IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC07-389

KENNETH ADAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON PETITION FOR CERTIORARI REVIEW

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RESPONDENT'S BRIEF ON THE MERITS

BILL McCOLLUM
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1515 North Flagler Drive
Suite 900
West Palm Beach, Florida 33401
Telephone: (561) 837-5000

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner, Kenneth Adams, was the Defendant and Respondent the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, “R” indicates the record on appeal, “T” indicates the transcripts; “PMB” followed by the page number, will be used to refer to Petitioner’s Brief on the Merits; and the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner plead guilty to one count of Lewd or Lascivious Molestation and one count of Lewd or Lascivious Exhibition of a child under 12 years of age (R. 37). Petitioner was found to be a sexual predator (R. 39). On September 1, 2004, the trial court declared Petitioner a habitual offender and placed Petitioner on two years community control, to be followed by three years **sex offender probation** (R. 37).

Twenty-one days later, on September 22, 2004, an affidavit of violation of community control was filed alleging Petitioner violated community control in that on September 18, 2004, Petitioner was away from his approved residence, without prior approval of his supervisor, "as evidenced by the Global Positioning System monitoring software and by his own admission when he stated 'I left to get a pack of cigarettes.'" (R. 40-41). By order of October 4, 2004, Petitioner was reinstated into community control, and to remain on electronic monitoring (R. 43).

Three days later an Affidavit of violation of community control was filed alleging Petitioner violated community control in that on October 5, 2004, Petitioner was away from his approved residence "at approximately 10:00 a.m., without prior

approval of the officer, as evidenced by his own admission when he stated "I stopped at a gas station to get a couple beers." Petitioner also violated community control by using intoxicants to excess. On October 5, 2004, Petitioner tested positive for the presence of alcohol (R. 46-48). On November 23, 2004, the trial court revoked the community control and probation that had been imposed in September 2004, and then the trial court placed Petitioner on **sexual offender probation** for six (6) years, with a condition that Petitioner serve 364 days in the Broward County Jail (R. 49-50, 52-57). One of the conditions of the sex offender probation imposed on November 23, 2004, was to "**enter, actively participate in, and successfully complete a sex offender treatment program with a therapist particularly trained to treat sex offenders, at probationer's or community controllee's expense**." (R. 57). Petitioner was released from jail to commence probation on June 22, 2005 (T. 25).

On August 1, 2005, an affidavit of violation of probation was filed, charging Petitioner violated condition K of the sex offender probation "by failing to enter, actively participate and successfully complete sex offender treatment program . . . ." (R. 58-59). A violation of probation hearing was held on September 12, 2005 (T. 1-45).

Petitioner's probation supervisor, Willie Jenkins, testified that the file showed Petitioner was advised of the conditions of sex offender probation on September 2, 2004 (T. 5). Mr. Jenkins also testified that when he began supervising Petitioner on June 22, 2005, he once again instructed Petitioner on the conditions of sex offender probation (T. 5). Mr. Jenkins testified that Petitioner said he had started working about three weeks before the affidavit of violation was filed (T. 8). Petitioner told Mr. Jenkins that he was working six or seven days a week (T. 8), but Petitioner never brought in any salary payment documentation (T. 9). Petitioner told Mr. Jenkins that he was going to counseling (T. 9). Petitioner never claimed he could not afford the counseling sessions, but only said he was working (T. 10). It was only when he was arrested that Petitioner claimed "he didn't have the money, and he just didn't go" (T. 10).

Dr. William C. Rambo operates the sex offender program (T. 11). Dr. Rambo testified he met Petitioner July 2, 2005, when Petitioner went for an initial intake appointment (T. 12). Dr. Rambo explained the fees to Petitioner. The initial intake would be $50. Dr. Rambo testified Petitioner was aware that if he could not pay the $50 then, Dr. Rambo would work with him (T.

14); that, in fact, Petitioner did not pay that day and that was okay (T. 14-15). Dr. Rambo told Petitioner the sessions would be $25 per session for the first two months, and then they may increase to $35 (T. 15).

For Petitioner's convenience, Petitioner was assigned to the Saturday group (T. 13-14). Petitioner showed up for the first session on July 9, 2005 (T. 14). Petitioner did not make the initial payment, and that was okay (T. 14, 15). The second session was to take place July 16. Petitioner called and said he had to work that Saturday, so Dr. Rambo excused Petitioner for that session (T. 15).

