IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1714
L.T. CASE NO. 3D04-78

**EVER NAHON ORTIZ,**

Petitioner,

-vs-

**THE STATE OF FLORIDA**,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

# BRIEF OF RESPONDENT ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

The decision in Ortiz v. State, 932 So. 2d 214 (Fla. 3d DCA 2004) was 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.

On July 25, 2006, Defendant's motion for rehearing was denied. Ortiz v. State, 2006 Fla. App. LEXIS 12963 (Fla. 3d DCA July 25, 2006).

Petitioner has filed a discretionary jurisdictional brief with this Court, alleging that the lower court's ruling conflicts with several district court opinions.

## SUMMARY OF THE ARGUMENT

The Third District's decision does not expressly or directly conflict with Bingham v. State, 655 So. 2d 1186 (Fla. 1st DA 1995); Bell v. State, 643 So. 2d 674 (Fla. 1s DCA 1994); Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001); Mitchell v. State, 871 So. 2d 1040 (Fla. 2d DCA 2004); Larangera v. State, 686 So. 2d 697 (Fla. 4th DCA 1996); and Carter v. State, 763 So. 2d 1091 (Fla. 4th DCA 1999), because the Third District's decision does not include the precise language

of the probation condition to establish an express or direct conflict with other jurisdictions' decisions on the same probation condition. In the alternative, the above cases establish holdings on orders to submit to a non-specified program or counseling, whereas, the Third District's decision appears to be a holding on an order to submit to a specific's programs evaluation. This distinction would negate that the decisions expressly and directly conflict each other. In addition, two of the cases relied upon by Defendant deal with a wholly distinct issue, i.e., multiple opportunities to satisfy the condition of probation, than the Third District's decision; therefore, there is no conflict in the holdings of these cases.

## ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995); Bell v. State, 643 So. 2d 674 (Fla. 1st DCA 1994); Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001); Mitchell v. State, 871 So. 2d 1040 (Fla. 2d DCA 2004); Larangera v. State, 686 So. 2d 697 (Fla. 4th DCA 1996); and Carter v. State, 763 So. 2d 1091 (Fla. 4th DCA 1999).

This Court's review of Petitioner's jurisdictional brief is limited to the facts contained within the four-corners of the lower court decision. See Reaves v. State, 485 So. 2d 829 (Fla. 1986). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither

a dissenting opinion nor the record itself can be used to establish jurisdiction." Id. at 830 (citing to Jenkins v. State, 385 So. 2d 1356 (Fla.1980)). Accord Dept. of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (the court rejected "inherent" or "implied" conflicts).

Defendant argues that "probation cannot be revoked for failure to successfully complete a program which the probationer has been ordered only to enter." *Petitioner's Brief, pg. 4.* Defendant cites to several district court cases to support his position and to assert that the Third District's decision in the case at bar expressly and directly conflicts with these district opinions. The State responds that the language of the condition of probation in the case at bar is not quoted in the Third District's decision; therefore, it cannot be conclusively stated that the decision expressly and directly conflicts with other opinions since there is no way to compare the respective conditions. In the alternative, the State responds that the Third District's decision appears to be a holding on an order to submit to a specific's programs evaluation; whereas, the other cases holdings are on orders to submit to a non-specified program or counseling. A holding related to a condition to specifically perform a detailed act does not conflict with holdings on orders to perform an act in a non-specified way.

The significance of this distinction is that when a defendant is ordered to submit to the evaluation of a specific program and the defendant physically goes but does not submit to the evaluation by complying with the program's rule for evaluation, the defendant's discharge from the specific program is a willful and substantial violation of the condition of probation. Therefore, the Third District's determination that there is an inherent requirement for completion when a defendant is ordered to submit to the evaluation of a specific program is not in conflict with other jurisdictions determinations that a defendant's failure to complete a non-specified program or counseling does not violate an order to submit.

