders under supervision including, *inter alia*, the "[a]ctive participation in and successful completion of a sex offender treatment program." See Ch. 95-283, §59 at 2689-2690, Laws of Fla. As noted by the Fifth DCA in Woodson, these mandatory conditions

> do not require oral pronouncement at the time of sentencing and shall be considered standard conditions of probation or community control for offenders specified in this subsection.

§948.03(5), Fla. Stat.; Woodson, 864 So. 2d at 515. Therefore, Young does not expressly and directly conflict because, unlike sex offender probation as provided in section 948.03(5), there was no statutorily mandated condition in 1987 that Young actively participate in and successfully complete a sex offender treatment program. Thus, based on the above-noted material factual differences as well as the statutorily mandated character of sex offender probation, Young cannot serve as a basis to invoke the discretionary jurisdiction of this Court based upon express and direct conflict.

Additionally, even assuming the Fifth DCA had certified

conflict with Lawson v. State, 845 So. 2d 349 (Fla. 2d DCA 2003), and Lynom v. State, 816 So. 2d 1218 (Fla. 2d DCA 2002), those cases do not expressly and directly conflict with Woodson. In Lawson, the appellant's therapist testified he was willing to accept Lawson back into the program, and Lawson continued to work on his treatment assignments while in jail. Id. at 350. Here, there was no testimony that Petitioner's therapist was willing to accept Petitioner back into the program and Petitioner made no attempt during the seven months' span between termination from the treatment program and the violation hearing to work on any of his homework. Finally, Lynom was never actually terminated from his treatment program, unlike Petitioner who admitted he had been terminated. Lynom, 816 So. 2d at 1220. Accordingly, just like Young, based upon these distinguishing material facts in Lawson and Lynom, there can be no express and direct conflict in the four corners of these district court opinions; each district court merely ruled on whether or not the trial court abused its discretion based on the facts of the individual case. This Court should refuse to accept jurisdiction.

However, assuming conflict in that Young, Lawson and Lynom stand for the proposition argued by Petitioner that a trial court *never* has the discretion to find a willful and substantial

violation of probation where a trial court has not set time parameters for a probationer to comply with the statutorily mandated terms of sex offender probation, these cases are not in accord with Florida law and should be reversed.

It is well established that "[p]robation is a matter of grace rather than right. The trial judge has broad discretionary power to grant as well as revoke probation." Diller v. State, 711 So. 2d 54, 55 (Fla. 5th DCA)(citing Robinson v. State, 442 So. 2d 284, 286 (Fla. 2d DCA 1983), rev. denied, 719 So. 2d 892 (Fla. 1998)). The evidence for revocation of probation need only be sufficient to satisfy the conscience of the court that the violation occurred. Rock v. State, 749 So. 2d 566, 567 (Fla. 3d DCA 2000). “Before a trial court can revoke a defendant's probation, the state must prove by a preponderance of the evidence that the defendant willfully violated a substantial condition of his probation." Crume v. State, 703 So. 2d 1216, 1217 (Fla. 5th DCA 1997)(citing Van Wagner v. State, 677 So. 2d 314, 316 (Fla. 1st DCA 1996)); see also Davis v. State, 704 So. 2d 681, 684 (Fla. 1st DCA 1997); Kolovrat v. State, 574 So. 2d 294, 297 (Fla. 5th DCA 1991).

As noted previously, whether a defendant’s violation of probation was willful and substantial is a question of fact, and will not be reversed on appeal unless an abuse of discretion is shown. Robinson v. State, 689 So. 2d 1147, 1149 (Fla. 4th DCA

1997)(citing Molina v. State, 520 So. 2d 320 (Fla. 2d DCA 1988)). An abuse of discretion is found "only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980).

The primary goals of probation are to impose conditions so that: (1) the probationer will be rehabilitated; (2) society will be protected from future criminal violations by the probationer; and (3) the crime victim's rights will be protected. Woodson, 864 So. 2d at 516; see also Grubbs v. State, 373 So. 2d 905, 909 (Fla. 1979)("Protection of the public is an important and proper consideration by the trial judge when determining whether probation or confinement should be imposed."); Bernhardt v. State, 288 So. 2d 490, 494 (Fla. 1974)("It is well settled that the primary purpose of probation is to rehabilitate the individual while he is at liberty under supervision."); Spry v. State, 750 So. 2d 123, 124-125 (Fla. 2d DCA 2000)("it is necessary to bear in mind the various purposes sought to be served by probation as a substitute for penitentiary custody. The freedom of the individual is only one of the desiderata. Rehabilitation and public safety are others.")(quoting from Sobota v. Williard, 247 Or. 151, 427 P.2d

758, 759 (1967)); Crossin v. State, 244 So. 2d 142, 145 (Fla. 4th DCA 1971)("The underlying purpose of probation is to give the individual a second chance to live within the rules of society and the law of the land during which time he can prove that he will thereafter do so and become a useful member of society. A grant of probation is a matter of grace and not of right, such grant being subject to revocation at any time the court determines that the probationer has violated the terms and conditions thereof.").