The following week, July 23, Petitioner did not call and failed to show up for the session (T. 15). The same on July 30, Petitioner failed to show up or call (T. 15). Dr. Rambo did not hear from Petitioner again after July 16th (T. 15). So, on August 1, 2005, when Petitioner did not show up for the July 23rd, or July 30th sessions, two consecutive un-excused absences, Dr. Rambo sent out the termination letter (R. 61, T. 16), stating Petitioner had been terminated "due to non compliance with the treatment program." (T. 18, R. 61)

Dr. Rambo testified that Petitioner never asserted he could not afford the fees of the program (T. 19). Dr. Rambo testified

he would not have terminated Petitioner for inability to pay (T. 19). Dr. Rambo explained that he believed Petitioner was aware he would not be terminated if he could not pay because that is "the same instruction that I give to everyone when I meet with them." (T. 20). However, because he does not have it written down, he could not testify positively he told Petitioner as such (T. 20-21). Dr. Rambo's testimony was that he told Petitioner of the fees and that he was expected to pay them; but that Dr. Rambo would work with him until he was on his feet financially, since he just got out of jail (T. 20). In July 2, Petitioner told Dr. Rambo he was living with his mother, and Petitioner wrote on his form "that he had a job working at a car wash." (T. 20). So Petitioner indicated that he had income coming in, and therefore Dr. Rambo had no reason to believe he would not be able to pay (T. 20). "But he was told that he would be given some time to get his first paycheck and get on his feet." (T. 20).

Petitioner testified that he was released from jail June 22, 2005 and went to live with his mother (T. 25). His mother is retired, and pays about $750 a month for rent (T. 26). His mother expects Petitioner to contribute towards rent (T. 26).

Petitioner testified he got a job at a car wash. If he

works, he would get $28, plus tips, a day (T. 26). While it was not a sure everyday thing, Petitioner testified that the guy at the car wash said, “if I come up there, I can work.” (T. 27). So Petitioner just has to show up at the car wash (T. 27). Petitioner testified that in June and July he worked “like 15 days” (T. 29). At the rate of $28, plus tips, Petitioner made about $635 (T. 33), and he gave half to his mother for rent (T. 33).

Petitioner testified he was aware one of the conditions was that he had to complete the program (T. 32). Petitioner testified Dr. Rambo told him what the fee schedule was (T. 32), but was not told he could go without paying (T. 31). Petitioner never told Dr. Rambo he could not afford to pay (T. 34). Petitioner testified he went to the program twice, and did not pay either time (T. 30). When asked why he did not continue going to the Saturday sessions, Petitioner stated, “**I don’t know, sir**. I feel like I didn’t have the money and I didn’t know how I would be treated, so.” (T. 31).

After listening to the testimony and the argument of counsel, the trial court made the following findings:

> COURT: . . . the Court makes the following findings:
>
> First, the Court does find that the

Defendant did not successfully complete the Fifth Street Counseling Center program, which would be a violation of condition K order of sex offender probation. He did enter it, **he did not actively participate, he did not successfully complete it as a result of his failure to attend two successive programs (sic)**. Based upon the information that he had been provided originally by Dr. Rambo and his staff, two successive misses and failure to appear would, in fact, result in him being terminated.

The Court would **also find that the Defendant, at the time, did have the ability to pay. That's based upon the Defendant's own testimony. The fact that he chose to give money to his mother, his first priority was to his treatment. And the twenty-five dollars that he had is still part of what he would have after he gave money to his mother, which again is not a mandatory requirement considering that Mr. Adams, while he was incarcerated, was providing absolutely no financial support to his mother. So I do find that he had the ability to pay.**

For the record, I would also have to make a record that Dr. Rambo was unsure as to whether he, in fact, told Mr. Adams that if he couldn't pay they would work with him and he could still go. And Mr. Adams indicates that --he just flat out says that he wasn't notified. With regard to Dr. Rambo's unsureness on that issue, I can't make any specific finding on that.

However, **he did have the ability to pay, he did have the financial resources. I do find that it was a willful violation of the terms and conditions of the sex offender probation, and I further find that it is, in**

> **fact, a substantial violation considering that sex offender probation and the treatment programs are absolutely essential to the well-being of not only Mr. Adams, but to the protection of society and any potential future victims that could result as a result of his not getting the necessary care and treatment. So, I do find that he did willfully and I do find that he did substantially violate.**
>
> **Additionally, this isn't the first time that Mr. Adams is back. He was reinstated once. He was violated once. It's a pattern. They're always different, but it's still another violation. So, I am at this point revoking his sex offender probation.**

(T. 37-39).

