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IN THE SUPREME COURT OF FLORIDA

ANTHONY GREEN,
Petitioner,

S.C.NO. SC10-369
D.C.A.NO.4D08-3864
L.T. No:99-9246CF10B

VS.

STATE OF FLORIDA,
Respondent.

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2010 MAR 26 AM 10:17
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BY

PETITIONER'S JURISDICTIONAL BRIEF

[COUNSEL]
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STATEMENT OF THE CASE AND FACTS

This is a Petition to invoke the discretionary jurisdiction of the Supreme Court of Florida.

The Petitioner following an unlawful traffic stop, beaten by officers, and being medically cleared at Bethesda Memorial Hospital was booked into Palm Beach County Jail, for Battery on a Law Enforcement Officer, Resisting Arrest with Violence, Possession of Cocaine, Tampering with Evidence, and Possession of Drug Paraphernalia. June 5, 2008, Affidavit of Violation of Probation was filed based on new law offenses. August 11, 2008, the State informed the trial court at violation hearing that the County of Palm Beach charged by Information 1-count Possession of Cocaine, 1-count Resisting Officer without Violence, dismissing the other charges per:(no-info)(no-action). Prior to the commencement of Final Revocation, the Court stated that Final Revocation Hearing was to be as testimony only, to be reset the following week to allow all parties to view the video of the alleged traffic violation before the court made its findings, however, following testimony-only, the court found Petitioner guilty and sentenced him to 180 months. An appeal was taken, and on December 2, 2009, the Fourth District affirmed revocation but remanded for order of revocation. A timely filed rehearing and clarification was denied on January 14, 2010, and the Petitioner's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on February 12, 2010.

This Petitioner to Invoke Discretionary Jurisdiction follows:

SUMMARY OF THE ARGUMENT

Petitioner concedes that upon receiving the record on appeal, thereafter reviewing, finding it incomplete, timely filed rehearing informing District Court of the record being incomplete, respectfully requesting the Clerk to direct the

Court Reporter to complete the record for full appellate review, and unfortunately the District Court allowed this fatal error to go uncorrected, denying rehearing, thus, Petitioner's liberty interest resulting in further manifest injustice. The Court's have frequently invoked this "manifest injustice" when a person has been wrongly seized, convicted, and imprisoned. It is well established ("[W]here....the Court finds that a manifest injustice has occurred, it is the responsibility of that Court to correct the injustice, if it can.") trial court's failure to continue revocation, whereas full hearing is demanded by due process, court reporter's failure to transcribe, the hearing prior to the commencement of revocation, where the trial court stated the final revocation hearing, for 9-12-08 was to commence as testimony-only to be reset for the following week to allow all parties to view video before court made its findings. Petitioner was and will continue to be prejudiced without the complete record on appeal, pursuant to ***Rule 9.200(f)(2)***, Fla. R. App. P. Whereas the burden fall upon the Petitioner to initiate a correction in the record before this Court. Furthermore, due to the incompleteness of the record, Petitioner was not afforded, as a matter of right, to effective assistance of appellate counsel to raise this fatal issue. Manifest Injustice, on its face, the records reflect the officer's patrol car was equipped with video surveillance, which would have captured the alleged traffic infraction, also the traffic stop, the video is and was "relevant" to establish a "material" fact as to those terms are defined in ***Section 90.401***, Fla. Stat.(2007) of the evidence code. Accordingly, this Court has recognized that due process entitles a criminal defendant to a full appellate review, whereas the record on appeal was incomplete, this Court should and must correct the miscarriage of justice, to uphold the liberty-interest of Petitioner.

JURISDICTIONAL STATEMENT

THE FLORIDA SUPREME COURT has discretionary jurisdiction to review a decision of a District Court of Appeals that expressly and directly conflicts with a decision of the Supreme Court of Florida or another District Court on the same point of law. (***Article V, § 3(b)(3)***, *Fla. Const.* and ***Rule 9.030(a)(2)(A)(iv)***, *Fla. R. App. P.)*

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION *GREEN V. STATE*, 34 FLA. L. WKLY. D2494 (4TH DCA 2009) DIRECTLY AND EXPRESSLY CONFLICTS WITH THE FIRST DISTRICT IN *KNIGHT V. STATE*, 566 SO.2D 339 (1990); AND *WHITE V. STATE*, 619 SO.2D 429 (1993);; SECOND DISTRICT IN *GRADDY V. STATE*, 517 SO.2D 772 (1988); *BOWLING V. STATE*, 779 SO.2D 613 (2001); *SWILLEY V. STATE*, 781 SO.2D 458 (2001); AND THE FIFTH DISTRICT IN *MANIS V. STATE*, 5D09-615, FEBRUARY 19, 2010 (35 FLA.L.WKLY. D422), AND OTHER DECISION OF THE FLORIDA SUPREME COURT.

