NO. 23-6732

IN THE SUPREME COURT OF THE UNITED STATES

Seth Connor Wells,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

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QUESTIONS PRESENTED FOR REVIEW

I. Section 960.293(2)(b) of the Florida Statutes permits the State and its local subdivisions to assess a liquidated damage amount of $50.00 per day of incarceration for individuals convicted of a felony. The damages are based upon the length of the offender's sentence imposed by the court at the time of sentencing.

Petitioner stated his question as follows:

Whether the imposition of a $401,500 cost of incarceration pursuant to section 960.293 Florida Statutes is an unconstitutionally excessive fine as applied and as described in *United States v. Bajakajian*, 524 U.S. 321 (1998) and *Timbs v. Indiana*, 139 S. Ct. 682 (2019), under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

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CITATION TO OPINION BELOW

The Florida Fifth District Court of Appeal opinion affirming in part, reversing in part, and remanding Petitioner's judgment and sentence on August 11, 2023, is published and found at *Wells v. Florida*, 369 So. 3d 1176 (Fla. 5th Dist. Ct. App. 2023). The Mandate was issued on September 7, 2023. The Florida Supreme Court's order declining to accept jurisdiction is unpublished and is found at *Wells v. Florida*, No. SC23-1247, 2023 WL 7657210 (Fla. Nov. 15, 2023).

JURISDICTION

The judgment of the Florida Fifth District Court of Appeal was entered on August 11, 2023. The Florida Supreme Court declined to accept jurisdiction on November 15, 2023. Because the appellate court reversed and remanded the case, the trial court's revocation order and imposition of liquidated damages is not final. Therefore, this Court does not have jurisdiction pursuant to 28 U.S.C. §1257(a). Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Petitioner cannot invoke jurisdiction as a matter of right. Given that Petitioner has failed to show a compelling reason for the Florida Fifth District Court's decision to be reviewed, this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, State of Florida (hereinafter "State"), accepts as accurate Petitioner's recitation of the applicable constitutional provision involved.

PROCEDURAL HISTORY AND STATEMENT OF CASE AND FACTS

Respondent generally accepts Petitioner's statement of the case and facts but would note the following in support of the brief in opposition.

Petitioner was convicted of four counts of Using a Minor in Production of Material Harmful to Minors and one count of Production of Child Pornography. [Appx. A. 21.] Petitioner was sentenced to twenty-four months in prison followed by three years of sex offender probation. [Appx. A 21.] The special conditions of his probation included, *inter alia*, that he was required to comply with all instructions of his probation officer; a mandatory curfew from 10:00 p.m. to 6:00 a.m.; and he was prohibited from distributing candy to children on Halloween, or wearing a Santa Clause costume, an Easter Bunny Costume, or any other costume that appealed to children. [Appx. A. 22-23.]

A violation of probation ("VOP") affidavit was filed against Petitioner. [Appx. A. 23.] The report alleged two violations. [Appx. A. 23.] First, the VOP alleged that on October 31, 2021, Petitioner failed to follow the instructions of his probation officer in that he was told by his officer not to engage in Halloween activities, but despite that direction he was found at his place of employment dressed in a devil costume. [Appx. A. 23.] Second, the VOP alleged Petitioner violated his 10:00 p.m. to 6:00 a.m. mandatory curfew on October 31, 2021, because he was not at his residence at 10:30 p.m. [Appx. A. 23.]

Following the presentation of evidence at Petitioner's VOP hearing, the trial court found that Petitioner had committed two material violations of his probation, first by failing to follow the instructions of his probation officer, and second by being

out past his mandatory curfew. [Appx. A. 21-24.] The court revoked and terminated Petitioner's probation and sentenced him to twenty-two years in Florida State Prison. [Appx. 21.] The court also ordered Petitioner to pay $401,500 for the costs of his incarceration pursuant to section 960.293.[1] [Appx. A. 21.]

