IN THE SUPREME COURT OF FLORIDA

ANTHONY K. RUSSELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. SC06-335
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

REPLY BRIEF OF THE PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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Point One

THE TRIAL COURT ERRED IN SUSTAINING THE VIOLATION OF PROBATION BASED SOLELY UPON THE HEARSAY STATEMENTS OF THE VICTIM AND OBSERVATION OF AN INJURY TO THE VICTIM.

This Court should continue to exercise jurisdiction.[1] The determination to accept jurisdiction has already been made. The order accepting jurisdiction was rendered on May 5, 2006. *Russell v. State*, 926 So.2d 1270 (Fla. 2006). This Court should continue to exercise jurisdiction because, as the district court noted in this case: "We acknowledge what appears to be contrary authority on this point in *Santiago v. State*, 889 So.2d 200 (Fla. 4th DCA 2004), *Colwell v. State*, 838 So.2d 670 (Fla. 2d DCA 2003) and *Blair v. State*, 805 So.2d 873 (Fla. 2d DCA 2001)" *Russell v. State*, 920 So.2d 683, 684, n. 2 (Fla. 5th DCA 2006). The conflict that existed when this Court determined to accept jurisdiction continues today.

It is indisputably true that "[a] defendant is put on probation as a matter of grace." *Lambert v. State*, 545 So.2d 838, 843 (Fla.1989). Nonetheless, "[i]t is

[1] References to the "Merits Brief of Respondent" are indicated "(MBR-page)." Those to the record on appeal are denoted "(R-page)."

clear at least after *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 819, 79 L.Ed. 1566 (1935), that probation is an 'act of grace.'" *Gagnon v. Scarpelli*, 411 U.S. 778, 782, n. 4 (1973). This Court has held similarly:

> The Supreme Court of the United States in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), has held that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed a defendant in a criminal proceeding. He is entitled only to minimal due process rights. These minimal rights are written notice of the claimed violation of probation, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confrontation and cross-examination of adverse witnesses, a neutral and detached hearing body, and a written statement by the fact finders as to the evidence relied on and the reason for revoking probation. *Gagnon v. Scarpelli*, 411 U.S. at 786, 93 S.Ct. at 1761.

Cuciak v. State, 410 So.2d 916, 918 (Fla. 1982) (emphasis added), *citing Gagnon, supra*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

Also, the Fifth District Court of Appeal has said: "While a probationer may not enjoy the same status as an ordinary citizen, he or she is entitled to some, although not all, due process rights." *Sears v. State*, 889 So.2d 956, 959 (Fla. 5th DCA 2004) (citation omitted).

It is true "[t]he evidence upon which to predicate a revocation [of probation] introduced at the hearing must be sufficient to satisfy the conscience of the court that a condition of probation has been violated." *Parker v. State*, 843 So.2d 871, 879, n. 11 (Fla.2003), *citing Bernhardt v. State*, 288 So. 2d 490, 495 (Fla. 1974). But further, "[t]rial 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." *State v. Carter*, 835 So.2d 259, 261 (Fla. 2002).

The defendant did not say that "he 'rough***ed*** up' his girlfriend." (MBR-11, emphasis added). The testimony was: "He also stated that he doesn't hit her, he just roughs her up." (R-137). The latter is a general statement, while the former would be inculpable as to the charged battery. In the decision under review the Fifth District Court of Appeal rejected the interpretation urged by the state:

> Although admissions may be used to corroborate otherwise inadmissible hearsay in a probation violation proceeding, here the admissions were not probative of the issues in dispute. Appellant's confirmation that the victim was pregnant, while relevant to the crime charged, did not tend to prove that a battery had occurred. As to Appellant's comment that he "roughs up" the victim, the admission was exculpatory as to the particular offense charged. Therefore, we have considered the sufficiency of the evidence without regard to the admissions.

Russell v. State, 920 So.2d 683, 684, n. 1 (Fla. 5th DCA 2006).

In other words, because the statement that he "roughs up" his girlfriend relates to his conduct in general, it has no probative value as to the specific battery. That is,

the fact that the defendant "roughs" up his girlfriend occasionally does nothing to establish that he "roughed" her up on the occasion in question.

"A reviewing court must assess the record evidence for its sufficiency only, not its weight." *Crain v. State*, 894 So.2d 59, 71 (Fla. 2004). There is nothing in the decisions of the district courts of appeal that ruled contrarily to the decision under review that even tends to suggest that those courts re-weighed the evidence. To the contrary, it is apparent that they took the evidence at face value and decided as a matter of law that the violations were improper.

The "per se" rule, of which the law has many, that the defense seeks does comport with Florida law. The defense seeks only a holding that precludes the establishment of a violation of probation based upon the commission of a battery through the use of hearsay statements by the victim coupled with evidence of an otherwise unexplained injury. Unlike *Carter v. State*, 835 So. 2d 259 (Fla. 2002), in which this Court rejected a per se rule that the failure to file a single monthly report as a matter of law could not constitute a violation of probation, the holdings that hearsay statements coupled with evidence of injury do not preclude actions for violations of probation entirely. Violations based upon batteries will still be possible in all cases. That which is affected by the contrary decisions is the amount and kind of proof necessary to sustain them.

This Court should continue to exercise its jurisdiction. The district court of appeal in the instant case did not adequately address the issue of conflict. Indeed, the decision was published with an acknowledgment of conflict with other district courts of appeal. Again, the other district courts of appeal did not re-weigh the evidence. The state's concluding words under this point are not quite accurate (MBR-17). The defense has not argued that there can never be a violation of probation "based upon hearsay statements which are corroborated by a testifying witness's independent observation . . ." *Ibid.* That is much too broad a proposition. An example undermining that assertion would be the clearly admissible testimony of an independent witness who observed a battery bolstering the hearsay statements of an alleged victim.

For the reasons expressed *ante* and those in the petitioner's merit brief, this Court should hold that a violation of probation based upon battery may not be established through the introduction of only hearsay statements from the victim coupled with evidence of an injury otherwise unexplained.

Point Two

ADMISSION OF HEARSAY FROM THE ALLEGED VICTIM DENIED THE DEFENDANT HIS RIGHT TO CONFRONTATION.

The petitioner will rely on the argument under point two in the petitioner's merit brief.

CONCLUSION

This Court should approve the decisions of the Second and Fourth District Courts of Appeal that hold that mere hearsay coupled only with a visible injury is inadequate to establish a VOP. Additionally, this Court should rule that the confrontation holding in *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), is applicable to VOP hearings.

Respectfully submitted,

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CERTIFICATE OF FONT

I certify that the font used in this brief is 14 point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief has been hand delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Anthony K. Russell, Inmate # U16516, G-1-21-U, Liberty Correctional Institution, 11064 N.W. Dempsey Barron Road, Bristol, Florida 32321-9711, on this 24th day of July 2006.

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