It is well established that when a court gives grace of probation, the probationer must abide by the conditions and limitations. Thus, in order to be in violation, the deviation must be knowingly and a willful act. In this case, the Petitioner driving lawfully with a valid driver's license (safe driver endorsement) in a 2008 rented Saturn Vue in his name was heading home, traveling down 10th Ave. (MLK Blvd.) coming upon N. Seacrest Blvd., in the City of Boynton Beach, as crossing thru the intersection N.W. 9th Ave., the traffic light changed to yellow. In accordance to ***West's F.S.A. 316.075(1)(c)(1)***, 2. Right of Way *See* ***Dade County Metropolitan Transit Authority v. Even***, 262So.2d 685 (3rd DCA 1972); ***West's F.S.A. 316.075(1)(C)(1)*** 1. Reasonable Care, *See* ***Tackett v. Hartack***, 98 So.2d 896 (3rd DCA 1957), thus, the decision of the Fourth District directly conflicts with the Second District in ***Bowling v. State***, 779 So.2d 613 (2001); and the First District in ***White v. State***, 619 So.2d 429 (1993). *See:* ***Holland v.State***, 696 So.2d 757 (Fla. 1997) on the same point of law. Here at present, the record is totally devoid of any traffic citations or warning issued for basis of stop (implicit in the language of Section 949.10, to wit: subsequently arrested on a felony charge is that the arrest be

lawful in accordance with ***Chapter 901***, Fla. Stat.) Immediately the patrol car turned behind and began to travel directly behind Petitioner for a distance of six blocks and two stop signs before activating stop lights while Petitioner was turning left upon N.W. 4th Ave., therein three houses Petitioner stopped, whereas officer ordered Petitioner out of the car **at gunpoint**, thus illegally seizing, (See:***Baptiste***,995So.2d 285 at 294(S.Ct. 2008), which Petitioner replied, "**Sorry Sir, I don't see why you are stopping me.**" Officer advised Petitioner to keep his hands up and turn around, which Petitioner complied, when another patrol car coming at a high rate of speed, Petitioner's knees gave out due to being shot with a taser by the officer that held him at gunpoint. Whereas, Petitioner caught his balance before falling on instinct, thinking he was being shot at, ran to his front door yelling for help, to no-avail ran across his yard to neighbors house, where again **at gunpoint** was ordered to get face down or be shot, which Petitioner complied, after being handcuffed was badly beaten with kicks and punches that Petitioner's body was numb, thus, carried to police car and medically cleared at hospital for taser wounds to left upper arm, multiple wounds to the face, face swollen, and a punctured blood vessel to the left eye, (also notable: Consquella Green was arrested for disorderly conduct for taking pictures with a camera phone, subsequently was never returned).

Prior to the revocation, a hearing was conducted, whereas the state informed the Court, it was ready to proceed the witnesses were outside the courtroom, they have the suspected cocaine, however not the video, also if it was possible to get testimony then to reset it altogether, since the witness was out of the county. The Court stated "**that the final hearing for September 12, 2008 was to commence as testimony-only to be reset the following week to allow all parties to view video before the**

Court makes its finding, thus, manifest injustice occurred. This portion of the proceeding was not furnished in the transcript for full appellate review by District Court, also in the liberty interest of Petitioner, deprived of the right to effective assistance of counsel to raise this fundamental fatal error on appeal, thus, in conflict of procedural due process, Petitioner was and will continue to be prejudiced by the absence of complete transcripts.

Here on the face of the record, it is clear that there is a video recording of the alleged traffic infraction and stop, Petitioner states in liberty-interest, the video is and was "relevant exculpatory evidence" involved evidence to establish "material" fact (that's consistent to defense exhibit #2, a photo of left upper arm, also supports Petitioner's flight, was not to run away from officer , but in fact, an act to safety, due to being tasered, also proves that Petitioner was complying to his terms of probation), as to those terms defined in Section 90.401, Fla. Stat, of the evidence code, trial court's failure to continue hearing to the following week to allow all parties to view the video, as stated prior to the commencement of the revocation hearing , deprived Petitioner of his constitutional due process requirements of a full revocation hearing, whereas a full hearing is a condition precedent to revocation and such a hearing is demanded by due process (***F.S.A. 948.06***, Fla. Stat.), wherein this Court has constitutional power to correct a manifest injustice by the trial court, failure to continue hearing as stated (See:***Martin v.State***, 399 So.2d 128 (5th DCA 1981) (finding probationer was entitled to a new probation revocation hearing, where judge revoked probation on mistaken belief that hearing, which had been continued, had been completed).