The trial court sentenced Petitioner to 11 years in prison to be followed by ten years of sex offender probation (R. 66-67, 69-77).

On direct appeal to the Fourth District Court, relying on Yates v. State, 909 So. 2d 974, 975 (Fla. 2d DCA 2005)[1]; and Larangera v. State, 686 So. 2d 697 (Fla. 4th DCA 1996), Petitioner argued that the trial court "erred" in revoking probation because "[t]he condition did not require that the

[1]It should be noted that this Court has now **specifically disapproved** the Second District's

treatment program had to be completed on the first try nor did it indicate how many chances Appellant would be given to complete the program." (Petitioner's Initial Brief, p. 5).

In its December 20, 2006 opinion, Adams v. State, 946 So. 2d 583 (Fla. 4th DCA 2006) (Appendix), the Fourth District Court of Appeal acknowledged and rejected Petitioner's argument that the trial court erred in revoking his probation because of the absence of a specific time period within which he was to complete the program:

> **We find no merit in Adams's argument that the trial court erred in revoking his probation where there was no time period specified for him to complete sex offender treatment.**
>
> * * *
>
> Adams claims the trial court abused its discretion by revoking his probation because the probation order did not specify a time period for completion of the program or how many chances he had to complete it. **We clarify at the outset that the trial court revoked Adams's probation based upon failure to attend and complete sex offender**

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decision in Yates, see, Lawson, 2007 Fla. LEXIS 1953 *38 (Fla. October 25, 2007).

> **treatment, not failure to pay. Adams merely cited inability to pay as a reason why he did not attend treatment. This distinction separates this case from those in which probation is revoked for failure to pay court-ordered costs.** (citations omitted.)

Adams, 946 So. 2d at 584, 585 (Appendix).

The District Court **affirmed** the trial court's order stating:

> "It is well settled that '[p]robation may be revoked only upon a showing that the probationer deliberately and willfully violated one or more conditions of probation.'" *Williams v. State*, 896 So. 2d 805, 806 (Fla. 4th DCA 2005) (quoting *Steiner v. State*, 604 So. 2d 1265, 1267 (Fla. 4th DCA 1992)). The State must prove by the greater weight of the evidence that the probationer substantially violated a condition of probation. *Blackshear v. State*, 771 So. 2d 1199, 1200 (Fla. 4th DCA 2000). Appellate courts should reverse a revocation of probation only if it is shown that the trial court abused its discretion. *Stanley v. State*, 922 So. 2d 411, 413 (Fla. 5th DCA 2006); *Bernhardt v. State*, 288 So. 2d 490, 501 (Fla. 1974).
>
> We find the facts of this case very similar to *Mills v. State*, 840 So. 2d 464 (Fla. 4th DCA 2003). In *Mills*, a condition of Mills's sex offender probation was that he complete a sex offender treatment program. 840 So. 2d at 465. Mills was terminated from the treatment program due to

multiple unexcused absences and lack of participation. Id. at 465-66. The trial court found that Mills had willfully and substantially violated the conditions of his probation by failing to complete the program. Id. at 466.

Like Adams, Mills argued on appeal before this court that the trial court erred in revoking his probation because of the absence of a specific time period within which he was to complete the program. Id. at 467. Although it found the issue unpreserved, this court specifically addressed and rejected Mills's argument. Id. (citing *Archer v. State*, 604 So. 2d 561, 563 (Fla. 1st DCA 1992) (rejecting argument that no violation of probation occurred because court had not assigned a specific time period for probationer to complete therapy)).

We distinguish the facts of this case from the recent opinion of this court in *Myers v. State*, 931 So. 2d 1069 (Fla. 4th DCA 2006). The probationer, Myers, had his probation revoked for failing to attend two treatment sessions. 931 So. 2d at 1070-71. Myers had attended sex offender treatment for over six years. Id. at 1071. The location of the facility required Myers to ride his bicycle two hours to reach it. Id. at 1070. Myers's probation officer gave him permission to switch to a program located closer to his home. Id. The doctor from the original program informed the probation office he objected to allowing Myers to switch programs, and Myers was instructed to return to the original program. Id. Myers missed two classes because he had already paid to attend the new treatment program and did not have the dues to pay to return to the initial program. Id. at 1071. This court stressed the unique facts of that

> case, noting that "Myers' probation officer initially gave him permission to change programs and thus led a probationer with limited means to spend money on a program which he ultimately was not permitted to attend, leaving no funds for him to attend the required program." Id. This court concluded that the trial court had abused its discretion under the unique circumstances of that case. Id.
>
> *Myers* is unique in that the probation officer essentially led Myers to violate his probation. Unlike *Myers*, the present case involved no confusion or transfer back and forth between two different treatment programs. **There was competent testimony that Adams** had the resources to pay for his treatment, was aware he would be accommodated if he could not pay, and **simply failed to attend. There was sufficient evidence for the trial court to find by a preponderance of the evidence that Adams willfully and substantially violated his probation.**
>
> ***Affirmed***.
>
> STONE and HAZOURI, JJ., concur.

