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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

In this brief, "R." refers to the record of appeal, "State Br." refers to the Brief of Respondent on the Merits, "Initial Br." refers to Petitioner's Brief on the Merits, and "TAB" refers to the additional material as indicated in the clerk's index from the Third District. Unless otherwise noted, all emphasis is supplied.

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 fatal problem with the State's arguments is that neither the order of probation (R. 9) nor the plea colloquy (R. 32) contained a requirement that Mr. Ortiz **complete** the TASC program on the first try or within a specified time, other than his term of probation.

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

The State relies upon a statement made by the trial judge **after** accepting the plea to argue that Mr. Ortiz was ordered to complete the TASC program. This argument is meritless.

During the plea colloquy, the following occurred with regard to the condition of entering the TASC program:

> Q. You understand that you must enter and submit 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?
>
> A. Yes.
>
> Q. Okay. Is that your understanding of the plea.
>
> A. Yes.

(R. 32). The written order was consistent with this colloquy, requiring of Mr. Ortiz "TASC eval. & treatment if necessary." (R. 9). It was **this** understanding of the plea that Mr. Ortiz agreed to.

After further colloquying Mr. Ortiz, the trial court accepted the plea and adjudicated Mr. Ortiz guilty. (R. 35). Only **after** the plea colloquy was completed and the plea had been accepted did the trial court state "You must complete the course, task [sic] and hours and also the restitution." (R. 35). Mr. Ortiz was never asked if he understood completion of TASC to be a part of his plea agreement. Nevertheless, it is this snippet that the State relies upon to argue that Mr. Ortiz was ordered to complete the TASC program. (State Br. at 10-12).

The same argument was made by the State below. (TAB B at 19-20). The Third District clearly rejected this argument by holding 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 v. State*, 932 So. 2d 214 (Fla. 3d DCA

2004). There would obviously be no need to talk about what was "inherent" in the plea agreement if, as the State has argued, that condition was an explicit part of the plea agreement. This Court should likewise reject the State's argument as neither the plea colloquy nor the orders of supervision contained any requirement that Mr. Ortiz "complete" the TASC program.[1]

On the merits, the only attempt the State makes to distinguish the cases cited by Petitioner in his brief on the merits is to reiterate its faulty argument that Mr. Ortiz was ordered to complete the TASC program as part of his probation. (State Br. at 12-13). The solitary case cited by the State on the merits, *Mills v. State*, 840 So. 2d 464 (Fla. 4th DCA 2003), is readily distinguishable on its facts. There, an explicit condition of the probation order was "[a]ctive participation in and successful completion of a sex offender treatment program." *Id*. at 465. Evidence at the hearing showed excessive absenteeism, and Mills did not deny that his excuses for the absences were unacceptable. *Id*. at 466. Moreover, "Mills made no effort, and demonstrated no willingness to either be reinstated into treatment or to participate in a comparable program." *Id*. at 467. Here, in marked contrast, Mr.

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[1] That conditions announced by the court after accepting a plea are invalid is supported by rule and case law. Fla. R. Crim. P. 3.172(c)(7); *Moore v. State*, 489 So. 2d 1215 (Fla. 2d DCA 1986); *Pumphrey v. State*, 502 So. 2d 982, 983 (Fla. 1st DCA 1987) ("The cases are clear that no additional conditions may be imposed after the trial judge accepts the plea bargain and the defendant's plea.").

Ortiz explained, without contradiction, that his two absences were caused by his job, and he attempted to go back to the TASC program the week after his second absence as he did not want to leave the program. (R. 77-78).

The next argument made by the State is that "the TASC program is a fixed program with a beginning and end." Therefore, the State postulates, "submission to the TASC **program** would require attendance within the rules and policy until the program is complete." (State Br. at 13). This argument is improper since there is no record evidence that the TASC program is a fixed program. In fact, the record shows otherwise. When asked to describe the TASC program, the probation officer explained "It is a program where they evaluate the defendant to determine whether they need further treatment." (R. 42). Even if the State's argument were proper and well-taken, it would not matter since there was no evidence that Mr. Ortiz, who had already been to six TASC appointments, could not pick up where he had left off if readmitted to the program.