The facts of the instant case are even more compelling, perhaps equally important, the trial court departed from procedural due process requirements of the law as set out in ***Bernhardt v.State***, 288 So.2d 490 (Fla. 1974), therein opportunity to present documentary evidence, thus when Petitioner attempted to show an aerial- view map from which the alleged infraction occurred was a series of two stop signs and a distance of six blocks when patrol car activated its stop lights while Petitioner was in the process of turning left upon N.W. 4th Ave., and a short distance of three houses, to which the Court replied **"I don't need to see that"**, also noted the record reflects the State made that remark, **in fact,it was the trial court** .

Furthermore, trial court, when told that Petitioner was only charged by Information, with 1-count of possession of cocaine, 1-count Resisting Arrest Without Violence, trial court replied, "**the charges are really irrelevant**," where the trial court lacked subject matter jurisdiction to make a finding on charges that are dismissed, per no-info, no-action [1] , in accordance to ***West's F.S.A. 948.06 at footnote 156***, **DISMISSED CHARGES**, ***Pendergrass v. State***, 601 So.2d 1250 (Fla. 2nd DCA 1992) expressly and directly conflicts with the Second District in ***Graddy v. State***, 517 So.2d 772 (reversing probation revocation where State conceded error in probation violation based upon dismissed charges) also the Second District in ***Swilley v. State***, 781 So.2d 458 at 461, furthermore, the trial court relied on **"what's listed on the warrant,"** also, it is well-settled that evidence that a mere arrest is insufficient to establish that probationer violated the law in violation of the terms of probation and will not support a revocation, here trial court

[1] (See: Petitioner's Suggestion for Certification)

used an improper standard **to me its credibility assessment; "do I believe him, or do I believe the police!"** The Fourth District allowed these fatal error to go uncorrected, thus, allowing a further miscarriage of justice.

The District Court in reviewing case at hand, did acknowledge that the State failed to prove the allegations of tampering with evidence, possession of narcotic equipment, to be stricken, the miscarriage of justice, by the record being incomplete, the reviewing court was unaware that the[2] possession of narcotic equipment was the alleged 2x2 zip-loc baggy filled with a white powder, test for cocaine, (notable the record is devoid of such lab report, also the officer that alleged he found the cocaine was the same to bring it to revocation, thus, a violation of procedural chain of custody).

The District Court also noting that the record in the instant case is devoid of an order of revocation, Petitioner states since rules of practice and procedure adopted by this Court, ***F.S.A. Const. Art. 5 § 2(a)***, on the Constitutional Right to Due Process of the ***Fourteenth Amendment***, as set forth in ***Bernhardt v. State***, 288 So.2d 490 (Fla. 1974); ***Morrissey v. Brewer***, 92 S.Ct. 2593; and ***Gagnon v. Scarpelli***, 93 S.Ct. 1756 (1973), a written statement by the fact finder as to the evidence relied on and reasons for revoking probation, these requirements in themselves serve as substantial protection against ill-considered revocation. Furthermore, the written order of revocation **must** conform to court's oral pronouncement, a due process precedent of law. ***Ramirez v. State***, 15 So.3d 827 (2nd DCA 2009); ***Rodriguez v. State***, 777 So.2d 30 1175, (4th DCA 2001), regrettably the Fourth District, got it wrong, on remand, pursuant to ***Jackson v. State***, 807 So. 864(Fla. 2nd DCA 2001);