Adams, 946 So. 2d at 585-586.

Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of Supreme Court. By its order **accepting jurisdiction** of September 20, 2007, the Court established a briefing schedule. Petitioner filed the Initial Brief on the Merits, and this, the Respondent’s Brief on the Merits, follows.

SUMMARY OF THE ARGUMENT

At bar, the district court specifically **rejected** Petitioner's argument that the trial court erred in revoking his probation where there was no time period specified for him to complete sex offender treatment, finding the argument to be without merit, and instead held that the trial court did not abuse its discretion in revoking Petitioner's probation on the finding that Petitioner "willfully and substantially violated his probation." Adams, 946 So. 2d at 585-586. This decision is consistent with Lawson v. State, 941 So. 2d 485 (Fla. 5 DCA 2006), which was **approved** by this Court in Lawson v. State, 32 Fla. L. Weekly S659 (Fla. October 25, 2007). Therefore, the State submits jurisdiction was improperly granted in this case.

In the alternative, Respondent submits that the decision rendered by the District Court must be **approved**, as it is consistent with this Court's recent decision in Lawson v. State, 32 Fla. L. Weekly S659 (Fla. October 25, 2007); as well as this Court's consistent determination that the issue whether a particular defendant has completed a treatment program is "factually distinguishable" and therefore the District Court's decision in **a** particular case must stand without further review

by this Court, see Ortiz v. State, 963 So. 2d 226 (Fla. 2007); Mitchell v. State, 911 So. 2d 93 (Fla. 2005); Woodson v. State, 889 So. 2d 823, 824 (Fla. 2004) (C.J. Pariente, concurring).

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING PETITIONER WILLFULLY VIOLATED PROBATION, WHEN HE WAS DISCHARGED FROM A SEX OFFENDER TREATMENT PROGRAM FOR **NONATTENDANCE**, EVEN THOUGH THE PROBATION ORDER DID NOT SPECIFY THE NUMBER OF ATTEMPTS THE DEFENDANT WOULD HAVE TO SUCCESSFULLY COMPLETE THE PROGRAM AND IMPOSE A TIME PERIOD FOR COMPLIANCE

JURISDICTION

In its September 20, 2007, this Court **accepted** jurisdiction to review the Fourth District Court's decision in Adams v. State, 946 So. 2d 583 (Fla. 4th DCA 2006). The question posed by Petitioner,

DOES A TRIAL COURT ABUSE ITS DISCRETION IN FINDING A DEFENDANT, WHO IS DISCHARGED FROM A COURT-ORDERED DRUG TREATMENT PROGRAM FOR NONATTENDANCE, IN WILLFUL VIOLATION OF PROBATION WHEN THE SENTENCING COURT DID NOT SPECIFY THE NUMBER OF ATTEMPTS THE DEFENDANT WOULD HAVE TO SUCCESSFULLY COMPLETE THE

PROGRAM AND IMPOSE A TIME PERIOD FOR COMPLIANCE?

however, has now been answer in the **negative** by this Court. Lawson v. State, 32 Fla. L. Weekly S659 (Fla. October 25, 2007).

The State respectfully submits that this Court improvidently accepted jurisdiction over this cause, and, therefore, jurisdiction should be discharged and the review proceedings herein should be dismissed. See, Gillis v. State, 959 So. 2d 194 (Fla. 2007); Zeigler v. State, 955 So. 2d 532 (Fla. 2007). First, to the extent that a "conflict" existed, the interdistrict conflict has been resolved by Lawson v. State, 32 Fla. L. Weekly S659, 2007 Fla. LEXIS 1953, * (Fla. October 25, 2007). Thus the outcome in the instant case being controlled by this Court's recent opinion in Lawson, the District Court's decision in Adams need only be approved on the authority of Lawson without further review.

Second, in Lawson, this Court specifically stated:

> [T]he certified question in this case specifically concerns the revocation of probation after being discharged from a court-ordered drug treatment program. Therefore, **we decline to address the**

certified conflict decisions that involve distinct categories of treatment programs.