As explained by the Fifth DCA, the Legislature enacted section 948.03(5) in order to achieve these goals in certain cases involving sex offenders. Id. at 516. Pursuant to section 948.001(7), Florida Statutes, sex offender probation or sex offender community control is separately defined as:

> "Sex offender probation" or "sex offender community control" means a form of intensive supervision, with or without electronic monitoring, which emphasizes treatment and supervision of a sex offender in accordance with an individualized treatment plan administered by an officer who has a restricted caseload and specialized training. An officer who supervises an offender placed on sex offender probation or sex offender community control must meet as necessary with a treatment provider and polygraph examiner to develop and implement the supervision and treatment plan, if a treatment provider and polygraph examiner specially trained in the treatment and monitoring of sex offenders are reasonably available.

Id. To realize the goals of probation in sex offender cases, the probationer must be "required to undertake immediate compliance with the mandatory conditions." Woodson, 864 So. 2d at 516; Cf. State ex rel. Roberts v. Cochran, 140 So. 2d 597, 599 (Fla. 1962)("[T]he offender is not entitled to remain at large if he persists in criminal tendencies. 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 in order. While this discretion is not unbridled and should not be arbitrarily exercised, it is necessarily 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.)

The statutorily mandated conditions for a sex offender remaining at large are set forth in Section 948.03(5). See §948.03(5)(a)1.-10., Fla. Stat. (2003). These conditions include, *inter alia*, a mandatory curfew from 10 p.m. to 6 a.m., a prohibition against living within 1,000 feet of a school or other places where children regularly congregate, active participation in and successful completion of a sex offender treatment program, a prohibition against working at any school or place where children regularly congregate and submission of

two specimens of blood to the Florida Department of Law Enforcement. § 948.03(5), Fla. Stat. (2003).

These conditions are self-explanatory and any sex offender granted the grace of sex offender probation should be required to immediately abide by these conditions not only to facilitate his or her rehabilitation, but, also, for the protection of society and the victim. Of course, the deal with the people of the State of Florida presupposes that the sex offender will abide by these conditions so that, in return, he or she is allowed to remain free in society. An essential part of that bargain, though, requires a sex offender to demonstrate that he or she is capable of rehabilitation in that the probationer actively seeks to become rehabilitated to avoid reoffending. For those whom sex offender treatment is necessary, without active participation in such treatment, it is highly unlikely that the sex offender will become rehabilitated.

Here, Petitioner complains that he was not given a specific time frame in which to comply, save the probationary term. Yet, limiting the time frame for each sex offender's treatment to be completed would not be workable since each probationer's treatment is individualized. Just like a homework assignment, a student progresses at an individual rate depending upon his or her abilities and disabilities. However, each assignment must be completed in a timely manner or the student will not progress at

all. Conditions of probation are not aspirations, and the timely fulfilling of these conditions is a prerequisite to remaining on probation. Probation does not anticipate an amnesty or vacation period where a probationer is not required to do anything to meet its requirements.

Allowing a probationer to choose when he or she complies with the conditions of probation would not serve the goals of sex offender probation, where, for example, a probationer is required to submit to an HIV test, as the victim certainly has a greater peace of mind when he or she learns about the offender's HIV status sooner rather than later. As the Fifth DCA pointed out, allowing a probationer additional chances to abide by a statutorily mandated condition of probation simply because he or she expresses a willingness to comply at a later date, "opens to door to mischievous manipulation by the offender and thwarts all of the goals of probation." Woodson, 864 So. 2d at 516.

The question then becomes whether a trial court is ever permitted to exercise its discretion and revoke the probation of a sex offender who is not abiding by these terms, even where there is time remaining in the period of probation. If a probationer who has not complied with his sex offender probation conditions after, say, one third of his probation has expired, and cannot be found to be in willful violation because he

asserts a willingness to comply, one wonders just how long does a trial court have to wait to find a willful violation? Two-thirds of a probationary term? Three-fourths?

Petitioner would have this Court essentially establish a per se rule that a probationer who is not abiding by the statutorily mandated conditions can never be found in willful violation, so long as he or she states a willingness to comply within the probationary period. However, such a per se rule does not comport with Florida law.

