No:_____

IN THE
SUPREME COURT OF THE UNITED STATES

SETH CONNOR WELLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MATTHEW J. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT
OF FLORIDA

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COUNSEL FOR THE PETITIONER

QUESTION PRESENTED FOR REVIEW

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 in Timbs v. Indiana, 139 S. Ct. 682, 690 (2019), under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

The caption of the case contains the names of all of the parties.

RELATED CASES

None known by Petitioner.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES CITED: PAGE NO.

STATUTES:

OTHER AUTHORITIES:

No:_____

IN THE
SUPREME COURT OF THE UNITED STATES

SETH CONNOR WELLS,

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v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

CITATIONS OF CASES AND ORDERS ENTERED

The opinion of the highest state court to review the merits appears at Wells v. State, 369 So. 3d 1176 (Fla. 5th DCA 2023), review denied, SC2023-1247, 2023 WL 7657210 (Fla. Nov. 15, 2023) and is attached as Appendix A

JURISDICTION

Florida's Fifth District Court of Appeals issued its opinion on August 11, 2023. The Mandate was issued on September 7, 2023. The Florida Supreme Court issued an order declining jurisdiction on November 15, 2023.

This Court has jurisdiction to entertain this petition under 28 United States Code Annotated, section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 960.293(2) Florida Statutes states, "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. […]" and further,

"(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."

The United States Constitution, Eighth Amendment states, ""[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The United States Constitution, Fourteenth Amendment states, "... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Mr. Wells was a 22-year-old offender on felony probation for four third degree felonies and one second degree felony. His probation included a 10 pm curfew, but he was allowed to work. One night, he had to work late. Mr. Wells was attempting to retain his job at the local Denny's. He was told by the manager that if he left his job at 10 pm before cleaning up he would be fired for job abandonment. He chose to stay and clean up and was discovered by his probation officer at the Denny's at 10:30 pm. No one was injured or harmed by the violation. There was no loss to the government, no restitution, no damages to anyone at all. For this violation, the Florida Court sentenced Mr. Wells to 22 years in prison and imposed a $401,500 cost of incarceration under Section 960.293 Florida Statutes. Mr. Wells was indigent.

A notice of appeal was filed on June 27, 2022, and Mr. Wells sought appellate review in Florida's Fifth District Court of Appeals. On direct appeal, Mr. Wells argued that the $401,500 imposed against him violated the Constitutional prohibitions against Excessive Fines, in accordance with this Honorable Court's analysis of such issues United States v. Bajakajian, 524 U.S. 321 (1998) and in Timbs v. Indiana, 139 S. Ct. 682, 690 (2019). These are the same arguments asserted herein. Florida's Fifth District Court of Appeals issued its opinion on August 11, 2023 upholding the $401,500 charge, but failing to apply or even cite those two controlling cases. The Florida Supreme Court denied review. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because Florida's cost of incarceration statute provides insufficient constitutional protection against excessive fines and the Florida's incorrect reading of the Constitution destroys the citizen's protection against excessive fines.

INTRODUCTION

Florida's cost of incarceration statute, Section 960.293 Florida Statutes, is being applied in the present case to create an unconstitutionally excessive fine. This fine is inconsistent with the Constitution and this Court's application of the excessive fines clause in United States v. Bajakajian, 524 U.S. 321 (1998) and in Timbs v. Indiana, 139 S. Ct. 682, 690 (2019).

BASES FOR REVIEW

Pursuant to Supreme Court Rule 10(c), a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Court should take up this case because this case has widespread impact on Florida citizens, who are Citizens of the United States. This Statute condemns every citizen who is subject to incarceration to financial ruin, in violation of the is excessive fines protections afforded them through the United State Constitution.

PRESERVATION

"With very rare exceptions ... [this 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." *Campbell v. Louisiana*, 523 U.S. 392, 403, 118 S.Ct. 1419, 1425 (1998) (internal quotation marks omitted) (*citing Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (per curium). These arguments were well preserved by presentation to the Appellate Court below.