In Bingham v. State, 655 So. 2d 1186 (Fla. 1st DA 1995), Bingham was ordered to "submit to PSYCHO/SEXUAL evaluation and treatment as directed by your probation officer." The district court held that "Bingham has satisfied the requirement that he submit to psychosexual counseling" when he submitted to six sessions before being terminated. Id. This holding does not conflict with the Third District's decision, because an order to abide by the direction of a probation officer to submit to the evaluation of a non-specified program of the probation officers choice is not similar to an order by the court to be evaluated by a specific program. Therefore, there is no conflict with the Third District's determination that an order to submit to a specific evaluation is an inherent order to complete the evaluation.

In Bell v. State, 643 So. 2d 674 (Fla. 1st DCA 1994), Bell was ordered to "submit to Psychosexual counseling as directed by your Probation Officer." The appellate court held that the order only required Bell to submit to counseling, which he did for eight weeks. Id. Similar to Bingham, the order in Bell does not conflict because the choice of the counseling program was within the authority of the probation officer instead of ordered by the court to a specific program. Also, programs are distinct from counseling sessions, because programs typically have requirement to be met by a defendant and counseling sessions typically do not any requirements.

In Larangera v .State, 686 So. 2d 697 (Fla. 4th DCA 1996), Larengera was ordered to "continue marital counseling or individual" and he stopped attending both types after a while. The appellate court held that the lack of temporal specificity in the condition prohibited the trial court from revoking probation based upon the discontinuation of either requirement. Id. at 697-698. Once again, this holding does not conflict with the Third District's decision, because Larengera was ordered to "continue" non-specific counseling and not ordered to submit to the evaluation of a specific program. Also, once again, a counseling session is distinct from a program, because a program typically has requirements to be met by a defendant.

In Carter v. State, 763 So. 2d 1091 (Fla. 4th DCA 1999), Carter was ordered to "attend weekly sessions with a licensed psychiatrist or psychologist," which he did for most of his fifteen-year probation. The appellate court held that the trial court could not revoke his probation on his failure to continue "because the condition did not require completion or have a time limit." Id. at 1092. This holding does not conflict with the Third District's decision, because an order to attend non-specified counseling is not the same as an order to submit to a specific program's evaluation. Also, a counseling session is distinct from a program, because a program typically has requirements to be met by a defendant.

In addition, to the above distinction of an order on a non-specific program versus a specific program, the remaining two cases relied upon by Defendant also do not conflict with the case at bar, because the holdings are on a different issue than the holding in the case at bar. In Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001), Dunkin was required to complete an outpatient sex offender treatment program within the first three years of his supervision. The appellate court held that there was no specificity that Dunkin had to complete the treatment program on the first try or that he had a limited amount of time to complete. Id. This holding does not conflict with the Third District's decision, because the decisions are dealing with separate and distinct issues. The case at bar does not deal with the issue of whether the condition of Defendant's probation allows him multiple times

to submit to the specific evaluation; therefore, the decisions do not conflict. Also, there is no conflict because the Third District's decision deals with an order to be evaluated by a specific program rather than a non-specified program as in the case at bar.

In Mitchell v. State, 871 So. 2d 1040 (Fla. 2d DCA 2004), Mitchell was ordered to attend and complete a sexual offender treatment program. The appellate court followed Dunkin and held that there was not requirement to complete the program on the first try. Id. 1041-1042. As discussed above, this holding does not conflict with the Third District's decision, because the decision at bar does not deal with the issue of a defendant having multiple opportunities to satisfy the condition of his probation. Also, there is no conflict in the holdings because the case at bar deals with a specific program and Mitchell dealt with a non-specific program.

## CONCLUSION

Based upon the arguments and authorities cited herein, Respondent decline to accept the instant case for review.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 20th day of September 2006, to Valerie Jonas, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

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LUCRETIA A. PITTS
Assistant Attorney General

## CERTIFICATION OF FONT AND TYPE SIZE

I HEREBY CERTIFY that the font and type size in this Brief of Respondent on Jurisdiction comply with Florida Rules of Appellate Procedure requirements in that Times New Roman 14-point was utilized.

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