On appeal, Petitioner argued, *inter alia,* that the cost of incarceration was an unconstitutionally excessive fine pursuant to *United States v. Bjakajian*[2] and *Timbs v. Indiana*.[3] [Pet. 3.][4]

The Fifth District Court of Appeal of Florida ("Fifth District") rendered its opinion on August 11, 2023. *Wells v. Florida*, 369 So. 3d 1176 (Fla. 5th Dist. Ct. App. 2023). The Fifth District affirmed the trial court's finding that Petitioner violated his mandatory curfew but reversed the finding that he failed to comply with the instructions of his probation officer. *Id.* The Fifth District found that because it was unclear whether the trial court would have imposed the same punishment for the single affirmed violation, the case was reversed and remanded for the trial court to make that determination. *Id.* at 1181. The Fifth District also ruled that "[a]s to [Petitioner's] argument that the cost of incarceration violates the Excessive Fines Clause of the Eight Amendment, we find the argument wholly without merit." *Id.* at 1178.

In analyzing Petitioner's Excessive Fines claim, the Fifth District noted that

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[1] Fla. Stat. § 960.293 (2022).

[2] *United States v. Bjakajian*, 524 U.S. 321 (1998)

[3] *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

[4] Petitioner's petition for writ of certiorari shall be cited as [Pet. #].

the threshold question when analyzing the Excessive Fines Clause of both the United States and Florida Constitutions is whether the cost is punitive. *Id.* at 1179-80. The Fifth District found that the Florida Supreme Court had already determined that the costs imposed by section 960.293 were "civil rather than punitive in nature[]" in *Goad v. Fla. Dep't of Corr.*[5] *Id.* at 1180. The Fifth District acknowledged that *Goad* upheld section 960.293 in the context of an *ex post facto* challenge and held that the analysis would be the same for an Excessive Fines Clause challenge. *Id.* at 1180-81. The Fifth District took note that Petitioner analogized section 960.293 to civil forfeiture cases in support of his argument that his incarceration costs were partially punitive; however, the court was unpersuaded by that argument. *Id.* The Fifth District found that the Florida Supreme Court in *Goad* recognized that while it was possible for a statute to be labeled civil and still be punitive in nature, in this case it weighed the relevant factors and still found the costs imposed under section 960.293 to be civil and not criminal. *Id.* Accordingly, the Fifth District concluded that "[b]ecause the Excessive Fines Clause does not pertain to the remedial costs required by [section 960.263, Petitioner's] facial and as applied challenges have no merit." *Id.*

The Fifth District affirmed Petitioner's conviction for violation of his mandatory curfew and reversed only the trial court's finding that Petitioner failed to follow the instructions of his probation officer. The Fifth District remanded the case for the trial court to reconsider whether it would impose the same punishment for the affirmed finding of a violation of probation. *Id.*

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[5] *Goad v. Fla. Dep't of Corr.*, 845 So. 2d 880, 884-85 (Fla. 2003).

Petitioner sought review in the Florida Supreme Court and on November 15, 2023, the court declined to accept jurisdiction. W*ells v. Florida*, No. SC23-1247, 2023 WL 7657210 (Fla. Nov. 15, 2023); [Appx. B. 32-34.]. As of the filing of this brief in opposition, the undersigned has searched Petitioner's lower court docket and it does not appear that the trial court has as of yet held a hearing and reconsidered Petitioner's sentence in accordance with the Fifth District's order.

REASONS FOR DENYING THE WRIT

I. CERTIORARI REVIEW SHOULD BE DENIED FOR THE FOLLOWING REASONS: (1) UNDER 28 U.S.C. §1257(a) THE COURT LACKS JURISDICTION BECAUSE THE ORDER IMPOSING THE CIVIL LIEN–WHICH HAS ALREADY BEEN REVERSED–IS NOT FINAL; (2) THE PETITION DOES NOT PRESENT THE QUESTION PRESENTED; (3) CERTIORARI IS NOT WARRANTED; AND (4) PETITIONER'S ARGUMENT LACKS MERIT.

(1) Jurisdiction.

This court has no jurisdiction to consider Petitioner's claim because no final judgment has been issued.

