IN THE SUPREME COURT OF FLORIDA

CASE NO. **SC06-1714**

EVER NAHON ORTIZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This is an appeal from a decision affirming the revocation of Mr. Otriz's probation for, *inter alia*, failing to successfully complete a program to which he had been ordered only to submit. The Petitioner, Ever Nahon Ortiz, was the appellant in the court of appeal and the State was the appellant. In this brief, the designation "R." refers to the record of appeal as it appears in the lower court. Unless otherwise noted, all emphasis is supplied.

POINTS ON APPEAL

1. Whether probation may be revoked for failure to successfully complete a program which the probationer has only been ordered to enter.

2. Whether, even if the order of probation were read to contain an inherent requirement that the program be completed, Mr. Ortiz's probation could be revoked where he evinced a desire to continue in the program, his probationary period was less than halfway over, the order contained no time requirements for completion of the program, and there was no evidence that he could not complete the program within his probationary period.

3. Whether this Court should consider the other aspects of the probationary hearing where all but one of the allegations were not proven by competent evidence and the proceeding was fundamentally unfair as the trial judge assumed the role of prosecutor by taking over the direct examination of the probation

officer.

STATEMENT OF THE CASE AND FACTS

Mr. Ortiz was charged by information with one count of burglary of an unoccupied dwelling. (R. 1-3). On the same day that the information was filed, Mr. Ortiz entered a plea of guilty in exchange for a sentence of probation. (R. 8-9, 28-36). The written orders of supervision show that the probation was for a period of one year, with special conditions of "1) theft course 2) TASC eval. & treatment if necessary 3) 100 CSH 4) restitution $530 equal monthly installments." (R. 9).[1] During the plea colloquy, the trial judge asked Mr. Ortiz "You understand that you must **enter and submit** [to] the task [sic] program after a drug and alcohol evaluation, and submit to any treatment that that evaluation may deem necessary, as part of your probation and that you successfully **complete** one hundred community service hours?" Mr. Ortiz responded "Yes." (R. 32).

More than five months later, an affidavit of violation of probation was filed. (R. 10-12). An amended affidavit of violation of probation was filed a few weeks later. (R. 14-18). The amended affidavit alleged that Mr. Ortiz had violated the conditions of his probation by:

(1) Failing to submit a monthly report since September 9, 2003;

[1] The acronym TASC refers to the **T**reatment **A**lternative **S**ubstance Abuse **C**enter, and the acronym CSH refers to **C**ommunity **S**ervice **H**ours.

(2) Failing to report to his Probation Officer on October 7, 2003, as instructed on September 9, 2003;

(3) Failing to make monthly payments for cost of supervision;

(4) Failing to make monthly restitution payments;

(5) Failing to **complete** his community service hours;

(6) "By failing to **enter and successfully complete** an Out-patient substance abuse program, which was referred to the defendant at his TASC evaluation, in that, the defendant left the program against staff advice and was unsuccessfully discharged from the program";

(7) Failing to **complete** the anti-theft course at the Advocate Program;

(8) Violating the law by using marijuana, as evidenced by a positive urinalysis conducted on October 24, 2003 and confirmed by a laboratory on November 1, 2003; and

(9) Failing to make a full and truthful report by saying in the October, 2003 monthly report that he had not used drugs.

A hearing on the amended affidavit was held on December 12, 2003. (R. 37-101). The State's only witness was probation officer Amy Tate. As the transcript shows, the trial judge initially prompted the prosecutor to ask certain questions (R. 45-46), but soon tired of the prosecutor's method and took over the direct examination of Ms. Tate. (R. 47). Mr. Ortiz also testified on his own behalf. The testimony about the alleged violations, and the findings by the trial judge, were as follows:

(1) Failing to submit a monthly report since September 9, 2003

Tate testified that she **did** receive a report on October 24, 2003. (R. 47). She acknowledged that the allegation of no report being filed since September 9th was "not true." (R. 56). Nevertheless, the judge found that Mr. Ortiz had committed this violation. (R. 89).

(2) Failing to report to his Probation Officer on October 7, 2003, as instructed on September 9, 2003

Tate testified that on September 9th she personally instructed Mr. Ortiz to report to her on October 7th. (R. 57-59). Mr. Ortiz did not show up that day, later explaining to her that he works long hours and so was unable to report that day. (R. 47-48). The judge found that Mr. Ortiz had committed this violation. (R. 89).