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

In his initial brief on the merits, Respondent cited to nine different cases

which held that probation could not be revoked for failure to complete a program when the order of probation did not specify that the program had to be completed on the first try or within a specified time and there was still time remaining in the probationary period to complete the program. (Initial Br. at 18-20). The State does not discuss, much less distinguish, **any** of these cases.

Instead, the State cites only to *Lawson v. State*, 941 So. 2d 485 (Fla. 5th DCA 2006), and urges this Court to adopt *Lawson*. (State Br. at 13-15).[2] As explained in the initial brief, though, *Lawson* is factually distinguishable because there was an explicit order in that case that the probationer "successfully complete" the treatment program, and it was explained to him that he would be subject to discharge if he missed three sessions. *Lawson*, 941 So. 2d at 487; *see* Initial Br. at 20 n.3. Neither an explicit requirement to "successfully complete" the TASC program nor an explanation that Mr. Ortiz would be subject to termination if he missed a specified number of meetings is present here. The State does not address these factual distinctions.

The State argues that a probationer should not be allowed to choose when to enter and complete a program, but should be required to immediately enter any assigned program and to successfully complete that program on the first try, or else

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[2] *Lawson* is pending review in this Court under case number SC06-2423.

face possible revocation of probation. (State Br. at 15-17). That can easily be accomplished — **if** it is so ordered as part of probation. There is nothing at all that prohibits a trial judge from imposing such requirements as conditions of probation. Acknowledging that such conditions can be imposed, though, is not a concession that such conditions must be read into every probationary order in which they are not imposed. The reasoning in *Lawson* is faulty and should be rejected in favor of the nine decisions cited in Petitioner's initial brief (Initial Br. at 18-20).

Factually, the State does not dispute that there was no specified time by which the TASC program had to be completed, and no evidence that Mr. Ortiz could not complete it within the remaining time of his probation. Instead, the State argues that Mr. Ortiz did not desire to be reinstated into the TASC program. (State Br. at 18-19).

This argument, too, is flatly refuted by the evidence at the probation violation hearing. The undisputed evidence at the probation revocation hearing was that, after missing two TASC appointments, Mr. Ortiz returned the next week only to be told that he'd been discharged. Mr. Ortiz answered "No" when asked if he had decided to leave the program. (R. 77-78). His act of returning to the program after missing two weeks because of his job is clear evidence of a desire to continue in the program.

Even if a requirement that the program be successfully completed was

"inherent" in the order of probation, then, it was still improper to revoke Mr. Ortiz's probation as he had demonstrated 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

The State suggests that the other aspects of the probation revocation proceeding should not be considered because Mr. Ortiz "has completely served his sentence and the issues of his revocation are moot." (State Br. at 21). The State is incorrect.

"An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992). Mr. Ortiz is not challenging the length of his sentence; he is challenging his status as a person who has been adjudicated of a crime due to having his probation revoked. When Mr. Ortiz entered his plea of guilty, adjudication was withheld. (R. 8). After probation was revoked, Mr. Ortiz was adjudicated guilty. (R. 19). If this Court determines that probation was improperly revoked, then this adjudication would be removed from his record. The issue of whether the revocation was proper, then, is not moot.

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

This part of the State's argument confusingly addresses two different violations as if they were one. The amended affidavit of violation of probation alleged (1) that Mr. Ortiz "has failed to submit a monthly report since September 9, 2003," and (2) that he "was instructed to report to his Probation Officer on October 7, 2003 and this he failed to do." (R. 14). In his initial brief here, Petitioner conceded that the latter violation had been proven. However, he contested, and still contests, the proof of the former violation.

With respect to the first alleged violation, the probation officer admitted in her testimony that Mr. Ortiz had submitted a monthly report on October 24, 2003. (R. 47, 56). Mr. Ortiz thus argued in the trial court that "he couldn't possibly have made a probation report if he had not been there." (R. 88). In the Third District, Mr. Ortiz addressed the first two violations together, again arguing "The evidence established that Mr. Ortiz filed his October report on October 24th." (TAB A at 2-3, 11). The State, then, is wrong; this issue was preserved below. (State Br. at 32).