The United States Supreme Court may only review a state court judgment if it is a final judgment rendered by the highest court of the state. 28 U.S.C.A. § 1257(a). The judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; and it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Market St. Ry. Co. v. Railroad Comm'n of the State of California*, 324 U.S. 548, 549 (1945). In general, the final judgment rule has been interpreted to preclude the review of a case where anything further remains to be determined by the state court. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). The Court's jurisdiction to review state court decisions is generally limited to a final judgment rendered by the highest court of the state in which a decision may be had. *Id.* In the context of a criminal prosecution, finality is normally defined by the imposition of the sentence. *Id.*

The finality requirement is not a mere technicality, but is rather an important factor in the smooth working of the federal system. *Radio Station WOW, Inc., et al v. Johnson*, 326 U.S. 120, 125 (1945). The finality requirement serves several ends: it

avoids piecemeal review by federal courts of state court decisions; it avoids giving advisory opinions in cases where there may be no real case or controversy; and it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

In this case there is no final judgment by the state's highest court. The trial court found that Petitioner had violated two conditions of his supervision and revoked his probation. The Fifth District reversed one of the violations and remanded the case to the trial court for further proceedings so that the lower tribunal could determine if it would still impose the same punishment for the single violation of probation that was affirmed. Because the case was remanded for further proceedings, there is no final judgment. *See Johnson v. California*, 541 U.S. 428 (2004) (The Court did not have jurisdiction to consider the Petitioner's claims under §1257 where the California Supreme Court remanded the case for further proceedings).

A consequence of the Fifth District remanding Petitioner's case back to the trial court for further proceedings is that the remedial lien of $401,500 imposed under section 960.293 no longer exists. Indeed, because the trial court has not yet decided if it will impose the same punishment, Petitioner is not even incarcerated in this particular case. While it is possible that the trial court may impose the same sentence, it is equally possible that the court could simply dismiss the violation and restore Petitioner to probation with no remedial lien amount being imposed.

Therefore, because Petitioner's case was reversed and remanded for reconsideration, there is no final judgment which would allow this Court to exercise its jurisdiction under §1257(a). Accordingly, this Court has no jurisdiction.

(2) The Petition does not present the question presented.

Petitioner bears the burden of demonstrating that his federal law claim was properly presented to the Florida appellate courts. *Campbell v. Louisiana*, 523 U.S. 392, 404 (1998). The Court "'will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Id.* (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)).

As noted above, the Fifth District reversed and remanded Petitioner's case because it was unclear on the record whether the trial court would have still revoked and terminated Petitioner's probation and sentenced him to a term of incarceration based upon the single affirmed violation. Accordingly, the Fifth District has remanded the case to the trial court to make that determination, and to date that determination has not been made.

Although Petitioner is still in custody in the Florida Department of Corrections, he is not in custody on this case. As was also noted above, the remedial lien of $401,500 no longer exists. Because the lien no longer exists, there is nothing for Petitioner to challenge under the Excessive Fines Clause. If the trial court imposes the same sentence that it did previously, or any incarceration sentence, then a new remedial lien of the same or a different amount will be imposed. If the court declines

to sentence Petitioner to incarceration in light of the Fifth District's decision, then no lien could be imposed because there would be no costs for the state of Florida to recover.

Therefore, until the lower tribunal conducts proceedings in accordance with the Fifth District's order, there is no lien, and therefore no Excessive Fines Clause argument that can be made to this Court.

(3) Certiorari is not warranted.

Petitioner has identified no split of authority among the federal courts or other state courts regarding whether the Excessive Fines Clause applies to section 960.293. As the Fifth District properly recognized in its decision, the constitutionality of the statute at issue has already been ruled upon twice by the Florida Supreme Court, first in *Ilkanic v. City of Fort Lauderdale*, 705 So. 2d 1371 (Fla. 1998) and later in *Goad v. Fla. Dep't of Corr.*, 845 So. 2d 880 (Fla. 2003). Petitioner has failed to show that Florida Supreme Court precedent conflicts with precedent established by this Court. In fact, in *Goad* the Florida Supreme Court relied upon this Court's precedent in reaching its conclusion.