(3) Failing to make monthly payments for cost of supervision
(4) Failing to make monthly restitution payments

Mr. Tate made a payment the day before the hearing which brought him up to date on both cost of supervision and restitution. The court thus dismissed both of those allegations. (R. 60-62, 82).

(5) Failing to complete his community service hours

The order of probation required Mr. Ortiz to complete 100 hours of community service but did not specify a date by which the hours had to be completed. (R. 9). Tate testified that Mr. Ortiz "had one year to complete the community service hours" and that she "didn't give him a specific amount of hours

to do per month." (R. 63, 64). She did advise him that he had to bring proof of any service hours he'd completed, that he needed to start performing his community service hours, and that he would be in violation if he did not complete his hours. (R. 64-67).

Mr. Ortiz testified that he twice went to a park to perform community service, but was told that if he wasn't there by 7:30 he couldn't work at all that day. It was difficult for him to arrange transportation to the park. He then began to work a full-time maintenance job at the Grand Hotel. (R. 71, 74-76).

After testimony concluded, the prosecutor **conceded** that there was nothing in the record to support this alleged violation. (R. 83). Defense counsel further argued that with respect to this alleged violation (and the next two) "I think you have a full year to complete the program. Doesn't say it has to be completed within the first three months, or the first six months, of the program. He's on probation for a full year. So we would ask that those three particular violations of probation be dismissed, Your Honor." (R. 86). The judge, though, found that Mr. Ortiz had committed this violation. (R. 89).

(6) "By failing to **enter and successfully complete** an Out-patient substance abuse program, which was referred to the defendant at his TASC evaluation, in that, the defendant left the program against staff advice and was unsuccessfully discharged from the program"

The order of probation required Mr. Ortiz to submit to "TASC eval. & treatment if necessary." (R. 9). Mr. Ortiz testified without contradiction that he had gone six times, as required, to TASC appointments, but then missed two weeks in a row due to his job. He explained that he was supposed to report to TASC at 7:30 but that was also when his job started. He did go back the following week as he did not want to leave the program, but he was told that he'd been discharged. (R. 77-78).

Tate acknowledged that Mr. Ortiz "**did go to the TASC program**." (R. 50). He was referred by TASC to something called "Perspective" and was unsuccessfully discharged from there. (R. 50). Tate had no personal knowledge about these events, but based her testimony upon a form "client status letter" she had received from the TASC program. (R. 50-52). She did not follow up with anyone after receiving the status report, and she admitted that the only information on this alleged violation was the report she'd received. (R. 67-68).

As with the prior alleged violation, the judge did not accept defense counsel's argument that Mr. Ortiz had a full year to complete any program. Instead, the judge found that Mr. Ortiz had committed this violation. (R. 89).

(7) Failing to complete the anti-theft course at the Advocate Program

Mr. Ortiz testified that he registered with the Advocate Program and made a payment of $150. He missed one course because he showed up late, but he rescheduled and was supposed to attend the next course beginning in early November. He never got the chance to attend that course, though, because he was arrested on the probation violation allegations in late October. (R. 73-74).

Tate testified that she had spoken with someone from the Advocate Program who had advised her that Mr. Ortiz did not show up for his August appointment but had rescheduled for a course beginning November 9th. (R. 53, 68-69).

As with the prior two alleged violations, the judge did not accept defense counsel's argument that Mr. Ortiz had a full year to complete any program. Instead, the judge found that Mr. Ortiz had committed this violation. (R. 89).

(8) Violating the law by using marijuana, as evidenced by a positive urinalysis conducted on October 24, 2003 and confirmed by a laboratory on November 1, 2003

Tate testified that Mr. Ortiz tested positive for marijuana in a urine analysis she had done on October 24th, and that the result was confirmed by a laboratory on November 1st. (R. 54). When defense counsel began his cross-examination on this alleged violation, the judge interrupted and stated "Dismiss that." (R. 69). "The last two paragraphs in the affidavit, I am dismissing. You don't have to ask any questions about it." (R. 69). The reason, the judge explained, was that a report

was insufficient to sustain a violation. (R. 70). The judge wrote "dismissed" on the amended affidavit. (R. 14).