In State v. Carter, 835 So. 2d 259 (Fla. 2002), this Court explained that:

> In the instant case, the district court improperly applied a per se rule when it relied on Moore and Sanders in reaching its conclusion that the failure to file a single monthly report as a matter of law is not a substantial violation, and thus not sufficient to justify a probation revocation. Such a holding means that under no circumstances could a failure to file a single report justify a revocation of probation. **Such a per se rule strips the trial court of its obligation to assess any alleged violations in the context of a defendant's case. Trial courts must consider each violation on a case-by-case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial** and is supported by the greater weight of the evidence. In other words, the trial court must review the evidence to determine whether the defendant has made reasonable efforts to comply with the terms and conditions of his or her probation.

Id. at 261(emphasis added). It is to the trial court that the discretion to find a willful violation is granted as "[t]he trial court is in a better position to identify the probation violator's motive, intent, and attitude and assess whether the violation is both willful and substantial." Carter, 835 So. 2d at 262.

Thus, a per se rule prohibiting a trial court from finding a willful violation of sex offender probation merely because there is time remaining and the probationer professes a willingness to comply, is inconsistent with the requirement that a trial judge consider each violation on a case-by-case basis for a determination that a particular violation is willful and substantial. In fact, the instant case is illustrative of just how such a per se rule could thwart the goals of sex offender probation.

Petitioner was charged by information with one count of lewd or lascivious battery for penetrating the victim's vagina with his penis; one count lewd or lascivious conduct for placing his penis in the face of the victim; and one count of contributing to the delinquency of a minor by providing or buying alcohol for the victim. On July 17, 2001, a plea agreement was reached whereby Petitioner pled *nolo contendere* to lewd and lascivious battery and in return the State agreed to file a *nolle prosequi* in the other two counts, and to recommend an adjudication of

guilt as well as a downward departure sentence of fifty-one weeks in the county jail with 339 days credit for time served followed by three years sex offender probation[3].

Also on July 17th, the trial court sentenced Petitioner in accord with the plea agreement. Petitioner signed a notice of the special conditions for sex offenders which included his submission to a polygraph as part of a treatment program and an HIV test at his own expense with the results to be released to the victim and/or the victim's parents or guardians. Moreover, an order regarding collection court set forth the total amount of fines imposed at $568.00 and that a $30.00 monthly payment would be made toward that amount.

An affidavit of violation of probation was filed on August 22, 2002, alleging Petitioner had failed to pay his costs of supervision[4], actively participate in a sex offender treatment program, or submit to an HIV test. On December 18, 2002, a hearing was held on the allegations of violation of probation. Petitioner's first probation officer (P.O.) explained that he

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[3]According to the scoresheet, Petitioner scored out a minimum of 144.4 months incarceration in the Department of Corrections. It should be noted that Petitioner's prior record included a conviction for a sexual assault out of Ocean County, New Jersey, in 1990.

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had instructed Petitioner on all of his probation conditions, including sex offender conditions on July 31, 2001. Petitioner's first P.O. and Petitioner also discussed a payment schedule, and a payment plan was reached without objection from Petitioner. During the time he supervised Petitioner, there were no complaints by Petitioner regarding this payment schedule or compliance with the HIV testing condition although he only supervised Petitioner for a little over a month.

Petitioner was called to the stand and claimed he was unable to make the payments working for a temporary employment agency. He stated that he had submitted to an HIV test in June or July, but he failed to show proof to his P.O. He admitted receiving a letter from his P.O. directing him to have the results of his HIV test in his possession when he appeared for his next appointment with his P.O. Petitioner also admitted he had been terminated from his sex offender treatment program.[5]

Sheila Jackson, Petitioner's successor probation officer, revealed that she began to supervise him in October of 2001. She mailed a letter (on May 21, 2002) to Petitioner to make it very clear what was required of him by their next appointment

[5]Petitioner was placed on a three year term of sex offender probation on July 17, 2001. According to the violation of probation report, Petitioner was referred to the sex offender group after an evaluation on August 6, 2001. He was terminated from the group on May 30, 2002.

set for June 5th. Prior to June 5th, she observed him at his group session where he indicated he had received her letter. She informed him that no excuses would be accepted if he failed to bring the documentation required of him as set forth in her letter. When Petitioner appeared on June 5th, he provided no proof of submission to an HIV test, no money payment, no DMV registration; merely excuses or no justification at all.