2007 Fla. LEXIS 1953, n.1 *2-3. Thus, Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001), and Lynom v. State, 816 So. 2d 1218 (Fla. 2d DCA 2002), were specifically **distinguished**, and not addressed by the Lawson decision because they dealt with **sex offender treatment programs**. Lawson, 2007 Fla. LEXIS 1953, n.1 *2-3.

Petitioner Adams, herein, was ordered to complete a "sex offender treatment program" (R. 57, 61). Thus, this case is specifically controlled by this Court's prior holdings starting with Woodson v. State, 889 So. 2d 823, 824 (Fla. 2004), where this Court has consistently **declined** to accept jurisdiction because "no genuine conflict exists between them because they are factually and legally distinguishable." In her concurring opinion, Justice Pariente succinctly explained:

> I concur with the decision to dismiss because of the factual differences in the cases, I write to point out that, as observed by the Fourth District in *Mills v. State*, 840 So. 2d 464, 467 (Fla. 4th DCA 2003), the underlying issue in all cases dealing with failure to actively participate in **sexual offender treatment** is whether the defendant's conduct in failing to participate and complete the program was willful.

> The parameters of sexual offender probation are statutorily defined as a form of intensive supervision with an individualized treatment plan. See § 948.001(7), Fla. Stat. (2004). The critical component of sexual offender probation is the active participation and completion of a sexual offender treatment program. See § 948.30(l)(c), Fla. Stat. (2004) (previously codified at section 948.03(5)(a)(3). Florida Statutes (2003)). It is only because the defendant agrees to participate in active treatment that the privilege of probation is extended. As Judge Sawaya expressed in the opinion below, "releasing a sex offender, untreated, does not alleviate the concern that he or she will reoffend and affords no protection to society." *Woodson v. State*, 864 So. 2d 512, 516 (Fla. 5th DCA 20041.
>
> **Because each treatment plan is individualized, it is not always realistic for the trial judge to specify time parameters for completion at the time of sentencing.** Nevertheless, the probation officer should clearly communicate to the defendant, both in writing and verbally, the specific details of the individualized treatment plan so that there is no question that the defendant is specifically on notice of exactly what is expected and when.
>
> BELL, J., concurs.
> (Emphasis added.)

889 So. 2d at 824 (Pariente, C.J., concurring).

After Woodson, and relying on Woodson, this Court also declined to accept jurisdiction to review another “sex offender treatment program” case in Mitchell v. State, 911 So. 2d 93 (Fla. 2005) (Consistent with our decision in *Woodson v. State*,

889 So. 2d 823 (Fla. 2004), we conclude that review herein was improvidently granted, and we hereby dismiss this review proceeding.) Also Ortiz v. State, 932 So. 2d 214 (Fla. 3d DCA 2004), and Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995) were not reviewed by this Court because the decisions were "based on a materially disparate fact as to whether the trial court ordered Ortiz to complete the drug offender treatment program." And, "the circumstances of this case and the alleged conflict decisions are factually distinguishable." Ortiz v. State, 963 So. 2d 226 (Fla. 2007) (Cases factually and legally distinguishable. Review dismissed.)

In his Petition before this Court, Petitioner cited to Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005); Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995); Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001); and Mitchell v. State, 871 So. 2d 223 (Fla. 2d DCA 2004), as the cases that established "conflict" jurisdiction for this Court. This Court in Lawson has now disposed of any "alleged" conflict as it relates to Yates, and Dunkin, see Lawson, 2007 Fla. LEXIS 1953, n.1 *2-3. Very recently, in July 12, 2007, this Court declined jurisdiction to review the issue by distinguishing Bingham, Ortiz v. State, 963 So. 2d 226 (Fla. 2007); and "Consistent with our decision in

Woodson v. State, 889 So. 2d 823 (Fla. 2004), we conclude that review [of *Mitchell v. State*, 871 So. 2d 1040 (Fla. 2d DCA 2004)] was improvidently granted, and we hereby dismiss this review proceeding." declined review of Mitchell.

There not being any conflict herein, this review proceedings should be dismissed.