When Mr. Ortiz testified, there were no questions during the direct examination related to drug use. (R. 70-78). Nevertheless, the prosecutor's first question on cross-examination was "Mr. Ortiz, do you admit smoking marijuana while you were on probation?" (R. 79). An immediate objection was overruled. Mr. Ortiz then admitted that he had smoked marijuana one time. (R. 79). He acknowledged that was a mistake, and he said he was sorry. (R. 81).

The judge noted that his intent had been to dismiss this allegation, "but after the defendant confessed to it during cross examination, the Court concluded that that matter is proven." (R. 89).

(9) Failing to make a full and truthful report by saying in the October, 2003 monthly report that he had not used drugs

The October, 2003 report prepared by Mr. Ortiz was not introduced into evidence. There was no testimony about its contents. The trial judge thus dismissed that allegation. (R. 83). He wrote "dismissed" on the amended affidavit. (R. 15). The judge directed the prosecutor to prepare a "very specific" order which showed the six violations he had found, and the three allegations that were dismissed. (R. 98-99). The Order of Revocation of Probation, though, shows that this violation was also proven. (R. 24).

Mr. Ortiz appealed the revocation of his probation. The Third District issued an opinion per curiam affirming the trial court. The opinion reads as follows:

> We affirm the trial court's Order revoking Defendant's probation. Moreover, contrary to Appellant's suggestion that probation was not violated where he submitted to TASC evaluation despite the admission that he was discharged from the program for missing two consecutive appointments, we hold that when a court Orders anyone to submit to a program, it is inherent within the Order that the Defendant "successfully complete" the program. Appellant's remaining points are without merit and/or moot in light of our holding.

Ortiz v. State, 932 So. 2d 214 (Fla. 3d DCA 2004). A motion for rehearing was denied on July 25, 2006.

Discretionary review was sought in this Court because of a conflict with other opinions regarding whether probation may be revoked for failing to complete a course when the order of probation only requires entering or submitting to the course. On December 13, 2006, this Court accepted jurisdiction and set a briefing schedule.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

1. The main issue for this Court to resolve, on which the lower courts are split, is whether probation may be revoked for failure to successfully complete a program which the probationer has only been ordered to submit to or to enter. The answer should be "no." It is a violation of due process to revoke probation on the

basis of a condition not contained in the order of probation. Thus, when an order of probation simply does not contain a requirement that the probationer "complete" the program, as here, probation may not be revoked for that reason.

Moreover, as applied to this case, even if the order of probation were read to contain an inherent requirement that the program be successfully completed, Mr. Ortiz still had more than half of his probationary period left to serve. There is no requirement in the order of probation that the TASC program be completed on the first try or by a specified date. Mr. Ortiz clearly wanted to continue with his program, as evidenced by his uncontradicted testimony that he returned to TASC, only to be told that he had already been discharged. With no evidence in the record either that Mr. Ortiz could not go back to TASC or that he could not complete the program before the expiration of this probation, revocation was improper in this case.

Review of an order revoking probation is generally for abuse of discretion. The question here, though, is whether **as a matter of law** probation may be revoked for a condition not contained in the probation order. Review of this question should thus be *de novo*.

2. This Court should additionally exercise its discretion and consider the other reasons the trial court found for revoking Mr. Ortiz's probation as all but one are unfounded or contrary to law, and the proceeding itself was fundamentally

unfair where the trial judge took over direct examination of the probation officer.

The probation officer conceded that Mr. Ortiz did file a report after September 9, 2003, so allegation (1) is unfounded on the facts. The prosecutor below correctly conceded that allegation (5) was not proven, so the finding there is unfounded on the facts as well as the law, which is well-settled that the probation has until the end of his probationary period to complete any community service hours when a schedule is not specified. The same is true of the failure to complete the anti-theft course, allegation (6) above. It is also well-settled that a probationer retains his Fifth Amendment right against self-incrimination when testifying at a revocation hearing, so the trial judge erroneously required Mr. Ortiz to answer the question about his use of marijuana, which was alleged violation (8) above. The trial judge dismissed allegation (9) above, so it is clearly also error for the order of revocation to include that. Finally, due process was violated where the trial judge takes over the role of prosecutor in the revocation proceeding. A probationer is entitled to a neutral fact-finder, and the trial judge here clearly departed from that role with his prompting of the prosecutor followed by his extensive questioning of the State's only witness.

