

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1828

LISA PEACOCK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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APPELLANT'S AMENDED BRIEF TO INVOKE  
DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME  
COURT OR IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

On Appeal from the Florida First District Court of Appeal

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## **STATEMENT OF THE CASE**

This is Appellant's Brief to Invoke Discretionary Jurisdiction of the Florida Supreme Court in her appeal from the Order of Revocation of Probation which was entered on May 3, 2006, in the Eighth Judicial Circuit by the Honorable David A. Glant, Lower Tribunal Case Numbered 01-2004-CF-000065-A. On February 9, 2005, the Honorable David A. Glant (the "lower tribunal" or the "court") adjudicated Appellant guilty of one count of Felony Theft and sentenced her to three years of probation (R<sup>1</sup>43-45). Appellant also received a suspended sentence of five year's imprisonment (R40-41).

## **STATEMENT OF FACTS**

Appellant's probation officer, Officer Sapp, testified that she called Appellant in for a urinalysis test on March 9, 2006 (S.T.R. p. 10, lines 5-7). Officer Sapp testified the March 9, 2006 test returned negative results for THC and cocaine, but "that the ph level was too low; it was adulterated" (S.T.R. p. 11, lines 20-23).

On February 9, when Officer Sapp tested Appellant's urine and obtained a positive result, she asked Appellant whether Appellant was on any medications (S.T.R. p. 14, lines 13-19). Appellant denied using any drugs, stated that she had been sick for the past month and that she was currently taking medication (S.T.R.

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<sup>1</sup> "R" refers to Record and "S.T.R." refers to Supplemental Transcript Record, both with the

p. 14, lines 17-21). Appellant also gave Officer Sapp a letter from her doctor “stating that she had been sick and that she had been taking some medication” (S.T.R. p. 14, lines 23-25). Officer Sapp acknowledged that at that time, Appellant had been taking Xanax and Amoxicillin, and that she accepted Appellant’s doctor’s note as confirmation Appellant had in fact taken these medications (S.T.R. p. 15, lines 1-9).

Appellant then called defense witness Denise O’Fallon, an employee of Elite Services, Inc., a company which provides drug and alcohol testing services (S.T.R. p. 18, lines 11-14). Appellant requested that Ms. O’Fallon observe her urinate for the test, and Ms. O’Fallon did so (S.T.R. p. 19, lines 8-14).

Ms. O’Fallon also stated that Dr. Michaels was the Medical Review Officer (“MRO”) for Elite Services, Inc., and that Dr. Michaels receives the test samples, does the testing and sends the results back to her (S.T.R. p. 21, lines 15-25). Appellant again requested that Ms. O’Fallon conduct a drug test of her urine on March 1, 2006 at 10:45 a.m. (S.T.R. p. 23, lines 15-23). Ms. O’Fallon testified that Appellant tested negative under observation. (S.T.R. p. 23, lines 18-24). Ms. O’Fallon once again tested Appellant on March 2, 2006 at 1:46 p.m., and the results were also negative (S.T.R. p. 25, lines 4-10).

The court clerk attempted several times to contact Dr. Michaels, who did not

answer (S.T.R. p. 37, lines 1-3). Defense counsel stated that he had told the witness the time for the hearing and requested either a continuance of the hearing or introduction of the test results from Elite Services, Inc. (S.T.R. p. 37, lines 8-10). Defense counsel also stated “I don’t think that my tests refute the state’s tests; that is to say that they were invalid tests” (S.T.R. p. 39, lines 9-11).

The State objected to Dr. Michael’s testimony alleging that he was not the proper person to question about the test results (S.T.R. p. 38, lines 8-22). At that time, the prosecutor stated to the court “Also, there’s nothing that tests positive for cocaine except cocaine” (S.T.R. p. 38, lines 24-25).

The court accepted testing results of Appellant’s urine from Quest Diagnostics from samples collected on February 14, 2006, February 21, 2006, March 1, 2006 and March 2, 2006 (S.T.R. p. 49, line 25; p. 50, lines 1-2). The court stated that each test was a five-panel test with a negative result (S.T.R. p. 50, lines 4-6).

Despite this evidence, the lower tribunal found that Appellant had violated her probation. Based on this finding, the court imposed the suspended sentence of sixty months with credit for fifty days of time served (S.T.R. p. 54, lines 10-25; p. 55, lines 1-2); see also (R79).