ARGUMENTS

I. The decision below involves an important question of law that should be decided by this Court.

As the New Hampshire Supreme Court eloquently stated in State v. Nickerson, 120 N.H. 821, 824 (N.H. 1980), when a statute threatens a fundamental right, special judicial scrutiny is required. Laws which threaten to financially destroy every citizen subject to incarceration in Florida are invalid under the excessive fines clause. This statue cannot withstand proper Constitutional scrutiny.

II. Petitioner has a likelihood of success on the merits.

The Eighth Amendment applies to Section 960.293 Florida Statutes. The opinion rendered by Florida's Fifth District effectively disarms citizens from contesting excessive fines imposed by the State. In this case, Mr. Wells raised the following Merit Point:

> "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 in Timbs v. Indiana, 139 S. Ct. 682, 690 (2019)."

The Fifth District Court reviewed the Constitutional argument de novo and found the cost imposition passed Constitutional muster. Reprinted here is the entirety of

the Fifth District's analysis on this point:

> **"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, 113 S.Ct. 2801, 125 L.Ed.2d 488 (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."

Wells v. State, 5D22-1550, 2023 WL 5155791, at *2 (Fla. 5th DCA Aug. 11, 2023)

Utterly absent from the written decision is any reference to the more recent and controlling Supreme Court of the United States cases that were *actually named* in the merit point below: United States v. Bajakajian, 524 U.S. 321 (1998) and Timbs v. Indiana, 139 S. Ct. 682, 690 (2019). Because of this avoidance, the Fifth District Court failed to apply the proper test or analysis for excessive fines as laid out in Bajakajian: Whether Florida's cost of incarceration is a fine, and second whether it is excessive. On both points, the Fifth District failed.

In its opinion, the Fifth District incompletely states the test as follows:

> "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, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); Wright v. Uniforms for Indus., 772 So. 2d 560, 561 (Fla. 1st DCA 2000)."

But this leaves out the essential words from both Austin and Timbs at 689:

> "[C]ivil in rem forfeitures fall within the Clause's protection when they are **at least partially punitive**."

Leaving out the "at least partially" language allowed the District Court to dodge the Constitution entirely. Reading the question without the "at least partially" language allows any fine that is at least partially remedial to survive Constitutional prohibition. This flipped the entire question on its head and in fact leads to the utter evisceration of an enumerated Constitutional Right dating back to Magna Carta. "Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." Browning-Ferris, 492 U.S., at 271, 109 S.Ct. 2909. See also 4 W. Blackstone, Commentaries on the Laws of England 372 (1769)" Timbs v. Indiana, 139 S. Ct. 682, 688 (2019)

The Fifth District also wrongfully applied Florida Supreme Court precedent in its opinion by stating: "Florida Supreme Court **has expressly held** that the costs imposed by section 960.293 are civil rather than punitive in nature." When in fact, Goad states that imposing a civil restitution lien […] is a civil remedy that is **not so punitive** in nature as to constitute criminal punishment."

The Fifth District did not conduct any kind of analysis as to whether the fine

imposed in Mr. Well's case was excessive or punitive. It simply concluded that it was not punitive because it was "remedial." But even a remedial civil fine or penalty is subject to the Excessive Fines Clause if it serves 'in part to punish.' Simply characterizing it in a particular way is calling a rose by another name -- it does not change the character of the object described.

The decision below failed to properly apply the Constitutional prohibitions against excessive fines by asserting that "civil" or "remedial" fines are not subject to the excessive fines clause. i.e. ("the Excessive Fines Clause does not pertain to the remedial costs[…]") This is flatly contradicted by Supreme Court precedent. The leading case, United States v. Bajakajian, 524 U.S. 321 (1988), is itself a civil action. In finding that a monetary forfeiture requirement was a fine as defined by the Eighth Amendment, Justice Thomas stated,

> "We have little trouble concluding that the forfeiture of currency ordered by §982(a)(1) constitutes punishment. The statute directs a court to order forfeiture as an additional sanction when "imposing sentence on a person convicted of" a willful violation of §5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a §5316 reporting violation."