In *Ilkanic*, the defendant was convicted of trespass after warning and sentenced to forty-five days in jail. *Id.* The city moved to impose a lien on him for $50 per day for each day of his incarceration pursuant to section 960.293(2)(b), part of the Civil Restitution Lien and Crime Victim's Remedy Act. *Id.* The county court ruled that the act was unconstitutional in its entirety, and found that it violated the Equal Protection and Due Process Clauses of both the Florida and United States

Constitutions. *Id.* at 1372. Ultimately, the Florida Supreme Court reversed, and concluded that imposing a per diem charge on convicted offenders clearly related to a permissive legislative objective, namely reimbursing public bodies for the costs expended in incarcerating those individuals. *Id.* The Florida Supreme Court further found that a flat charge of $50 per day was reasonably related to the costs of incarceration.

In *Goad*, the defendant challenged section 960.293 on the grounds that it violated the Constitutional prohibition against *ex post facto* laws. 845 So. 2d at 882. The court noted that, pursuant to this Court's decision in *Allen v. Illinois*, 478 U.S. 364 (1997), although a civil label is not always dispositive, the legislature's stated intent should only be rejected where the challenging party presents the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intention that the proceeding be civil. *Goad*, 845 So. 2d at 884.

The court found that the legislature intended to provide a legal mechanism in the form of a civil restitution lien that would enable the state to recover damages and losses arising out of criminal acts; to prevent convicted offenders from increasing their assets after a conviction while the state remained uncompensated for losses; and to impose long term civil liability for the costs of incarceration by means of a civil restitution lien against a convicted offender regardless of financial status. *Id.* at 883. The court found that the legislature specifically stated that the Act rested upon the principles of remediation and not punishment. *Id.*

The Florida Supreme Court also acknowledged that a civil statute could

actually be punitive in nature, and considered the seven factors laid out by this Court in *Hudson v. United States*, 522 U.S. 93 (1997), to determine if section 960.293 was in fact punitive. *Goad*, 845 So. 2d at 884. Those factors were: first, whether the sanction involved an affirmative disability or restraint; second, whether the sanction was historically regarded as punishment; third, whether a finding of *scienter* was necessary; fourth, whether operation of the sanction would promote traditional aims of punishment, specifically retribution and deterrence; fifth, whether the behavior to which it applied was already a crime; sixth, whether there was an alternative purpose to which it could be rationally connected; and seventh, whether it appeared excessive. *Id.* at 884.

Based upon the seven *Hudson* factors, the Florida Supreme Court concluded that "the incarceration costs of convicted offenders is a civil remedy that is not so punitive in nature as to constitute criminal punishment." *Id.*

Therefore, because the Florida Supreme Court has already addressed the constitutionality of section 960.293 and concluded that it is a civil remedy and not a punishment, the Fifth District properly relied upon that precedent. Furthermore, because the Florida Supreme Court and the Fifth District were interpreting a Florida statute, their decisions are entitled to great deference from this court. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute."). Finally, Petitioner has identified no split of authority or conflict of Florida law with precedent set by this Court.

(4) Petitioner's claim lacks merit.

The gravamen of Petitioner's argument proceeds from the assumption that the remedial lien was a fine and therefore subject to the Excessive Fines Clause. (Pet. 5-6.) Petitioner specifically argues that the Fifth District applied an incomplete analysis when it found that the threshold question of the Excessive Fines Clauses of the United States and Florida Constitution is whether the fine is punitive, because it failed to include the following sentence in its analysis: "[C]ivil in rem forfeitures fall within the Clause's protection when they are **at least partially punitive**." (Pet. 6-7) (emphasis original). However, Petitioner offers no analysis or explanation regarding why the remedial lien in this case is in fact more punitive than remedial. Instead, Petitioner stacks a series of conclusions: he concludes that because the lien is large, it is a fine, and because it is a large fine, it is excessive, and because it is excessive, it violates the Excessive Fines Clause, and therefore this Court has jurisdiction. (Pet. 7-10.) From that stacking of conclusions Petitioner proceeds to argue that two cases involving the forfeiture of property, *United States v. Bajakajian* and *Timbs v. Indiana* are controlling precedent, and that they were ignored by the Fifth District. Setting aside for a moment Petitioner's reliance on merely conclusory statements, the cases he cites are clearly distinguishable.