MERITS

In his Merits Brief before this Court, citing to Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005), overruled, Lawson v. State, 2007 Fla. LEXIS 1953, *38 (Fla. Oct. 25, 2007); Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995), distinguished, Ortiz v. State, 963 So. 2d 226 (Fla. July 12, 2007); Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001), distinguished, Lawson v. State, 2007 Fla. LEXIS 1953, n.1 *2-3 (Fla. Oct. 25, 2007); Mitchell v. State, 871 So. 2d 1040 (Fla. 2d DCA 2004), review dismissed, Mitchell v. State, 911 So. 2d 93 (Fla. 2005); and Lynom v. State, 816 So. 2d 1218 (Fla. 2d DCA 2002), distinguished, Lawson v. State, 2007 Fla. LEXIS 1953, n.1 *2-3 (Fla. Oct. 25, 2007), Petitioner argues "it is not a violation of probation for a probationer to fail to complete a condition of probation **where the probation order does not require a parameter for completing the condition**." (PMB, p. 5). That,

"the probationer must be informed of the limit part of the condition of probation." (PMB, p. 6) That at bar, "Petitioner was never given notice that his first attempt at the treatment program had to be successful." (PMB, p. 7) Therefore, "Petitioner should not [have been] violated where he was not given notice." (PMB, p. 10).

Respondent, the State of Florida, will begin by pointing out that in Lawson v. State, 32 Fla. L. Weekly S659, 2007 Fla. LEXIS 1953, *31-35 (Fla. Oct. 25, 2007), this Court emphatically rejected Petitioner's argument:

> We continue to adhere to the principle that trial courts must have broad discretion in deciding whether to revoke a defendant's probation. **We conclude that a trial court could be well within its discretion in finding a willful and substantial violation where a defendant fails to complete a court-ordered drug treatment program, even though the order did not specify how many chances the defendant had to complete the program or when it had to be completed.** Probation orders need not include every possible restriction so long as a reasonable person is put on notice of what conduct will subject him or her to revocation. We agree with the Fifth District that a condition of probation should "provide reasonable individuals of common intelligence the basis to know and understand its meaning." *Lawson*, 941 So. 2d at 489; *accord Britt v. State*, 775 So. 2d 415, 417 (Fla. 1st DCA 2001) (stating that two probation conditions were "sufficiently precise to 'give [ ] a person of ordinary intelligence fair notice of what

constitutes forbidden conduct.'") (*quoting Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994)). **Although the conditions should be clearly set out and must mean what they say, every detail need not be spelled out and the language should be interpreted in its common, ordinary usage.** *See Rothery*, 757 So. 2d at 1259. Thus, **a probation order that requires the completion of a drug treatment program but fails to specify time parameters should be read in a commonsense manner.** Accordingly, a probationer who has been given the privilege of being placed on probation, in lieu of serving jail time, is put on adequate notice that the treatment program should be undertaken at the beginning of the probationary period and that, if he or she is discharged for nonattendance, he or she may not have another chance to complete the program.

As previously discussed, for those drug-addicted defendants who are making genuine attempts to recover from their illnesses, flexibility of the treatment program is vital to their success. However, just as a defendant who unfortunately relapses while making good faith efforts at rehabilitation should not be subject to a bright line rule requiring the automatic revocation of his or her probation no matter the circumstances, a defendant who flouts the system by making little or no effort should not be able to escape the consequences of his or her noncompliance through a per se rule that prohibits the trial court from revoking simply because the order failed to specify the time for completion. This is the essence of the Fifth District's reasoning and we agree with this approach.

We caution, however, that our decision today should not be interpreted as a complete rejection of detailed orders or more

specific conditions. In fact, we take this opportunity to encourage trial courts to be as specific as possible so that probationers are on clear notice of exactly what they are required to do and what actions will subject them to revocation. However, we reject a bright-line rule in the context of drug treatment programs because such a rule may undermine the trial court's ability to "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." *Carter*, 835 So. 2d at 261.

If we were to require trial courts in every case to specify when a treatment program must be completed or how many chances a probationer has to complete it, a trial court would be without discretion to revoke probation until the number of allowable chances had been reached. For instance, if an order gave a probationer three opportunities or two years to complete a drug treatment program, the trial court would be precluded from revoking probation even where the probationer showed absolutely no willingness to submit to treatment and has been discharged from the treatment

> program twice without any reasonable excuse. Such a result would undermine the rehabilitative purposes that drug treatment programs are intended to serve. That being said, trial courts should always be mindful of the underlying disease of addiction and aware that at times circumstances make it difficult for the defendant to comply, as many of the above-mentioned Second District cases demonstrate.

However, Respondent understands that because this case involves "sex offender probation" and not a "drug treatment program", the specific holding of Lawson is not controlling to the facts and circumstances of the case at bar. Lawson, 2007 Fla. LEXIS 1953, n.1 *2-3.