Similarly, the "cost of incarceration" imposed by Statute 960.293(2) is only imposed at the culmination of a criminal proceeding, is paid to the government, and requires conviction of an underlying crime.

The Fifth District in the present case asserts that the fine in the present case

is "**not so** punitive in nature as to constitute criminal punishment." (Emphasis added) citing Goad v. Fla. Dep't of Corr., 845 So. 2d 880, 884–85 (Fla. 2003) But Goad must be read in light of Bajakajian, wherein a statute's excessiveness is measured. The fine here **is so** punitive in nature as to constitute criminal punishment. For example, the amount of the fine imposed here ($400,000) equaled or exceeded Mr. Wells' anticipated lifetime earning potential. But this fact was never addressed or analyzed by the Fifth District because they characterize the statutory fee as "remedial."

The present case asks this Honorable Court to uphold the Constitutional prohibition against excessive fines, to find that the Constitution means what it says, to clarify that the excessive fines prohibition applies when it is at least partially punitive (rather than it "is punitive" as incorrectly applied in this case), and that the Bill of Rights was written to shield the People from such State overreach.

III. Petitioner has been irreparably harmed.

Mr. Wells suffers an excessive fine for which there is no reasonable prospect that he will ever escape.

The Court should take up this case because a state court has decided an important question of federal constitutional law that has not been, but should be, settled by this Court, or has decided an important constitutional question that expressly declared valid a state statute and expressly construed a provision of the federal constitution. The rule of law is constitutionally deficient as applied by

Florida's Fifth District because they have failed to provide adequate protection from excessive fines as required by the Eighth and Fourteenth Amendments.

Because this statute is being used as a vehicle for extracting money from citizens, the Court's duty to defend individual citizens from majority attack is strongly implicated. See Harmelin v. Michigan, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.) ('it makes sense to scrutinize governmental action more closely when the State stands to benefit').") The Court should take up this case because it threatens the ongoing livelihoods of numerous citizens. All too often, these punitive fines are buried under a citation opinion. Now, the Fifth has greatly weakened if not destroyed the protections for numerous citizens by improperly stating the test for excessive fines in its written opinion.

The present case has been well preserved, allowing this Court to uphold the individual, enumerated Right of the People shielding them from excessive fines. The ruling by Florida's District Court and Florida's Supreme Court upholding this excessive fine cannot stand considering the Eighth Amendment of the United States. This Honorable Court should accept jurisdiction.

CONCLUSION

Certiorari should be granted. The Statute cannot stand in light of the excessive fines clause of the Eighth Amendment of the United States Constitution. The issue was well preserved in this case by presentation to the state appellate court.

Respectfully submitted,

MATTHEW J. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT
OF FLORIDA

/s/ Steven N. Gosney
Steven N. Gosney
Counsel of Record
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COUNSEL FOR THE PETITIONER

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SETH WELLS – PETITIONER

VS

STATE OF FLORIDA – RESPONDENT

PROOF OF SERVICE

I, STEVEN N. GOSNEY, do swear or declare that on this rd day of January, 2024, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on the Attorney General's Office by electronic service to crimappdab@myfloridalegal.com and mailed to Seth Connor Wells, DOC# G50107, Wakulla Correctional Institution, 110 Melaleuca Drive, Crawfordville, FL 32327.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of February, 2024.

/s/ Steven N. Gosney
Steven N. Gosney
Assistant Public Defender

No:_____

IN THE
SUPREME COURT OF THE UNITED STATES

SETH CONNOR WELLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF COMPLIANCE

I, Steven N. Gosney, pursuant to rule 33.1(h) do swear or declare that I have complied with the word limit of Rule 33.1(g) in the Petition for Writ of Certiorari. The Petition for Writ of Certiorari contains 3,177 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 2024.