Bajakajian involved a forfeiture statute, wherein the defendant was caught boarding an international flight while carrying $357,144 in cash, which he failed to report pursuant to 31 U.S.C. §5316, and the government sought and received forfeiture of the entire amount of monies pursuant to 18 U.S.C. §982. *Bajakajian*, 524

U.S. at 325-26. This Court reversed and found that section 982 constituted a punishment under the excessive fines clause because it did not bear the traditional hallmarks of a civil forfeiture. *Id.* at 332-33. Therefore, *Bajakajian* is factually distinguishable because in that case, the defendant had a certain amount of money in his personal possession, and the federal government took that money from him since it was used in the commission of a crime. In this case, no personal property or anything else of value has been taken from Petitioner's possession. Rather, a civil lien has been placed against him to reimburse the State for the costs of his incarceration.

In *Timbs*, the defendant pled guilty in Indiana state court to dealing in a controlled substance, and at the time of his arrest the police seized his Land Rover, which he had purchased for $42,000 with proceeds from an insurance policy. 139 S. Ct. 682 (2019). The state sought to seize his vehicle through civil forfeiture because the defendant used it to commit his trafficking offense. *Id.* The trial court refused to allow the state to confiscate the vehicle and found that its value was far in excess of the maximum $10,000 fine that was applicable to the offense which the defendant was convicted under. *Id.* The Court of Appeals affirmed the trial court's decision, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrained only federal action, and was inapplicable to the states. *Id.* On appeal, this Court framed the issue as follows: "Is the Eight Amendment's Excessive Fines clause an 'incorporated' protection applicable to the States under the Fourteenth Amendment's Due Process Clause?" *Id.* This Court ultimately held that the Excessive Fines Clause was in fact incorporated and applicable to the states. *Id.* at 691.

Timbs is therefore factually distinguishable because, like *Bajakajian*, the state seized property from the defendant's possession, unlike the situation in this case. *Timbs* is also legally distinguishable because the issue before this Court was not whether the forfeiture of his vehicle was violative of the Excessive Fines Clause, but rather, whether that clause applied to the states.

Furthermore, to the extent that Petitioner contends that the Fifth District ignored both *Bajakajian* and *Timbs*, that argument is factually inaccurate. As noted above, both of those cases involved criminal forfeiture statutes. The Fifth District wrote in its opinion that "[Petitioner's] analogies to civil forfeiture cases for the premise that incarceration costs are partly punitive is unpersuasive." *Wells*, 369 So. 3d at 1180. Therefore, while the Fifth District's opinion did not specifically mention *Bajakajian* and *Timbs* by name, based upon the previous sentence it clearly considered and rejected them as inapplicable in this case because they involved the forfeiture of the defendant's assets, and not the imposition of a civil lien for the reimbursement of the costs of incarceration.

It is also noteworthy that Petitioner's argument appears to commit the very sin that he accuses the Fifth District of committing: Petitioner complains that the Fifth District incorrectly characterized the lien as remedial, and that "[s]imply characterizing [the lien] in a particular way is calling a rose by another name – it does not change the character of the object described." (Pet. 8.) However, that is exactly what Petitioner's argument does. He begins by concluding that the lien is a fine. He then makes an unsupported assumption that the amount of the lien exceeds

his lifetime earning potential, and argues it is therefore excessive, and therefore this Court has jurisdiction. (Pet. 9-10.) By completely avoiding the threshold analysis that the Fifth District correctly engaged in, i.e. whether the lien is so punitive that it is actually a fine, Petitioner has skipped the first step in the analysis and has proceeded directly to the Excessive Fines Clause based upon an assumption.

Based upon the foregoing, this case fails to satisfy any of the compelling reasons justifying certiorari review by this Court. Petitioner has failed to offer any explanation as to why the statute in question is more punitive than remedial, which is the first step in an Excessive Fines inquiry. The Fifth District properly began its analysis with that threshold question, and correctly concluded based upon Florida Supreme Court precedent which was based upon this Court's precedent that the lien imposed pursuant to the statute was not a fine. And because the lien was not a fine, it was not subject to the Excessive Fines Clause. To respectfully borrow Petitioner's analogy, his attempt to call a rose by another name does not change its character.