Review of these additional matters will provide further guidance to the lower courts on what constitutes a validly found violation and on how a probation revocation proceeding should be conducted. Review will also ensure that Mr.

Ortiz's probation is not improperly revoked.

ARGUMENT

I. PROBATION MAY NOT BE REVOKED FOR FAILURE TO SUCCESSFULLY COMPLETE A PROGRAM WHERE THE ORDER OF PROBATION ONLY REQUIRED THE PROBATIONER TO ENTER THE PROGRAM AND SUBMIT TO TREATMENT IF DETERMINED TO BE NECESSARY

The order of probation required that Mr. Ortiz submit to TASC evaluation and treatment if necessary. (R. 9). The judge who took the plea explained to Mr. Ortiz that he must **enter and submit to** the TASC program after a drug and alcohol evaluation, and **submit to** any treatment that that evaluation may deem necessary, as part of his probation. (R. 32). Mr. Ortiz testified without contradiction that he had gone six times, as required, to TASC appointments, but then missed two weeks in a row due to his job. He returned the following week as he did not want to leave the program, but he was told that he'd been discharged. (R. 77-78). The probation officer concurred that Mr. Ortiz had gone to the TASC program and had been referred to something called "Perspective" when he was discharged. (R. 50).

A. Due Process Prohibits Revocation Of Probation For A Condition Not Contained In The Order Of Probation

Prior to the decision in the instant case, it was uniformly held by Florida courts that probation could not be revoked for failure to complete counseling or

treatment where the order of probation only required the probationer to attend or submit to the counseling or treatment. Thus, in *Bell v. State*, 643 So. 2d 674 (Fla. 1st DCA 1994), a condition of probation required Bell to "submit to Psychosexual counseling as directed by your Probation Officer." He attended eight weekly sessions but was then terminated from the program. The probation officer directed Bell to "successfully complete" his counseling program and, when he failed to do so, filed an affidavit of probation violation. *Id*. at 675. The trial court revoked his probation.

On appeal, the First District found that Bell did not violate his probation. "Bell's probation order merely required that he 'submit to' psychosexual counseling - a requirement which he satisfied by attending eight weekly counseling sessions." 643 So. 2d at 675. The court described the additional requirement that Bell "successfully complete" the program as "an unauthorized and impermissible upward modification of Bell's probation conditions." *Id*.

In *Bingham v. State*, 655 So. 2d 1186 (Fla. 1st DCA 1995), the probationer was likewise required to "submit to PSYCHO/SEXUAL evaluation and treatment as directed by your probation officer." *Id*. at 1187. He submitted to six counseling sessions before being terminated from the program. The First District reversed the trial court's order revoking probation: "Because condition 11 did not include a

requirement of completion or some other time limit, Bingham has satisfied the requirement that he submit to psychosexual counseling." *Id*.

In *Larangera v. State*, 686 So. 2d 697 (Fla. 4th DCA 1996), a condition of the two-year term of probation was that Larangera "continue marital counseling or individual." *Id*. at 697. He voluntarily stopped attending one type of counseling after eighteen weeks and the other after twenty-three weeks. *Id*. The Fourth District, relying on *Bell* and *Bingham*, reversed the order revoking probation as the condition did not require completion of the counseling or any other time limit. *Id*.

In *Cyr v. State*, 747 So. 2d 1005 (Fla. 2d DCA 1999), a condition of probation required Cyr to comply with the condition that he "shall continue sex offender counseling." *Id*. He attended counseling sporadically for five years, then was terminated from the program. The trial court found a violation of probation as Cyr had not successfully completed the counseling program. The order of revocation was reversed on appeal: "But Cyr's probation condition did not direct him to *complete* counseling, nor did it require him to remain in a counseling program for a specified period. Probation may not be revoked based on a condition such as Cyr's when the probationer has actually attended some counseling sessions, but has either quit or been involuntarily terminated." *Id*. at 1005-06.

In *Carter v. State*, 763 So. 2d 1091 (Fla. 4th DCA 1999), a condition of probation was that he "must attend weekly sessions with a licensed psychiatrist or psychologist." *Id*. at 1092. The trial court revoked probation for failure to comply with this condition, but the Fourth District reversed: "Appellant apparently complied with the condition for at least three years after his plea . . . We conclude, as we did in *Larangera*, that because the condition did not require completion or have a time limit, his probation should not have been revoked." *Id*.