This Case

In the case at bar, one of the conditions of the sex offender probation imposed on November 23, 2004, was to "enter, **actively participate in, and successfully complete** a sex offender treatment program with a therapist particularly trained to treat sex offenders, **at probationer's or community controllee's expense**." (R. 57). The affidavit and warrant filed

in this case charged Petitioner violated condition K of the sex offender probation "by failing to enter, actively participate and successfully complete sex offender treatment program . . . ." (R. 58, 59).

After listening to the testimony and the argument of counsel at the final violation of probation hearing, the trial court made the following findings:

> COURT: . . . the Court makes the following findings:
>
> First, **the Court does find that the Defendant** did not successfully complete the Fifth Street Counseling Center program, which would be a violation of condition K order of sex offender probation. He did enter it, he **did not actively participate, he did not successfully complete it as a result of his failure to attend two successive programs (sic).** Based upon the information that he had been provided originally by Dr. Rambo and his staff, two successive misses and failure to appear would, in fact, result in him being terminated.
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> The Court would also find that the Defendant, at the time, did have the ability to pay. That's based upon the Defendant's own testimony. The fact that he chose to give money to his mother, his first priority was to his treatment. And the twenty-five dollars that he had is still part of what he would have after he gave money to his mother, which again is not a mandatory requirement considering that Mr. Adams, while he was incarcerated, was providing absolutely no financial support to his

> mother. So I do find that he had the ability to pay.
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> For the record, I would also have to make a record that Dr. Rambo was unsure as to whether he, in fact, told Mr. Adams that if he couldn't pay they would work with him and he could still go. And Mr. Adams indicates that --he just flat out says that he wasn't notified. With regard to Dr. Rambo's unsureness on that issue, I can't make any specific finding on that.
>
> However, he did have the ability to pay, he did have the financial resources. I do find that **it was a willful violation of the terms and conditions of the sex offender probation, and I further find that it is, in fact, a substantial violation considering that sex offender probation and the treatment programs are absolutely essential to the well-being of not only Mr. Adams, but to the protection of society and any potential future victims that could result as a result of his not getting the necessary care and treatment**. So, I do find that he did willfully and I do find that he did substantially violate.
>
> **Additionally, this isn't the first time that Mr. Adams is back. He was reinstated once. He was violated once. It's a pattern. They're always different, but it's still another violation. So, I am at this point revoking his sex offender probation.**

(T. 37-39).

In rejecting Petitioner's argument, and affirming the trial

court's order revoking probation, the District Court held:

> Adams claims the trial court abused its discretion by revoking his probation because the probation order did not specify a time period for completion of the program or how many chances he had to complete it. **We clarify at the outset that the trial court revoked Adams's probation based upon failure to attend and complete sex offender treatment**, not failure to pay. . . .
>
> * * *
>
> There was competent testimony that Adams had the resources to pay for his treatment, was aware he would be accommodated if he could not pay, and simply failed to attend. There was sufficient evidence for the trial court to find by a preponderance of the evidence that Adams willfully and substantially violated his probation.
>
> Affirmed.

Adams, 946 So. 2d at 585-586 (Appendix).

The State submits that based on the record before the Court, Petitioner has failed to show the trial court abused its discretion. As such, the District Court's opinion affirming the trial court's order revoking probation must be approved. See, Woodson v. State, 864 So. 2d 512 (Fla. 5th DCA 2004), review dismissed, 889 So. 2d 823 (Fla. 2004).

In Woodson, the Fifth District Court affirmed the trial court's order revoking the sex offender probation holding:

> Accordingly, we conclude that "if the

> trial court does not announce time parameters for compliance with sex offender conditions of probation at sentencing, **the defendant is not at liberty to pick the time of compliance within the probationary period**. Rather, the defendant must undertake compliance with each condition as soon as he or she is placed on probation. Consequently, willful failure to actively participate in or complete sex offender treatment, or provide test results to the victim, does not necessarily preclude revocation simply because the number of attempts at compliance were not specified or because the defendant is willing to undertake another attempt at compliance within the probationary period. If immediate initial attempts are unsuccessful and the defendant expresses a willingness to try again, other chances at compliance are a matter that should be left to the sound discretion of the trial court.
>
> **We believe that affording the trial court discretion in determining whether a violation of sex offender probation is willful and substantial, and the penalty to be imposed for a violation, provides the court with flexibility in imposing just punishments for probation violations, comports with legislative intent and fosters the goal of imposing probation as a criminal sanction. Indeed, the contrary result would be irrational in that it would require the court to do little or nothing to enforce the terms of the defendant's sex offender probation, thus diminishing the utility of sex offender probation as a viable alternative to incarceration. Accordingly, Woodson's conviction and sentence are affirmed.**
> (Emphasis added)