In conclusion, this Court should decline to exercise jurisdiction in this case. Because the Fifth District reversed and remanded the case for further proceedings in the lower tribunal, there is no final judgment of Florida's highest court, and this Court therefore lacks jurisdiction under §1257. Additionally, the Petition does not present the Question Presented. Petitioner has presented no split of authority or conflict of Florida law with this Court's precedents regarding this issue. The Fifth District properly relied upon Florida Supreme Court precedent regarding the statute in question, and state court rulings about state statutes are entitled to great

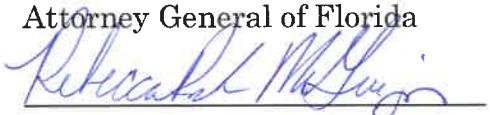
deference. Finally, Petitioner's claim lacks merit because it rests on the inaccurate, unsupported conclusion that the remedial lien in this case is a punitive fine akin to the forfeiture of assets.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida



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APPENDIX

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A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SETH CONNER WELLS,

Appellant,

v.

Case No. 5D22-1550
LT Case No. 2018-CF-525-A

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed August 11, 2023

Appeal from the Circuit Court
for Citrus County,
Richard A. Howard, Judge.

Matthew J. Metz, Public Defender, and Steven N. Gosney, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Daniel P. Caldwell, Assistant Attorney General, Daytona Beach, for Appellee.

MACIVER, J.

Seth Wells was convicted of four counts of Using a Minor in Production of Material Harmful to Minors and one count of Production of Child Pornography, and was sentenced to twenty-four months' incarceration in the Florida Department of Corrections followed by three years of sex offender probation.

Approximately eighteen months after his release from prison, the court below found that Wells violated two conditions of his probation order. The court revoked Wells's probation, sentenced him to twenty-two years' incarceration in the Florida Department of Corrections, and ordered $401,500 incarceration costs. Wells appeals and this Court has jurisdiction. Fla. R. App. P. 9.140(b)(1)(D).

We affirm Wells's conviction for the violation of Condition 27—his mandatory curfew—but reverse for the violation of Condition 9—failure to comply with the instructions of his probation officer. The court below, based upon the violation of curfew alone, would have been and remains within its discretion to revoke probation and impose the same sentence. However, because it is unclear from the record whether the court would have done so without the second violation, we remand for reconsideration.

As to Wells's argument that the cost of incarceration violates the Excessive Fines Clause of the Eighth Amendment, we find the argument wholly without merit.

Background

In May 2018, Wells was charged as an adult with five felony sex offenses. Wells pled no contest to the charges, pursuant to a plea agreement, and was sentenced to twenty-four months' incarceration in the Florida Department of Corrections followed by three years of sex offender probation. Wells was released from prison in May 2020 and began serving his probationary term. His probation order included fourteen Standard Conditions of supervision, eleven Special Conditions, and nineteen Standard Sex Offender Conditions. The three conditions at issue in this case are:

Condition 9, which provided:

> You will promptly and truthfully answer all inquiries directed to you by the court or the officer, and allow your officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions your officer may give you.

Condition 27, which provided:

> A mandatory curfew from 10 p.m. to 6 a.m. The court may designate another 8-hour period if the offender's employment precludes the above specified time, and the alternative is recommended by the Department of Corrections. If the court determines that imposing a curfew would endanger the victim, the court may consider alternative sanctions.

Condition 44(b), which provided:

> A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court.

On October 31, 2021, Wells's probation supervisor and another officer were conducting a compliance check on sex offenders in Citrus County. When they checked Wells's residence at 10:30 p.m.—thirty minutes past his curfew—Wells was not at home. They contacted Wells, who said he was working late. The officers met Wells at his place of employment—a local restaurant—and found him dressed in a devil costume. Wells was subsequently charged and found to have violated Condition 9 and Condition 27 of his probation order. Notably, Wells was not charged with violating Condition 44(b)—the provision that refers to wearing costumes. Rather, because his probation officer testified to having instructed him not to wear a costume, he was instead charged with failing to comply with the probation officer's instructions.