MATTHEW METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT OF FLORIDA

/s/ Steven N. Gosney
Steven N. Gosney
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No:_____

IN THE
SUPREME COURT OF THE UNITED STATES

SETH CONNOR WELLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT
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INDEX TO APPENDICES

APPENDIX A
Decision of State Court of Appeals
Opinion issued August 11, 2023

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.

APPENDIX A-1
Decision of State Court of Appeals
Mandate Issued September 7, 2023

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE BRIAN D. LAMBERT, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: September 07, 2023
FIFTH DCA CASE NO.: 5D 22-1550
CASE STYLE: SETH CONNER WELLS v. STATE OF FLORIDA
COUNTY OF ORIGIN: Citrus
TRIAL COURT CASE NO.: 2018-CF-000525-A

I hereby certify that the foregoing is
(a true copy of) the original Court mandate.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Mandate and Opinion to: Clerk Citrus
cc: (without attached opinion)

Office of the Public Defender Steven N. Gosney	Daniel P. Caldwell	Office of the Attorney General

APPENDIX B
Judgement and Sentence

SETH CONNER WELLS vs. STATE OF FLORIDA
LT. CASE NO: 2018 CF 000525 A DIV CF
HT. CASE NO: 5D22-1550

Official Records Citrus County FL, Angela Vick, Clerk of the Circuit Court & Comptroller
#2018048350 BK: 2928 PG: 1770 9/24/2018 10:12 AM 1 Receipt: 2018042707

IN THE CIRCUIT COURT IN AND FOR
CITRUS COUNTY, FLORIDA

STATE OF FLORIDA vs.

Case # 2018 CF 000525 A

WELLS, SETH CONNER

Date of birth: 05/15/2000

JUDGMENT
Pursuant to FS. 939.185
Assessment of Additional Court Costs and Surcharges

A $65.00 assessment of additional court costs per count shall be recorded in the public record. Such record constitutes a lien against the person upon whom the costs are imposed and shall attach as a lien on any real property owned by such person located in the county in which such order is recorded.

Ordered and adjudged that a lien of $ 325.00 is rendered in favor of Angela Vick, Clerk of Courts, Citrus County, Florida and against the defendant in the sum of $ 325.00 which let execution issue instanter pursuant to F.S. 922.02.

Done and Ordered in Inverness, Citrus County, Florida, on this 18th day of September, 2018.

RICHARD A HOWARD, CIRCUIT COURT JUDGE

SEP 18'18 11:59AM

Official Records Citrus County FL, Angela Vick, Clerk of the Circuit Court & Comptroller
#2018048350 BK: 2928 PG: 1771 9/24/2018 10:12 AM 2 Receipt: 2018042707

CERTIFICATE OF COSTS IMPOSED UNDER FS 939.185

To meet the 2009 legislative amendment to FS 939.185, the Citrus County Clerk's Office is attaching this certified document to the Final Judgment and Sentence rendered in this case to certify that the $65.00 cost in FS 939.185 per count was imposed in this case.

This document constitutes a lien against the person upon whom the costs are imposed and shall attach as a lien on any real property owned by such person located in the county in which such order is recorded.

Dated: September 20, 2018

By: _____

Official Records Citrus County FL, Angela Vick, Clerk of the Circuit Court & Comptroller
#2018048351 BK: 2928 PG: 1772 9/24/2018 10:12 AM 1 Receipt: 2018042708

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

JUDGMENT

CASE #: 2018 CF 000525 A

PROBATION VIOLATOR ☐ **RETRIAL** ☐

COMMUNITY CONTROL VIOLATOR ☐ **RESENTENCE** ☐

THE STATE OF FLORIDA VS SETH CONNER WELLS

PLAINTIFF **DEFENDANT**

The Defendant, SETH CONNER WELLS being personally before this court represented by, BRIAN TREHY , His/Her attorney of record, and having