The Third District likewise reached the same conclusion in *Rial v. State*, 835 So. 2d 291 (Fla. 3d DCA 2002). There, a special condition of community control required Rial to "complete the Start program and then enter the Passageways program." *Id*. at 292. She completed the Start program and entered Passageways, but absconded after three weeks. She returned five days later. *Id*. The trial court found that Rial willfully violated her probation by absconding from Passageways, but the Third District reversed: "As the terms of defendant's probation did not require that she complete the Passageways program, but only that she enter it, the trial court erred in finding that defendant violated her probation when she absconded from the program." *Id*. The court went on to explain that "Defendant satisfied the conditions of her probation by completing the Start program and entering Passageways. Requiring that defendant complete the Passageways

program constitutes 'an unauthorized and impermissible upward modification of [defendant's] probation conditions.'" *Id*. (quoting *Bell*, 643 So. 2d at 675).

In the decision below, however, the Third District reversed course. It held that "when a court Orders anyone to submit to a program, it is inherent within the Order that the Defendant 'successfully complete' the program." *Ortiz*, 932 So. 2d 214. No authority was cited for this holding.

The reason that the decisions in *Bell*, *Bingham*, *Larangera*, *Cyr*, *Carter* and *Rial* should be approved, and the decision below quashed, is because it is a violation of due process to revoke probation for failure to adhere to a condition not stated in the order of probation. Due process "**mandates**" that a defendant "be given notice of the conditions of probation to be imposed." *State v. Williams*, 712 So. 2d 762, 764 (Fla. 1998). "Violation of probation cases adhere to strict due process requirements attendant to criminal cases. A probationer must be violated for the reasons stated in the affidavit filed, and . . . **the violation must mirror the language of the condition of probation allegedly violated**." *Stanley v. State*, 922 So. 2d 411, 415 (Fla. 5th DCA 2006) (footnote omitted). If the "condition" allegedly violated "was not included in the order of probation, it cannot be the basis for the revocation of his probation." *Perez v. State*, 805 So. 2d 76, 79 (Fla. 4th DCA 2002); *Jones v. State*, 876 So. 2d 642, 644 (Fla. 1st DCA 2004) (revoking probation for condition neither orally pronounced nor contained in written order

"violates a defendant's due process rights under the Florida and United States Constitutions").

Thus, when an order of probation requires only that a defendant "submit to" or "attend" or "enter" a program, but does not require that he "complete" the program, it is a violation of due process to revoke probation for failure to complete the program. The decision makes no mention of due process, and in fact cites to no authority for its conclusion that an "inherent" unstated condition may form the basis for a revocation of probation. The decision below should be quashed due to its failure to recognize and give effect to the due process rights afforded a probationer.

B. Even If There Is An "Inherent" Requirement That A Probationer Successfully Complete A Program He is Just Ordered To Submit To, Revocation Of Probation Was Improper Here As Mr. Ortiz Evinced A Desire To Continue In The Program, His Probationary Period Was Less Than Halfway Over, And There Was No Evidence That He Could Not Complete The Program Within His Probationary Period

When Mr. Ortiz was arrested for allegedly violating probation, he still had more than half of his probationary period left. He had clearly shown a desire to continue in the TASC program by returning there after missing two weeks due to his work schedule. There was no evidence presented to show either that Mr. Ortiz would not be permitted to return to the TASC program or that he would be unable

to complete the ordered treatment within his remaining probationary period. The order of probation did not require that Mr. Ortiz successfully complete the TASC program on his first try or within a specified time. Under these circumstances, as numerous cases have explained, probation may not be revoked for failure to successfully complete the program.

In *Dunkin v. State*, 780 So. 2d 223 (Fla. 2d DCA 2001), a special condition of probation required Dunkin to "enter and successfully complete an outpatient sex offender treatment program until discharged by the therapist." *Id*. at 224. The condition, though, "did not specify that treatment had to be successfully completed on the first try or how many chances the appellant would be given to complete it successfully." *Id*. Evidence that Dunkin had been terminated from the program due to unexcused absences was thus insufficient to establish a willful and substantial violation of probation. *Id*.