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Additionally Petitioner, who lived with his mother, admitted he did not pay rent to his mother, his daughter was self-sufficient, and his income went toward his bills, which included counseling, although he conceded he was currently in arrears at

the treatment program. After considering closing argument and case law provided by the defense, the trial court found Petitioner to be in violation of his probation and held as follows:

> TRIAL COURT: This was a stipulated downward departure to sex offender probation. The special conditions of sex offender probation are quantitatively different than the conditions that apply to other probations because the special conditions that apply to sex offender probation are not made up by a judge, they're mandated by statute. They're considered and passed by the legislature.
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> It's my finding that Mr. Woodson was informed, he had knowledge of the statutory requirements. The language chosen by the legislature for special condition 17 is: 'You will actively participate in and successfully complete sex offender treatment program." It's my finding that Mr. Woodson did not actively participate in the program.
>
> Unlike alcohol treatment or drug treatment programs...the legislatively mandated treatment for sex offenders isn't something that, my finding, that the legislature intended for courts to wait until the end of the probationary period, whether they were in, they intended that the sex offenders participate in programs from the outset. That, in fact, participation in this program is the essence of the probation intended by the legislature.
>
> But the probation is an alternative to being incarcerated and it was the legislative finding and the intent of the legislature that persons did not have to be incarcerated if society could be assured that they were being supervised and treated and actively participating in treatment. When they then fell out of the treatment it

was time to impose incarceration....

Mr. Woodson accepted the benefit of a stipulated downward departure and part of his undertaking as part of that stipulated downward departure was his compliance with and actively participating in a treatment program and it is the testimony of the probation officers and the counselor here that he did not and they're the ones in best position to assess whether his treatment was active, which is another way of saying whether it was genuine participation or just going through the motions.

I find Mr. Woodson's violation to be both willful and substantial. With respect to the HIV test....the defendant was advised repeatedly that he had to comply with the terms of the statute and the intent of the legislature that the HIV test be taken and the results made available and there was a repeated refusal to do that. That is quantitatively different than not completing community service hours and a probation officer setting an arbitrary deadline....

I recognize that body of law regarding date setting and certainly it is better practice to give the defendant a date certain by which conditions of probation are to be complied with, but they are not applicable to the special - sex offender conditions which were set forth by legislative mandate.

And the repeated reminders by the probation officer did not amount to an arbitrary date setting but repeated advice that the defendant was not in compliance with the statute and being given a second chance and a third chance and a fourth chance to avoid the possibility of noncompliance which had already occurred. I find that violation to be both willful and substantial.

> As to the failure to pay costs, I find that the defendant had an ability to pay but not a willingness to pay. I find that violation to be less substantial than the others but I do find it to be further evidence of his willful noncompliance.

(T63-68). Petitioner contends the Fifth DCA erred by upholding the trial court's revocation of sex offender probation because his violations were not willful and substantial.

Here, pursuant to the legislatively mandated conditions of sex offender probation, Petitioner was required to actively participate in and successfully complete a sex offender treatment program. § 948.03(5)(a)3., Fla. Stat. (2000). In accord with that condition, Petitioner was evaluated and referred to a sex offender treatment program. At the hearing, Petitioner was characterized by his sex offender counselor as uninterested and unmotivated. Petitioner was terminated from his program, despite having received prior warnings that his behavior would result in termination from the program. Thus, the termination was his fault.

At the hearing, Petitioner claimed to have finished his homework, yet, according to his counselor, he never submitted any homework. He also claimed to have obtained two different HIV tests, yet had never provided proof to his probation officer. The purported evidence of the test provided by Petitioner at the hearing did not even reflect that it had anything to do with an

HIV test. Most tellingly, he refused to face the fact that he was not participating in the program and denied sleeping during group; instead blaming his termination solely on his arrearage[6].

Probation is a grace and not a right. Petitioner received a downward departure sentence of probation instead of incarceration and part of his deal with the people of the State of Florida was that this repeat sex offender who was given the opportunity to avoid prison would receive counseling so that he would not reoffend. Yet, Petitioner's repeated lack of participation in group and refusal to complete his homework coupled with his refusal to acknowledge his own lack of participation guarantee future failure in any program. Like a probationer who will not admit guilt, Petitioner's refusal to participate and make any progress in his treatment renders further treatment impossible. See, e.g., Miller v. State, 661 So. 2d 353 (Fla. 4th DCA 1995); Archer v. State, 604 So. 2d 561 (Fla. 1st DCA 1992).