☐ Been tried and found guilty ☐ Entered a plea of guilty

☒ Entered a plea of nolo contendre ☐ Admitted violation

to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE #	DEGREE OF CRIME	OBTS #	CASE #
1,2,3,4	USING MINOR IN PRODUCTION OF MATERIAL HARMFUL TO MINORS	847.012(4) 847.012(6)	F3-L6	0901094820	2018 CF 000525 A
5	PRODUCTION OF CHILD PORNOGRAPHY	827.071(3)	F2-L6	0901094820	2018 CF 000525 A

Official Records Citrus County FL, Angela Vick, Clerk of the Circuit Court & Comptroller
#2018048351 BK: 2928 PG: 1773 9/24/2018 10:12 AM 2 Receipt: 2018042708

Seth Wells
18CF525

✓ and no cause being shown why the defendant should not be adjudicated guilty, **IT IS ORDERED THAT** the defendant is hereby **ADJUDICATED GUILTY** of the above crime(s).

_____ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (ch. 794), lewd and lascivious conduct (ch. 800), or murder (s. 782.04), aggravated battery (s. 784.045), carjacking (s. 812.133), or home invasion robbery (s. 812.135), or any other offense specified in sections 943.325, the defendant shall be required to submit two specimens of blood or other biological specimens approved by the Department of law Enforcement to a Department of Law Enforcement designated testing facility as directed by the department.

_____ and with good cause being shown; **IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.**

DONE AND ORDERED in open court in Citrus County, Florida, this 18 day of September 2018.

Circuit Judge

SEP 18'18 11:59AM

NAME (LAST, FIRST, MI)	DOCKET #
WELLS, SETH CONNER	09-2018-CF-000525

Page 1 Subtotal: 108

V. Legal Status Violation = 4 Points
☐ Escape ☐ Fleeing ☐ Failure to Appear ☐ Supersedeas bond ☐ Incarceration ☐ Pretrial intervention or diversion program
☐ Court imposed post prison release community supervision resulting in a conviction **V.** _____

VI. Community Sanction violation before the court for sentencing **VI.** _____
☐ Probation ☐ Community Control ☐ Pretrial Intervention or diversion
☐ 6 points for any violation other than new felony conviction x _____ each successive violation OR
☐ New felony conviction = 12 points x _____ each successive violation if new offense results in conviction before or at same time as sentence for violation of probation OR
☐ 12 points x _____ each successive violation for a violent felony offender of special concern when the violation is not based solely on failure to pay costs, fines, or restitution OR
☐ New felony conviction = 24 points x _____ each successive violation for a violent felony offender of special concern if new offense results in a conviction before or at the same time for violation of probation

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 points **VII.** _____

VIII. Prior Serious Felony = 30 points **VIII.** _____

Subtotal Sentence Points 108

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enf. Protect.	Drug Trafficker	Motor Vehicle Theft	Criminal Gang Offense	Domestic Violence in the Presence of Related Child (offenses committed on or after 03-12-07)	Adult-on-Minor Sex Offense (offenses committed on or after 10-1-14)
☐ x 1.5 ☐ x 2.0 ☐ x 2.5	☐ x 1.5	☐ x 1.5	☐ x 1.5	☐ x 1.5	☐ x 2.0

Enhanced Subtotal Sentence Points **IX.** 0

TOTAL SENTENCE POINTS 108

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non-state prison sanction. If the total sentence points are 22 points or less, see Section 775.082(10), Florida Statutes, to determine if the court must sentence the offender to a non-state prison sanction.

If total sentence points are greater than 44:

108 (total sentence points) minus 28 = 80 x .75 = 60 (lowest permissible prison sentence in months)

If total sentence points are 60 points or less than and court makes findings pursuant to both Florida Statutes 948.20 and 397.334(3), the court may place the defendant into a treatment-based drug court program.

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s.775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If the total sentence points are greater than or equal to 363, a life sentence may be imposed.