In *Mitchell v. State*, 871 So. 2d 1040 (Fla. 2d DCA 2004),[2] community control was revoked, in part, due to failure to attend and complete a sexual offender treatment program. *Id*. at 1041. Mitchell was terminated from the program due to unexcused absences. *Id*. On appeal, the Second District reversed:

[2] *Review granted*, 900 So. 2d 554 (Fla.), *review dismissed as improvidently granted*, 911 So. 2d 93 (Fla. 2005) (Case No. SC04-873).

> In this case, the sex offender treatment condition only stated that Mitchell needed to complete the program. It did not specify that treatment had to be successfully completed on the first try or how many chances he would be given to complete the program. Accordingly, the State failed to prove that the violation of condition 67 was willful and substantial, and the trial court abused its discretion in finding that the condition was violated.

Id. at 1042.

In *Spayde v. State*, 899 So. 2d 1274 (Fla. 2d DCA 2005), a condition of community control/probation was that Spayde successfully complete a residential drug treatment program. He absconded upon release from jail. Nevertheless, because the condition did not specify the time period in which Spayde was required to complete the treatment or that he complete it the first time, the evidence was insufficient to support a finding of violation. *Id*. at 1275.

In *Wilkerson v. State*, 884 So. 2d 153 (Fla. 2d DCA 2004), a condition of probation required him to "successfully complete" any treatment deemed necessary after a mental health evaluation. Wilkerson began a treatment program but was discharged twice for excessive absences and his probation was revoked. *Id*. at 153. The order of revocation was reversed on appeal:

> This court has consistently held that if a defendant is discharged or terminated from a required treatment program prior to its completion, the discharge or termination does not amount to a willful and substantial violation of probation when the probation order does not require completion within a specified period of time and sufficient time remains for the defendant to complete the program. Although Wilkerson was twice discharged from his treatment program, the State

> did not establish that he was either unwilling or unable to complete the program during his probationary term. Because Wilkerson has the remainder of his probationary period to comply with condition 18, the State failed to establish a willful and substantial violation of probation.

Id. at 154-55 (citations omitted); *Anderson v. State*, 2006 WL 3498339 (Fla. 2d DCA December 6, 2006) (same); *Yates v. State*, 909 So. 2d 974, 975 (Fla. 2d DCA 2005).

The same result was again reached in *Quintero v. State*, 902 So. 2d 236 (Fla. 2d DCA 2005), where the court stated that "evidence of the failure to complete a counseling program is insufficient to establish a willful and substantial violation of probation if the condition in question does not specify a time for completion." *Id*. at 237. *See also, Campbell v. State*, 939 So. 2d 242, 244 (Fla. 1st DCA 2006) (same); *O'Neal v. State*, 801 So. 2d 280 (Fla. 4th DCA 2001) ("It is an abuse of discretion to find a willful and substantial violation of probation where a defendant has expressed a willingness to complete or continue with a program and where the order of probation did not specify a date certain for compliance.").[3]

[3] The Fifth District recently reached a different result in *Lawson v. State*, 941 So. 2d 485 (Fla. 5th DCA 2006). Direct conflict was certified with *Quintero, O'Neal, Dunkin* and several other cases. A question of great public importance was also certified. That case is presently before this Court as case number SC06-2423. *Lawson* differs factually from this case in that there was an explicit order that Lawson "successfully complete" any treatment program. It was also explained to Lawson that he would be subject to discharge if he missed three sessions. 941 So. 2d at 487. In contrast, as defense counsel argued here, "there is no evidence

Based on these authorities, none of which are addressed by the decision below, even if the requirement that the program be successfully completed is "inherent" in the order of probation, it was still improper to revoke Mr. Ortiz's probation as he had shown his willingness to continue with the program, there was no date by which the program had to be completed, and there was no evidence to show that the program could not be completed with the remaining probationary period.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND CONSIDER THE OTHER ASPECTS OF THE PROBATION REVOCATION PROCEEDING

"Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case." *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982); *accord Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986); *Sullivan v. Sapp*, 866 So. 2d 28, 34 (Fla. 2004). This Court should review the rest of the probation revocation proceeding here as most of the violations were not competently proven and the hearing itself was conducted in a manner that violated Mr. Ortiz's due process right to a fair and impartial tribunal.

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presented by the State saying that if you don't report that he would be terminated, that he was warned, that he was given written notice, nothing at all." (R. 84-85). Further, Lawson missed nine sessions before being discharged from his program. He was reinstated, then missed another class and was discharged again. 941 So. 2d at 487.