On the merits, the State argues that the probation officer instructed Mr. Ortiz to file a report on October 7th, and he did not do so. Thus, according to the State, there was a violation "of the reporting condition" which was not cured by the later filed report. (State Br. at 32-33). The obvious problem with this argument, pointed out in the initial brief (Initial Br. at 22), is that Mr. Ortiz was not charged

with filing a **late** report; he was charged with failing to submit **any** report. (R. 14). As noted in the initial brief, it is a violation of due process to revoke probation on a ground not alleged in writing. The State does not address this case law, instead choosing to ignore the difference between what was alleged and what was proven.

The State also writes that it "did not have to prove that Defendant failed to file any monthly report after September 9, 2003 as interpreted by Defendant. The State was required to submit evidence, which it did, that Defendant had not filed a report on time." (State Br. at 34). Not surprisingly, the State does not cite to any authority to support this contention, which is directly contrary to the facts and the law. The requirement of what the State had to prove is not an "interpretation by Defendant"; it is the wording of the amended affidavit of violation of probation. And, yes, of course the State has to prove the allegations contained in the affidavit of violation of probation. The State cannot allege one thing (failure to submit any report), prove another thing (late submission of a report), and have probation revoked on that basis. Due process prevents such an outcome.

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

According to the State, Mr. Ortiz failed to argue in the trial court "that he had time remaining in his probation to complete the [community service] hours." (State Br. at 22-23). This is demonstrably wrong. Trial counsel initially argued

that there was "nothing" in the evidence to support a violation of the requirement that Mr. Ortiz perform 100 community service hours. The prosecutor **conceded** this point. (R. 83). There was no need, then, for defense counsel to make any further argument. Nevertheless, defense counsel did further argue that, with respect to this and two other alleged violations, "I think you have a full year to complete" the requirements. (R. 86). Under any fair reading of the record below, the issue was fully presented and preserved.

On the merits, the State hangs its hat on the pre-printed special condition 6 that required Mr. Ortiz to "perform 100 hours of community service at a non-profit organization, **as directed**." (R. 9). According to the State, this required Mr. Ortiz to perform the hours as directed by his probation officer. (State Br. at 23). To the contrary, as noted in one of the cases relied upon by the State, "only the court can impose conditions of probation." *Rowland v. State*, 548 So. 2d 812, 813 (Fla. 5th DCA 1989). What may be delegated to the probation officer is "the normal **supervision of those conditions**." *Id*. Thus, the probation officer could certainly supervise the condition of community service imposed by the court by asking Mr. Ortiz for proof of any hours he worked (R. 66), and could tell him he had to start performing the required hours (R. 62). Probation, though, could only be revoked if he failed to complete the 100 hours within his one year of probation because that was what the trial court had ordered.

None of the cases cited by the State (State Br. at 23-24) involve the condition at issue here. *See Mathis v. State*, 683 So. 2d 634, 636 (Fla. 4th DCA 1999) (condition of employment); *Draper v. State*, 403 So. 2d 615, 616 (Fla. 5th DCA 1981) (instruction to write no checks); *Wheatley v. State*, 629 So. 2d 896, 897 (Fla. 1st DCA 1993) (submit to drug/alcohol evaluation and counseling as directed); *Rowland*, 548 So. 2d at 813 (same); *Roff v. State*, 644 So. 2d 166 (Fla. 4th DCA 1994) (unspecified instruction).

In contrast, the main case cited by Petitioner in his initial brief (Initial Br. at 23), involved this exact same condition. *Matthews v. State*, 943 So. 2d 984 (Fla. 2d DCA 2006). There, the probation argued that "the court erred when it revoked his probation on the ground that he failed to perform community service hours **as ordered**." *Id*. at 985. The Second District agreed, holding that the "deficiency in the order revoking Mr. Matthews' probation on the basis of his failure to perform community service hours derives from his original probation order's omission of defined times for his commencement and completion of the condition." *Id*. This factually indistinguishable case is not discussed or even mentioned by the State. Of course, the State also makes no attempt to distinguish any of the many other cases that directly deal with this issue and which were cited in the initial brief. *See also, Lewellen v. State*, 685 So. 2d 1367, 1368 (Fla. 2d DCA 1996) ("The trial court cannot delegate to the probation officer the authority to determine a

restitution payment schedule.").