On appeal Wells argues first that the court below improperly found that he willfully and substantially violated his probation. Specifically, he argues

that the State did not present sufficient evidence that his curfew violation was willful and substantial given that it was prompted by "the exigencies and circumstances" of his job duties and the countervailing probation requirement that he be gainfully employed. As to the second violation—the wearing of a Halloween costume—he argues that the court improperly found a willful and substantial violation because he was not legally prohibited from wearing a Halloween costume as a condition of his probation.

Wells's second argument on appeal relates to his ordered costs of incarceration. Section 960.293, Florida Statutes, provides:

> (2) Upon conviction, a convicted offender is liable to the state and its local subdivisions for damages and losses for incarceration costs and other correctional costs.
> . . .
>
> (b) If the conviction is for an offense other than a capital or life felony, a liquidated damage amount of $50 per day of the convicted offender's sentence shall be assessed against the convicted offender and in favor of the state or its local subdivisions. Damages shall be based upon the length of the sentence imposed by the court at the time of sentencing.

§ 960.293, Fla. Stat. (2022). Wells argues that section 960.293 violates the Excessive Fines Clause of the Eighth Amendment both on its face and as applied to Wells.

We will briefly address Wells's constitutional argument first. Because the argument is a pure question of law, we review de novo. *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013).

Constitutional Argument

The threshold question when invoking the Excessive Fines Clauses of both the Unites States and Florida constitutions is whether the "fine" is punitive. *E.g.*, *Austin v. United States*, 509 U.S. 602 (1993); *Wright v. Uniforms for Indus.*, 772 So. 2d 560, 561 (Fla. 1st DCA 2000). The Florida Supreme Court has expressly held that the costs imposed by section 960.293 are civil rather than punitive in nature. *Goad v. Fla. Dep't of Corr.*, 845 So. 2d 880, 884–85 (Fla. 2003) ("Therefore, we hold that imposing a civil restitution lien pursuant to sections 960.293 and 960.297 to recover the incarceration costs of convicted offenders is a civil remedy that is not so punitive in nature as to constitute criminal punishment."). While *Goad* upholds the statute in the context of an *ex post facto* challenge, the reasoning is the same for the Excessive Fines Clause. Wells's analogies to civil forfeiture cases for the premise that incarceration costs are partly punitive is unpersuasive. The Florida Supreme Court recognized that a statute may be legislatively labeled civil and still be punitive in nature, and, after weighing the relevant factors, still found the costs to be civil and not criminal. *Id*.

Because the Excessive Fines Clause does not pertain to the remedial costs required by the statute, Wells's facial and as applied challenges have no merit.

Violation of Probation Argument

"At a violation of probation [hearing], '[t]he State has the burden to prove by a preponderance of the evidence that the defendant violated a condition of probation willfully and substantially.'" *Knight v. State*, 187 So. 3d 307, 309 (Fla. 5th DCA 2016) (second alteration in original) (quoting *Limbaugh v. State*, 16 So. 3d 954, 955 (Fla. 5th DCA 2009)). "A trial court's determination that a probationer willfully and substantially violated a term or condition of his probation must be supported by competent, substantial evidence." *Laing v. State*, 200 So. 3d 166, 168 (Fla. 5th DCA 2016).

Once the violation has been established, the revocation order is then reviewed for abuse of discretion. *Faulstick v. State*, 333 So. 3d 797, 799 (Fla. 5th DCA 2022). Whether a violation is willful and substantial is a factual issue which may not be overturned on appeal unless there is no competent, substantial evidence to support it. *Wilson v. State*, 781 So. 2d 1185, 1187 (Fla. 5th DCA 2001).

Curfew—

There was competent, substantial evidence that Wells violated his curfew, and the trial court did not abuse its discretion in finding Wells in willful and substantial violation of his curfew. Testimony from both Wells and his probation officers was sufficient for the court to conclude that Wells was aware that his curfew was 10:00 p.m.; that he was working past 10:00 p.m.; and that he knew a motion to extend his curfew had not yet been approved. Wells attempts to argue that he had no choice but to violate the curfew because if he did not stay to complete work past the curfew he would lose his job—and be in violation of a separate condition of probation. The court had sufficient evidence to reject this argument. Testimony showed that Wells had left a previous job to meet conditions of probation and had been instructed by his probation officer that the curfew condition was mandatory. At the time of his violation, he had requested a modification to his curfew and was aware that it had not yet been granted. Importantly, his probation officer testified that on October 6, just weeks prior to the violation, Wells was specifically told he could not work past 10:00 p.m. and still had to abide by the terms of the curfew because the motion to modify had not yet been ruled upon.