Woodson, 864 So. 2d at 517. In **dismissing review** of the Fifth

DCA's opinion in Woodson, Justice Pariente wrote:

> I concur with the decision to dismiss because of the factual differences in the cases. I write to point out that, as observed by the Fourth District in *Mills v. State*, 840 So. 2d 464, 467 (Fla. 4th DCA 2003), the underlying issue **in all cases dealing with failure to actively participate in sexual offender treatment is whether the defendant's conduct in failing to participate and complete the program was willful.**
>
> The parameters of sexual offender probation are statutorily defined as a form of intensive supervision with an individualized treatment plan. See § 948.001(7), Fla. Stat. (2004). The critical component of sexual offender probation is the active participation and completion of a sexual offender treatment program. See § 948.30(1)(c), Fla. Stat. (2004) (previously codified at section 948.03(5)(a)(3), Florida Statutes (2003)). It is only because the defendant agrees to participate in active treatment that the privilege of probation is extended. As Judge Sawaya expressed in the opinion below, "releasing a sex offender, untreated, does not alleviate the concern that he or she will reoffend and affords no protection to society." *Woodson v. State*, 864 So. 2d 512, 516 (Fla. 5th DCA 2004).
>
> **Because each treatment plan is individualized, it is not always realistic for the trial judge to specify time parameters for completion at the time of sentencing.** Nevertheless, the probation

> officer should clearly communicate to the defendant, both in writing and verbally, the specific details of the individualized treatment plan so that there is no question that the defendant is specifically on notice of exactly what is expected and when.

Woodson v. State, 889 So. 2d at 824 (Pariente, J.C., concurring).

It is settled that un-excused absences from required therapeutic programs constitute willful violations of probation. Mercano v. State, 814 So. 2d 1174, 1176 (Fla. 4th DCA 2002) (Citing: *Boyd v. State*, 756 So. 2d 1114, 1115 (Fla. 1st DCA 2000)and *Santiago v. State*, 722 So. 2d 950, 950 (Fla. 4th DCA 1998)). As the Fifth DCA stated in Woodson, it makes no sense to release defendants into society on a lengthy term of probation only to allow the defendant the discretion to undertake the treatment when he wants to undertake it. "[A] requirement that provides additional chances for treatment in the future before expiration of the probationary period after willful failure to actively participate in and complete the program, simply because the offender expresses a willingness to attend, opens the door to mischievous manipulation by the

offender and thwarts all of the goals of probation."

At bar, the trial court noted that Petitioner had already been given several chances. When Petitioner first violated community control, he was reinstated, then when he violated again, he was then placed on sex offender probation. So this was Petitioner's third violation of the trial court's order. Additionally, the trial court found that Petitioner's explanation that he did not go to those two sessions because he did not have the money was not a valid excuse. Petitioner had $635 at his disposal, and he chose to spend the money otherwise. The trial court's order is clear that probation was revoked because Petitioner "did not actively participate, he did not successfully complete it as a result of his failure to attend two successive" sessions (T. 37-39), and not because he did not have the ability to pay! The greater weight of the evidence supports the lower courts' determination of the issue under the facts and circumstances of this particular case. As such the finding of willful violation must be affirmed. Woodson; Lawson.

The district court's decision is consistent with this Court's reasoning and holding in Lawson and Woodson. Therefore, this Court should either dismiss the review proceedings as improvidently granted, or approve the decision rendered by the

District Court on the basis of Lawson and Woodson.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully urges the Court to **APPROVE** the decision of the district court issued in the case at bar **finding the trial court did not abuse its discretion, and affirming** the trial court's decision to revoke the order of probation since Petitioner willfully failed to participate or attend sex offender treatment as required by condition 4 of the order of probation.

Respectfully submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

_____
CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

_____
GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401

Telephone: (561) 837-5000
Facsimile: (561) 837-5099

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Courier to: JEFFREY L. ANDERSON, ASSISTANT PUBLIC DEFENDER, Attorney for Petitioner, CRIMINAL JUSTICE BUILDING, 421 THIRD STREET/6TH FLOOR, WEST PALM BEACH, FL 33401, this 7th day of November, 2007.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel for the State of Florida, Respondent herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
GEORGINA JIMENEZ-OROSA
Assistant Attorney General
Florida Bar No. 441510