35 (maximum sentence in years)

TOTAL SENTENCE IMPOSED

		Years	Months	Days
☒ State Prison	☐ Life		24	followed by
☐ County Jail	☐ Time Served			
☐ Community Control				
☒ Probation ☐ Modified		3		

See offender

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career offender, ☐ prison releasee reoffender, or a ☐ mandatory minimum applies.

☐ Mitigated Departure ☐ Plea Bargain ☐ Prison Diversion Program

Other Reason _____

JUDGE'S SIGNATURE

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

Rule 3.992(b) Supplemental Criminal Punishment Code Scoresheet

NAME (LAST, FIRST, MI)	DOCKET #	Date of Sentence
WELLS, SETH CONNER	09-2018-CF-000525	

II. ADDITIONAL OFFENSE(S):

DOCKET #	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY	COUNTS	POINTS	TOTAL

DESCRIPTION: _____

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

II. 0

IV. PRIOR RECORD:

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY: A/S/C/R	DESCRIPTION	NUMBER	POINTS	TOTAL
						X	=

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

IV. 0

Reasons for Departure - Mitigating Circumstances
(reasons may be checked here or written on the scoresheet)

- ☐ Legitimate, uncoerced plea bargain.
- ☐ The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- ☐ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- ☐ The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.
- ☐ The need for payment of restitution to the victim outweighs the need for a prison sentence.
- ☐ The victim was an initiator, willing participant, aggressor, or provoker of the incident.
- ☐ The defendant acted under extreme duress or under the domination of another person.
- ☐ Before the identity of the defendant was determined, the victim was substantially compensated.
- ☐ The defendant cooperated with the State to resolve the current offense or any other offense.
- ☐ The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
- ☐ At the time of the offense the defendant was too young to appreciate the consequences of the offense.
- ☐ The defendant is to be sentenced as a youthful offender.
- ☐ The defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program.
- ☐ The defendant was making a good faith effort to obtain or provide medical assistance for an individual experiencing a drug-related overdose.

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence, except for the provisions of s.921.0026(2)(m).

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY
OF DEPARTMENT OF CORRECTIONS

The Circuit Court of Fifth Judicial Circuit In and For Citrus County, Florida
in the FALL Term, 2018, in the case of

State of Florida

vs

SETH CONNER WELLS

Case No. **2018 CF 000525 A**

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF THE ABOVE-REFERENCED COUNTY AND THE DEPARTMENT OF CORRECTIONS, GREETINGS:

The above-named defendant having been duly charged, convicted, adjudicated guilty, and sentenced for the offense(s) set forth in the attached certified copies of the Indictment(s)/Information(s), Original Judgment(s) Adjudicating Guilt, and Sentencing Order(s). In addition to the Original Judgment, if judicial supervision has been revoked subsequent to the entry of the judgment adjudicating guilt, a certified copy of the order revoking supervision (rather than a duplicative judgment adjudicating guilt) is also attached in support of this commitment.

Now therefore, this is to command you, the Sheriff, to take and keep and, within a reasonable time after receiving this commitment, deliver the defendant into the custody of the Department of Corrections; and this is to command you, the Secretary of the Department of Corrections, to keep and imprison the defendant for the term of the sentence. Herein fail not.

WITNESS the Clerk, and the Seal thereof, this the 18th day of SEPTEMBER, 2018.

Clerk of the Circuit Court and Comptroller — In God We Trust — Citrus County, Florida

ANGELA VICK
Clerk of the Circuit Court and Comptroller

By: _____
RHONDA FRANKLIN , Deputy Clerk

DC6-306 (Revised 5/3/11) Page __ of __ Pages

Filed: Angela Vick, Clerk 9/25/2018, 2:17 PM

APPENDIX C
Decision of State Supreme Court denying Review

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

DL

Served:

DANIEL CALDWELL
5DCA CLERK
CITRUS CLERK
STEVEN NEALE GOSNEY

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

DL

Served:

DANIEL CALDWELL
5DCA CLERK
CITRUS CLERK
STEVEN NEALE GOSNEY