A. Failing To Submit A Monthly Report Since September 9, 2003

The first alleged violation of probation was that Mr. Ortiz "failed to submit a monthly report since September 9, 2003." (R. 14). The evidence at the hearing, though, showed that Mr. Ortiz **did** submit a monthly report on October 24, 2003. (R. 47, 56). There was no factual basis, then, to support the trial judge's unexplained determination that this allegation had been proven.

In the Third District, the State argued that the late filing of the October report was sufficient to uphold the trial court's finding. That argument, however, flies in the face of due process as Mr. Ortiz was never charged with filing a report late. "As a fundamental principle of due process, a revocation may be based only on a violation alleged and presented." *Davis v. State*, 891 So. 2d 1186, 1187 (Fla. 4th DCA 2005). "Revocation of probation on grounds never alleged in writing violates due process and is fundamental error." *Smith v. State*, 738 So. 2d 433, 435 (Fla. 1st DCA 1999). *Accord Gaines v. State*, 800 So. 2d 732, 733 (Fla. 5th DCA 2001) ("As a matter of due process, probation may not be revoked for conduct not charged in the affidavit."); *Perkins v. State*, 842 So. 2d 275, 277 (Fla. 1st DCA 2003) ("A trial court is not permitted to revoke probation on conduct not charged in the affidavit.").

The Third District did not specifically address this finding, but it should be reversed as it clearly was not proven in the trial court.

B. Failing To Complete His Community Service Hours And Failing To Complete The Anti-Theft Course At The Advocate Program

Mr. Ortiz was required to complete 100 hours of community service as part of his probation. (R. 9). When arrested, he still had more than six months left on his probationary period, clearly an adequate time to complete 100 hours of community service. The probation officer acknowledged that Mr. Ortiz "had one year to complete the community service hours" and that she "didn't give him a specific amount of hours to do per month." (R. 63, 64). The State **conceded at the hearing** that the evidence did not support this violation. (R. 83).

Numerous decisions have held that, with respect to community service hours orders, "a violation will not be deemed willful and substantial if the performance parameters have not been spelled out and sufficient time remains in the probationary period for the probationer to complete the requirement." *Matthews v. State*, 2006 WL 3524274 (Fla. 2d DCA December 8, 2006); *see, e.g.*, *Ballien v. State*, 2006 WL 3452416 (Fla. 5th DCA December 1, 2006); *Bowser v. State*, 937 So. 2d 1270, 1272 (Fla. 2d DCA 2006); *Bryant v. State*, 931 So. 2d 251, 253 (Fla. 2d DCA 2006); *Pollard v. State*, 930 So. 2d 854, 855-56 (Fla. 2d DCA 2006); *Francois v. State*, 923 So. 2d 1219, 1221 (Fla. 3d DCA 2006); *Shipman v. State*, 903 So. 2d 386, 387 (Fla. 2d DCA 2005); *Muthra v. State*, 777 So. 2d 1067, 1067-

68 (Fla. 3d DCA 2001); *Willis v. State*, 727 So. 2d 952, 953 (Fla. 4th DCA 1998); *Tracy v. State*, 673 So. 2d 544 (Fla. 4th DCA 1996).

The same reasoning applies with respect to the completion of a required course when there is no specified time for compliance and completion within the probationary period is still possible. *E.g.*, *Creamer v. State*, 900 So. 2d 773 (Fla. 1st DCA 2005); *Gamble v. State*, 737 So. 2d 1160 (Fla. 1st DCA 1999)

Based on the foregoing authorities, as well as the authorities cited in Part I.B, *supra*, then, these two violations were also not proven, and the trial judge abused his discretion in finding that they were proven.

C. Violating The Law By Using Marijuana

The trial judge was announced that he was dismissing this allegation. (R. 69-70). He wrote "dismissed" on the amended affidavit. (R. 14). However, although Mr. Ortiz was not questioned about this allegation during direct examination, the trial judge permitted the State to cross-examine Mr. Ortiz by asking him, over objection, if he admitted to smoking marijuana while on probation. (R. 79). Based upon Mr. Ortiz's admission, the trial judge found that this allegation had been proven. (R. 89).