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[2] (See: Rehearing Appendix Probable Cause Affidavit)

following ***Dolinger v. State***, 779 So.2d 419, 420-421 (Fla. 2nd DCA 2000) relying on ***Dawkins v. State***, 936 So.2d 710 (2nd DCA 2006) with ***Dolinger*** and ***Dawkins*** on the face of the record admitted the alleged violations, thus conforming oral pronouncement, probation was revoked based on those admissions, here the case at bar, at the close of revocation, the Defense informed the trial court Petitioner was currently only charged with 1-count of possession of cocaine, 1-count of resisting arrest without violence, in Palm Beach, the trial court stated "**the charges are really irrelevant...what's listed on the warrant, but I need to determine, number one, whether he committed battery on a law enforcement officer, whether he tampered with evidence, whether he possessed cocaine, whether he possessed narcotic equipment** (although he failed to mention resisting arrest with violence District Court failed to correct it). Thereafter, the determination of what's listed on warrant and speaking to defense, the trial court stated "**and I have to tell you that, on a "credibility assessment"...I do find that that you did indeed willfully and substantially violate your probation in case number 99-9246CF10B**" (emphasis added)." The record reflects trial court was aware of the allegations of violation, the court was aware of what it needed to determine and the burden of proof, thus, the court should have specified orally, or in writing, which of the five criminal offenses, without such an oral or written finding, the Fourth District's miscarriage of justice be remanding for order of probation pursuant to ***Jackson***, following ***Dolinger***, expressly and directly conflicts with the Fifth District in ***Manis v. State***, 5D09-615 Feb. 19, 2010 [35 Fla. L. Weekly D422] (finding as to condition 7, the trial court made an express finding that defendant violated that condition by using prescription medicine Percocet without having a legal prescription, however, as to condition 5, the trial court

verbally indicated that defendant violated condition 5, but did not make an express finding that the defendant had filed a false police report). also, expressly and directly conflicts with the decision of the First District in ***Knight v. State***, 566 So.2d 339 (1990) (finding the court neither orally announced nor entered a written finding) Thus, Fourth District rendered a further manifest injustice, failure to uphold Petitioner's liberty interest.

CONCLUSION

This Court has discretionary jurisdiction to remedy the manifest injustice, based on the foregoing facts, authorities, and arguments this Honorable Court should exercise its constitutional powers, of liberty-interest of Petitioner, accept review the decision of the Fourth District Court of Appeal.

Respectfully submitted,

Anthony D. Green,
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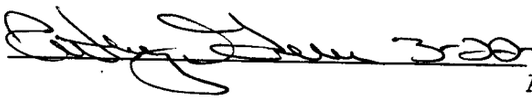
500 Orange Avenue Circle
Belle Glade, Florida 33430

UNNOTARIZED OATH

UNDER PENALTIES OF PERJURY, I declare that I have read the foregoing brief, and the facts stated herein are true.



Anthony D. Green,
DC #247930, Dorm A1-120L

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief was sent via U.S. Mail to: Office of the Attorney General, The Capitol, Tallahassee, Florida 32399. Supreme Court of Florida, Office of the Clerk, 500 South Duval Street, Tallahassee, FL 32399

3-00-10

Anthony D. Green,
DC #247930, Dorm A1-120L

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with the font requirements prescribed in Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

3-00-10

Anthony D. Green,
DC #247930, Dorm A1-120L

I HEREBY CERTIFY I place this in the hands of the prison officals on this 3rd of march, 2010

Anthony Green
B-247430 A1-120L

IN THE SUPREME COURT OF FLORIDA

ANTHONY GREEN,
Petitioner,

S.C.NO. SC10-369
D.C.A.NO.4D08-3864
L.T. No:99-9246CF10B

VS.

STATE OF FLORIDA,
Respondent.

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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34 Fla Law. weekly D2494

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

ANTHONY GREEN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-3864

[December 2, 2009]

STEVENSON, J.

When Anthony Green was charged with five new criminal offenses, the trial court, following a hearing, revoked his probation and sentenced him to 180 months in prison. We affirm the revocation, but remand for the entry of an order of revocation that lists only the three charges proven by the State.

In 1999, Green pleaded no contest to robbery with a firearm, and the trial court sentenced him to fifteen years of probation. On June 5, 2008, an affidavit of violation of probation was filed, alleging that Green had violated his probation by resisting an officer with violence, tampering with evidence, battering a law enforcement officer, possessing cocaine, and possessing narcotics equipment. These charges arose from an incident on June 2, 2008, when a road patrol officer in Boynton Beach noticed a silver Saturn run a red light at 1:30 a.m. The officer attempted to make a traffic stop; however, instead of stopping, the Saturn slowed down to approximately five miles per hour and turned left onto another road. Finally, the Saturn stopped, and Green emerged. The officer initiated a felony stop, and Green apologized for not stopping sooner, explaining he had not seen the patrol car. When asked to place his hands on his head, Green fled. When the officer caught him, he observed Green fiddling with something in the bushes. Two additional officers arrived to provide assistance, and Green struggled with them and hit one in the head before being placed under arrest. One of these officers recovered a bag of cocaine and Green's cell phone from the nearby bushes.