### **STANDARD OF REVIEW**

The Florida Supreme Court has jurisdiction over this case pursuant to

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Florida Supreme Court may “be sought to review decisions of district courts of appeal that...expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.” Alternatively, certiorari should be granted because the lower tribunal’s decision constituted a departure from the essential requirements of law, the order will cause material injury throughout subsequent proceedings and there will be no remedy for Appellant’s injury following the lower tribunal’s final decision if this order is permitted to stand. See Haines City Community Dev. v. Heggs, 658 So.2d 523, 531 n. 7 (Fla. 1995).

### **SUMMARY OF ARGUMENT**

The Appellant’s defenses contained in her Amended Initial Brief were proper because they all referred to matters of record on appeal or appropriate legal authorities, and the district court’s order striking this brief is erroneous. The harm to Appellant will be irreparable if the district court’s order is permitted to stand because she will be forced to submit an amended initial brief without one of her crucial defenses - namely, that there is legal authority supporting Appellant’s argument that her positive test results for cocaine were caused by her legal treatment with amoxicillin.

#### **I. APPELLANT CITED ONLY TO MATTERS OF RECORD IN HER AMENDED INITIAL BRIEF.**

Appellant's case is distinguishable from cases in which briefs were ordered stricken because they referred to material not contained in the record on appeal. See Altchiler v. State, Dep't of Prof. Reg., 442 So.2d 349 (Fla. 1<sup>st</sup> DCA 1983); Hillsborough v. Pub. Emp. Rel. Comm'n, 424 So.2d 132, 133 (Fla. 1<sup>st</sup> DCA 1982). This is completely opposite from the case before the Court. The record on appeal clearly states that Appellant was taking amoxicillin in close proximity to the time of her alleged offense (S.T.R. p. 15, lines 1-9).

## **II. LAW REVIEW ARTICLES ARE LEGAL AUTHORITIES AND APPELLANT USED THEM TO ESTABLISH POINTS OF LAW.**

In support of her defenses pertaining to her treatment with amoxicillin, Appellant cited to numerous law review articles finding that amoxicillin can cause false positives for cocaine in urinalysis tests. See, e.g., Muczyk, Jan P., A Management Perspective On The Controlled Substance Testing Issue: Management's Newest Pandora's Box, 2 Journal of Law & Health at \*29 (1987-1988). Appellant has searched Florida case law vigorously and is unable to find any case or other law which restricts the manner in which a party may cite law reviews as legal authorities. There appears to be no law which would restrict a party from relying upon factual findings or theories contained in law reviews, even when a factual proposition enunciated by the law review is not contained in a record on appeal.

The district court's order struck Appellant's brief in part because she cited to these law reviews. Law reviews are recognized in Florida law as legal authorities. See Florida Dep't. of Bus. Reg. v. Invest. Corp., 747 So.2d 374, 381 (Fla. 1999); Florida League of Cities v. Smith, 607 So.2d 397, 403 (Fla. 1992); Engelberg v. Birnbaum, 580 So.2d 828, 830 (Fla. 4<sup>th</sup> DCA 1991). Appellant's reliance on her treatment with amoxicillin and the supporting law reviews is necessary for her to present one of her crucial defenses in this case. These defenses go to the heart of this case, because if Appellant received false positive urinalysis test results for cocaine due to her treatment with amoxicillin, she committed no crime and never violated the terms of her probation. Appellant has the right to rely upon these law reviews in her initial brief and she will suffer irreparable harm if she is forced to omit these law review articles and her arguments based thereon from her initial brief. See Haines, 658 So.2d at 531.

## CONCLUSION

The district court's order directly contradicts the opinions of other district courts and the supreme court in finding that Appellant failed to cite to matters of record in her Amended Initial Brief. See Fla. R. App. P. 9.030(a)(2)(A)(iv). Law reviews are not evidentiary materials which must be contained in the appellate record, but legal authorities. See Florida Dep't. of Bus. Reg. v. Invest. Corp., 747 So.2d 374, 381 (Fla. 1999). The district court's order will cause irreparable harm to Appellant if enforced. See Haines, 658 So.2d at 531. Appellant respectfully requests that the Florida Supreme Court accept jurisdiction over this cause or in the alternative, grant certiorari.

Dated October 23, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished by U.S. Mail this 23<sup>rd</sup> day of October to Christine Ann Guard, Esq., Office of the Attorney General, Plaza 01, 400 South Monroe Street, Tallahassee, Florida 32399-6536.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the font requirements set forth in Fla. App. P. 9.210(a)(2).

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**APPENDIX**

Florida First District Court of Appeal Order Dated September 6, 2007