Plainly, Petitioner is unwilling to do more than go through the motions where his sex offender probation is concerned. Petitioner's utterance of the words at his probation violation

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[6]Obviously, the trial court as the trier of fact is permitted to weigh the conflicted testimony and reject a defendant's testimony as not credible. Miller v. State, 661 So. 2d 353, 355 (Fla. 4th DCA 1995).

hearing to the effect that he was interested in treatment is plainly belied by his actions including his refusal to participate in group or complete any homework; his complete denial that he was not participating and assertion that he was terminated due only to his arrearage with the program; and, finally, his failure to even inquire about or attempt to enroll in another sex offender treatment program prior to his hearing in December of 2002. Thus, the trial court did not abuse its discretion in finding that Petitioner had willfully and substantially violated this condition of his sex offender probation.

Another indication of Petitioner's failure to do more than give lip service to sex offender probation is his repeated claim he had more than one HIV test taken; a claim for which he never provided proof. The document presented at the hearing did not reflect that it had anything to do with HIV testing. Obviously, where penetration has occurred (as it was alleged and pled to in the instant case), a victim has a right to be made aware if the rapist is inflicted with the HIV virus; and the sooner the better. Petitioner continuously promised to take the test, but never fulfilled this promise despite being told he was in violation. At the hearing, he claimed he had taken the test, yet, he failed to provide proof to the court just as he never provided proof to his probation officer. Allowing Petitioner

even more time to continue to promise to fulfill this condition would be futile - Petitioner clearly has no desire or interest in satisfying the conditions of his sex offender probation and the trial court's conscience was rightfully satisfied regarding Petitioner's lack of amenability to supervision.

Although not addressed by the Fifth District Court, as far as his claimed inability to pay costs, it is well-settled that once the state makes an initial showing of a probationer's failure to pay court-ordered costs, the burden shifts to the probationer to demonstrate by clear and convincing evidence that he or she lacked the ability to pay. McQuitter v. State, 622 So. 2d 590, 592 (Fla. 1st DCA 1993); see §948.06(5), Fla. Stat. (2002)("In any hearing in which the failure of a probationer...to pay...the cost of supervision...is established by the state, if the probationer...asserts his or her inability to pay...the cost of supervision, it is incumbent upon the probationer...to prove by clear and convincing evidence that he or she does not have the present ability to pay...despite sufficient bona fide efforts legally to acquire the resources to do so.").

In the instant case, the violation report reflects that Petitioner was delinquent in all areas and he had a remaining balance of $720.00. Furthermore, Petitioner initially agreed to pay twenty dollars a month toward his cost of supervision and

signed a second agreement in December of 2001 to pay $23.23 per month. Petitioner had made no payments - *none* - toward this obligation as of July of 2002. Since it is accepted that "[w]here a probationer makes reasonable efforts to comply with a condition of probation, violation of the condition cannot be deemed 'willful[,]'" Van Wagner, 677 So. 2d at 317, it would seem to follow that where a probationer makes no effort to comply with a condition of probation, violation of the condition should be willful. Thus, the court properly found him willfully and substantially in violation of his probation.

In summary, this repeat sex offender was sentenced to a downward departure sentence of three years sex offender probation in July of 2001. By August 2002, after one third of his probationary term had elapsed, Petitioner had, despite repeated requests, failed to submit to an HIV test and provide the results to the victim, which would have afforded her some peace of mind in knowing whether she had been infected. Petitioner was also terminated in May of 2002 from his sex offender treatment program for his failure to participate and made no effort or arrangements to seek admission to another treatment program by the time of his hearing in December of 2002. As this Court pointed out in State v. Carter, 835 So. 2d at 261: “[t]he probation system operates under a tremendous workload. In order to maintain its effectiveness, all

participants, including the defendants, must comply with the requirements imposed upon them." Petitioner willfully and substantially failed to comply with the statutorily mandated requirements of sex offender probation. Accordingly, on the merits, the Fifth District's decision in this case should be affirmed.

Based on the foregoing facts and authorities, this Court should not accept jurisdiction as Woodson, infra, does not expressly and directly conflict with the opinion in Young and there is no possible conflict with Lawson or Lynom. Additionally, Petitioner's advocation of a per se rule that the trial court can never find a willful and substantial violation for failing to actively participate in a sex offender treatment program where a portion of the probationary period remains, is not in accord with Florida law. Finally, it is apparent that Petitioner is not amenable to treatment or supervision, his violations of the statutorily mandated conditions of sex offender probation were willful and substantial, and the trial court did not abuse its discretion by revoking his probation based on the willful and substantial violation. The Fifth District Court of Appeal properly found that Petitioner's unwillingness to abide by the statutorily mandated conditions of sex offender probation constituted a valid basis for revocation.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this Honorable Court either refuse to accept jurisdiction of this cause or approve the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery to A.S. Rogers, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 12th day of April, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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