After a revocation hearing, the trial court determined the State had satisfied the court's conscience by a greater weight of the evidence that Green willfully and substantially violated his probation. *See Jenkins v. State*, 963 So. 2d 311, 313 (Fla. 4th DCA 2007) ("'[A] violation which triggers a revocation of probation must be both willful and substantial, and the willful and substantial nature of the violation must be supported by the greater weight of the evidence.'" (quoting *Steiner v. State*, 604 So. 2d 1265, 1267 (Fla. 4th DCA 1992))). "The determination of whether a violation of probation is willful and substantial is a question of fact and will not be overturned on appeal unless the record shows that there is no evidence to support it.'" *Jenkins*, 963 So. 2d at 313 (quoting *Davis v. State*, 796 So. 2d 1222, 1225 (Fla. 4th DCA 2001)).

On appeal, Green contends the State failed to prove the allegations of tampering with evidence and possession of narcotics equipment. On this first point we agree, and the State does not argue otherwise in its answer brief. Green further avers that the remaining findings that he possessed cocaine, battered a law enforcement officer, and resisted an officer with violence, standing alone, would be insufficient to constitute a willful, substantial, and material violation warranting probation revocation and a maximum sentence. On Green's second point, we cannot agree.

In *Jackson v. State*, 807 So. 2d 684 (Fla. 2d DCA 2001), the appellate court concluded the State had proven only two out of the three alleged violations by a preponderance of the evidence. *Id.* at 685. That court nonetheless affirmed the revocation of probation and sentence because the record left no question that the trial court would have revoked Jackson's probation for any one of the three violations. *Id.* However, it also ordered the trial court to strike from the revocation order the violation that lacked sufficient proof. *Id.* at 686. Upon consideration of the entire record in the instant case, we are confident the trial court would have revoked Green's probation based on the three sufficiently proven charges and would have imposed the same sentence.

We note, however, that the record in the instant case is devoid of an order revoking probation. *Dawkins v. State*, 936 So. 2d 710 (Fla. 2d DCA 2006), involved a similar situation and explained that an appellate court can either "relinquish[] jurisdiction to the trial court by nonpublished order to enter an order of revocation" or, alternatively, require the order of revocation be entered on remand from the appellate court. *Id.* at 712 (citing *Dolinger v. State*, 779 So. 2d 419, 420–21 (Fla. 2d DCA 2000), which remanded for entry of a written order of revocation where record clearly showed trial court had revoked appellant's probation but neglected to enter a written order). Because the record in the instant

case clearly reflects the trial court revoked Green's probation, we follow *Dolinger* and remand with directions for the trial court to enter an order of revocation in accordance with Florida Rule of Criminal Procedure 3.995. On remand, pursuant to *Jackson*, the order of revocation should reflect only the three charges proven by the State.

Revocation affirmed, remanded for entry of revocation order consistent with this opinion.

POLEN and GERBER, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey R. Levenson, Judge; L.T. Case No. 99-9246 CF10B.

Carey Haughwout, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

January 14, 2010

CASE NO.: 4D08-3864
L.T. No. : 99-9246 CF10B

ANTHONY GREEN v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's *pro se* motion filed December 21, 2009, for rehearing is hereby denied; further,

ORDERED that appellant's *pro se* motion filed December 21, 2009, for clarification is hereby denied.

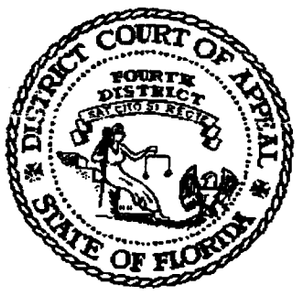
I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Public Defender-P.B. Anthony Green Attorney General-W.P.B.

kb

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal



CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing document has been furnished by U.S. Mail to the following: Hon. Bill McCollum, Attorney General The Capitol, Tallahassee, Fl 32399, Office of the Clerk, 500 South Duval Street, Tallahassee, Fl 32399 this 22nd day of March, 2010.

Respectfully Submitted,

Anthony Green

B-074930 A1-120L, pro se

Glades Correctional Institution
500 Orange Ave. Circle
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I HEREBY CERTIFY that this has been placed into the hands of the prison officials on this 22nd day of March, 2010

Anthony Green
Anthony Green
B-074930 A1-120L