

IN THE SUPREME COURT OF FLORIDA

JASON DEMOTT, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Supreme Court Case No. SC15-868

**ON DISCRETIONARY REVIEW FROM THE  
FIFTH DISTRICT COURT OF APPEAL**

**REPLY BRIEF OF APPELLANT**

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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## ARGUMENT

THE VAGUE, SPECIAL CONDITION IMPOSED  
DOES NOT SPECIFY WHAT ASSOCIATIONS OR  
CONDUCT IS PROHIBITED AND ITS TERMS ARE  
DISTINGUISHABLE FROM THE GENERAL  
PROBATION CONDITION.

Without a waiver of arguments raised in the initial brief, Petitioner submits the following arguments in response. Before responding to counter-arguments in the answer brief, Petitioner asserts the State has tacitly conceded that using means “repeated or habitual conduct” and engaged is defined as “the act of using something or the state of being used.” Unlike using, engaged refers to a specific act or point in time. Petitioner contends these definitions are common, understood meanings of these terms.

Petitioner agrees that probation is a matter of grace and that a trial court has broad discretion whether to impose probation and whether to revoke it. (AB 6-7.) However, this judicial discretion is not unbridled. In State v. Springer, 965 So.2d 270 (Fla. 5<sup>th</sup> DCA 2007), the Fifth District held a trial court generally has authority to modify or rescind the terms or conditions of probation imposed by it; however, that discretion is not unlimited. Notice is implied to a defendant in the statutorily authorized, general conditions of probation. With special conditions, a sentencing court can only impose condition that provide sufficient notice of what specific

conduct is prohibited. The special condition in this case fails to provide the requisite notice and may result in an unintentional violation due to unforeseeable, unintentional contact with certain individuals.

The State cites due process protections afforded a defendant in a violation of probation proceeding, then acknowledges various fact patterns that it asserts would not be a willful violation; (1) to cross paths with someone who a probationer did not know had illegally used drugs; (2) if someone placed a drug into probationer's food or drink; or (3) talking to someone law enforcement knows had used illegal drugs or was under the influence of drugs but the defendant does not. (AB 7-9, 10-11.) This counter-argument that the violations would not be willful belies its position that the condition is not vague. If the condition was not vague, then no discussion of the willfulness would be required.

Incidental association between Mr. Demott and an individual who is not in possession of drugs, but is under their influence or used drugs outside Demott's presence, can reasonably be expected to result in an on-view arrest for a violation of the second half (not associate with individuals illegally using drugs) of this special condition. Respondent's argument that the trial court would determine these violations are not willful ignores the reading and interpretation of this vague, special condition by either a law enforcement or a probation officer

could lead to a no-bond, on-view arrest for a probation violation. Regardless of due process protections in the violation hearing, the impact on a probationer is in the defendant's potential for loss of liberty in being jailed and the collateral consequences that flow from an on-view arrest.

Petitioner has never challenged the standard condition to not associate with persons engaged in criminal activities or argued the terms of that condition are vague. (AB 11.) The issue is not whether an unknown, social encounter constitutes a violation of probation, but whether the challenged special condition of probation is vague and impermissibly broad. The State implicitly asserts that both the general condition and special condition only prohibit the exact same conduct, using drugs or associating with those who are engaged in using drugs.

The special condition of probation requires Demott to abstain entirely from association with anyone who illegally using drugs. This condition and its requirement for Demott to abstain entirely from association with persons who, unbeknownst to Demott, regularly use or have recently used narcotics, is invalid. Aside the lack of knowledge, Petitioner agrees that the special condition that Petitioner not use drugs is valid. In addition, both the general and special condition intended to prohibit conduct where Petitioner engaged in the use of drugs or is present and knowingly remains as others engage in the actual use of

illegal controlled substances. Petitioner does not dispute if Demott was present in either set of facts, this would be a violation of both the general and special condition.

However, the challenged special condition lacks a knowledge requirement and can lead to unknown, unintentional violations. The vague nature of the term using in the condition, does not provide a person adequate notice of specific, conduct prohibited. The condition is invalid when the special condition does not consider the unforeseeable contact problem - such as being thrust into a situation at [a] job or ... an unplanned social situation. The unclear term used in the special condition is subject to overly broad interpretation and renders the special condition vague.

**CONCLUSION**

BASED UPON the foregoing cases, authorities and policies, the undersigned counsel respectfully asks this Court to reverse the decision of the Fifth District Court of Appeal in this cause, and remand the matter to the Circuit Court in and for St. Johns County with directions to strike the special condition of probation.

Respectfully submitted,

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**CERTIFICATE OF FONT**

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and mailed to Justin Demott, DC#V44957, Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, FL 32327, on this 25<sup>th</sup> day of January, 2016.

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