The State's argument about the failure to complete the anti-theft course (State Br. at 25-26) warrants little discussion. Where the evidence was undisputed that Mr. Ortiz had set up an appointment for the course at a time where he still had over six months of probation remaining, and the orders of supervision contained no date by which the course had to be completed, the State's assertion that there was somehow a "violation of a condition of probation" is ludicrous. This is not at all like a failure to file a single report since reports are required monthly.

Once again, the State cannot distinguish the cases cited by Petitioner, so the State simply ignores them.

C. Violating The Law By Using Marijuana

The State refuses to recognize that the trial judge announced he was **dismissing** this allegation **prior to** Mr. Ortiz testifying. (R. 70).

The State argues that the objection made below was not specific enough to preserve the issue for appeal. (State Br. at 27-28). An objection is sufficient, though, so long as the trial court clearly understands the nature of the objection. *E.g.*, *Franqui v. State*, 699 So. 2d 1332, 1335 (Fla. 1997); *State v. Heathcoat*, 442 So.2d 955, 956 (Fla. 1983); *Layman v. State*, 728 So. 2d 814, 817 (Fla. 5th DCA 1999) ("The contemporaneous objection rule is satisfied under the facts of this case because the trial court clearly understood the defendant's position and further

debate would have been futile."). Defense counsel here immediately objected when the prosecutor asked Mr. Ortiz if he admitted to smoking marijuana while on probation. (R. 79). The trial court overruled the objection: "Overruled. Cross examination. **State may be able to prove it through the defendant himself. Very good question.** What's the answer?" (R. 79). The trial court clearly understood the defendant's position and, just as clearly, any further debate would have been futile given that the trial judge himself then demanded Mr. Ortiz answer the question. The issue was preserved.

The State argues alternatively that there was "sufficient additional evidence" to support the finding of a violation here. The State relies on the probation officer's testimony that she had done a urine analysis with a positive result and that she had received a lab report that showed marijuana. (State Br. at 28). However, a lab report standing alone is an improper basis for revoking probation. *Whisler v. State*, 569 So. 2d 934, 935 (Fla. 1st DCA 1990).

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

The State concedes that "the trial court did not find that Defendant violated the truthful reporting condition" and suggests that this scrivener's error can be corrected in the trial court. (State Br. at 30). Of course, it can also be corrected by this Court as part of the determination that probation was improperly revoked.

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

The State agrees that "departure from judicial neutrality is fundamental error in some cases." (State Br. at 35). The State also agrees that the trial judge took over the role of the prosecutor by questioning the probation officer. (State Br. at 35). The State, though, argues that "a verbal indication must be created on the record" to preserve an argument that the trial judge departed from his role of neutrality. (State Br. at 35-36). The State provides no citation to support this assertion. The law, as cited in the initial brief, is that:

> 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). The State, again, has no answer for these authorities and so ignores them.

The State also argues that any error was harmless. (State Br. at 36). The

error complained of here, though, is **fundamental** error. *Padilla*. It is well settled that fundamental error can never be harmless. *Reed v. State*, 837 So. 2d 366, 369-70 (Fla. 2002).

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 State asserts that, besides failing to report on October 7, 2003, the evidence shows that Mr. Ortiz "lied to his probation officer" and "willfully smoked marijuana," and so the revocation should be affirmed in any event. (State Br. at 37). Mr. Ortiz, though, was not charged in the affidavit of violation of probation with lying, and as argued above, the only admissible evidence that he smoked marijuana was hearsay. The case should be remanded for consideration, by a different judge, of whether the single violation was sufficient to revoke probation.

CONCLUSION

Relief should be granted as specified in Respondent's Brief on the Merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Petitioner on the Merits was delivered by hand to Richard L. Polin and Lucretia Pitts, Assistant Attorneys General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on April 5, 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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