"[T]he fifth amendment privilege against self-incrimination is applicable in a probation revocation hearing as to specific conduct and circumstances concerning criminal offenses and . . . where the accused testifies, he shall be considered to

have waived the privilege only as to matters relevant to issues raised by his testimony on direct examination." *Johnson v. State*, 509 So. 2d 373 (Fla. 4th DCA 1987) (citing *State v. Heath*, 343 So. 2d 13, 16 (Fla. 1977)). Smoking marijuana obviously entails possessing it, which is a separate criminal offense. Mr. Ortiz thus had a fifth amendment right not to be subjected to the question posed by the prosecutor. The trial court's decision to permit the question, and its subsequent consideration of the answer to the question, were legally erroneous. This violation, too, should thus be reversed.

D. Failing To Make A Full And Truthful Report By Saying In The October, 2003 Monthly Report That He Had Not Used Drugs

The October, 2003 report filed by Mr. Ortiz was never introduced into evidence and its contents were never described during testimony. The trial court thus properly decided to dismiss this allegation and wrote "dismissed" on the amended affidavit. (R. 15, 83). The Order of Revocation of Probation, though, shows that this violation was also proven. (R. 24). This is clearly erroneous as it is contrary to the trial judge's specific ruling and is unsupported by any evidence. This violation, too, should be reversed.

E. Violation Of Due Process When The Trial Judge Assumed The Role Of Prosecutor

A review of the transcript of the probation revocation proceeding clearly shows the judge's impatience with the prosecutor's method of questioning the State's only witness. However, he allowed his impatience to overcome his proper role of a neutral factfinder. Thus, the judge prompted the State to introduce certain evidence. (R. 45) ("Do you want to ask your witness under what case number [Mr. Ortiz was placed on probation]"; "Do you want to ask the Court to take judicial notice of the case?"). Not satisfied with the prosecutor's plodding pace, the judge then took over the questioning of the probation officer. (R. 47). All of the evidence concerning violations was elicited by the trial judge's examination of the probation officer. (R. 47-54). During his examination of the probation officer, the trial judge prompted the prosecutor to introduce into evidence a letter from the TASC program and the results of a drug test. (R. 52, 54).

> A trial court may conduct probation revocation proceedings in an informal manner and it may question witnesses, but it may not assume the role of the prosecutor. Doing so deprives the defendant of the fair and impartial tribunal which is the cornerstone of due process. Such conduct amounts to fundamental error that may be raised for the first time on appeal.

Padalla v. State, 895 So. 2d 1251, 1252 (Fla. 2d DCA 2005) (citations omitted); *Cagle v. State*, 821 So. 2d 443, 444 (Fla. 2d DCA 2002). "[T]he requirement of a neutral factfinder in VOP hearings is an indispensable part of elemental due

process of law. . . . The same person simply cannot be both prosecutor and judge because it is only a VOP hearing and not a full blown criminal trial." *McFadden v. State*, 732 So. 2d 1180, 1185 (Fla. 4th DCA 1999).

Mr. Ortiz was deprived of a neutral factfinder when the trial judge took over the prosecution of the probation revocation. The fundamental fairness of the entire proceeding is thus very questionable.

F. The Case Should Be Remanded To The Trial Court For A Determination Of Whether Failure To Appear As Directed On October 7, 2003 Was A Willful And Substantial Violation Sufficient To Revoke Probation Where Mr. Ortiz Did Keep A Subsequent Appointment On October 24, 2003

The only allegation in the affidavit of violation that was competently proven was that Mr. Ortiz failed to appear as directed on October 7, 2003. The evidence, though, shows that he did appear as directed on October 24, 2003. The case should be remanded for consideration, by a different judge, of whether the single violation was sufficient to revoke probation.

CONCLUSION

1. This Court should quash the decision below and approve the decisions in *Bell*, *Bingham*, *Larangera*, *Cyr*, *Carter* and *Rial* because it is a violation of due process to revoke probation for failure to adhere to a condition not stated in the order of probation.

2. Even if this Court finds that successful completion of the TASC program was "inherent" within the order of probation, revocation was still improper here as Mr. Ortiz was clearly willing to continue in the program and the order did not specify a time by which it had to be completed.

3. This Court should also consider the other alleged violations and the course of the revocation hearing. The case should be remanded to the trial court for consideration by a different judge – a neutral judge – of whether the single competently proven violation was sufficient to warrant revoking probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on the Merits was delivered by hand to Lucretia Pitts, Assistant Attorney General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on January 8, 2007.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

_____
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