Costume and Probation Officer's Instructions—

Wells next argues that that he did not willfully and substantially violate Condition 9. The Order of Revocation of Sex Offender Probation states that Wells violated Condition 9 by "[f]ailing to follow instruction and not engage in Halloween activities." However, the specific instruction that he failed to follow arose from a condition that was imposed by the probation officer, and not by the court. "Violation of a condition which is imposed by a probation officer, rather than an express condition of the trial court, cannot serve as a basis for revocation of probation." *Hostetter v. State*, 82 So. 3d 1217 (Fla. 1st DCA 2012) (citation omitted); *see also Waldon v. State*, 670 So. 2d 1155, 1157 29 (Fla. 4th DCA 1996) ("We have several times held that probation or community control may not be revoked for violation of a condition or requirement imposed unilaterally by the probation officer but not by the sentencing order."). To be sure, a probation officer "may give a probationer routine supervisory directions that are necessary to carry out the conditions imposed by the trial court." *Miller v. State*, 958 So. 2d 981, 984 (Fla. 2d DCA 2007). The difference between a supervisory direction and a new condition is that a supervisory direction "simply effectuates the conditions already imposed by the court." *Id*.

Here the conditions imposed by the court regarding costumes are found in Condition 44(b), which prohibits:

1. distributing candy or other items to children on Halloween (Wells did not violate this prohibition);

2. wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas (Wells did not violate this prohibition);

3. wearing an Easter Bunny costume, or other costume to appeal to children, on or preceding Easter (Wells did not violate this prohibition);

4. entertaining at children's parties (Wells did not violate this prohibition); and

5. wearing a clown costume (Wells did not violate this prohibition).

By way of analogy, Condition 27 provides a curfew of 10 p.m. If a probation officer, just to err on the side of caution, instructed Wells that he instead had to be home by 9 p.m., that would be a new condition of probation that was not ordered by the court. Similarly, the officer's instruction not to dress up for Halloween exceeds the prohibitions ordered by the court, so we cannot affirm a violation of Condition 9.

The court below, based upon the violation of curfew alone, would have been and remains within its discretion to revoke probation and impose the same sentence. *See Evins v. State*, 690 So. 2d 675, 676 (Fla. 3d DCA 1997); *Eullett v. State*, 507 So. 2d 736 (Fla. 4th DCA 1987). Because it is unclear from the record whether the court would have done so without the second violation—indeed, the primary focus of the discussion at the hearing related to the costume violation—we reverse Wells's violation of Condition 9 and the

revocation of his probation and remand for the trial court's reconsideration. We affirm in all other respects.

AFFIRMED, in part; REVERSED, in part; REMANDED.

JAY and SOUD, JJ., concur.

B

Supreme Court of Florida

WEDNESDAY, NOVEMBER 15, 2023

Seth Conner Wells,
Petitioner(s)
v.

State of Florida,
Respondent(s)

SC2023-1247
Lower Tribunal No(s).:
5D22-1550;
092018CF000525XXXAXX

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, LABARGA, COURIEL, GROSSHANS, and FRANCIS, JJ., concur.

A True Copy
Test:

SC2023-1247 11/15/2023

John A. Tomasino
Clerk, Supreme Court

SC2023-1247 11/15/2023

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Served:

DANIEL CALDWELL
5DCA CLERK
CITRUS CLERK
STEVEN NEALE GOSNEY

NO. 23-6732

IN THE SUPREME COURT OF THE UNITED STATES

SETH CONNOR WELLS, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

CERTIFICATE OF SERVICE

I, Rebecca Rock McGuigan, a member of the Bar of this Court, hereby certify that on this 29th day of May, 2024, a copy of the Respondent's Brief in Opposition has been submitted using the Electronic Filing System. I further Certify that a copy was furnished by hand delivery to Steven N. Gosney, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, and also via email at Gosney.Steve@pd7.org and appellate.efile@pd7.org.

Respectfully submitted,

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