IN THE SUPREME COURT OF FLORIDA

RAYMOND EUGENE CLARK, :

Petitioner, :

vs. : Case No. 76,006

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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STATEMENT OF THE CASE AND FACTS

The district court of appeal stated the facts as follows:

> On November 10, 1986, the defendant pled nolo contendere to attempted arson and was placed on two years community control. Two days later, he signed a waiver of rights and motion to modify community control. The waiver form advised him that he had the right to counsel and to a hearing before the court. In signing the form, the defendant waived these rights and requested that his community control be modified to add a condition to require him to enter and complete a program at the Lakeland Probation and Restitution Center. Later that day, the trial judge entered an order of modification adding the requested condition. On March 26, 1987, the defendant was found in violation of the additional condition. The court revoked his community control and sentenced him to three years in prison.

Clark v. State, 15 F.L.W. D1072, D1072 (Fla. 2d DCA April 18, 1990). The district court found that this modification to the petitioner's community control was legally imposed. The court disagreed with Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989), which held otherwise.

SUMMARY OF THE ARGUMENT

The result in this case expressly and directly conflicts with Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989), which held that a modification of probation is illegal unless it occurs in open court pursuant to statutory procedures.

ARGUMENT

ISSUE

THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH HOLCOMBE V. STATE, 553 SO.2D 1337 (FLA. 1ST DCA 1989).

The facts of the present case and Holcombe v. State, 553 So.2d 1337 (Fla. 1st DCA 1989) are indistinguishable. In both cases, the defendant waived his right to have a hearing on the modification of his probation or community control. In both cases, the defendant agreed to go to a probation and restitution center. In both cases, the defendant was unable to comply with the requirements of the center. In both cases, the probation or community control was revoked and the defendant sent to prison.

The Holcombe court found that this procedure was illegal because a trial court cannot modify probation absent some proof or admission in open court of a violation of probation, even if the probationer has waived his rights. 553 So.2d at 440 The second district, however, expressly disagreed with Holcombe. Clark v. State 15 F.L.W. D1072, D1072 (Fla. 2d DCA April 18, 1990). The second district found that no such hearing was necessary, if the probationer has executed an out-of-court waiver of his rights.

Holcombe and its companion, Ford v. State, 553 So.2d 1340 (Fla. 1st DCA 1989) certified that this was a question of great public importance, because some probation officers were apparently making a practice of modifying probation by obtaining out-of-court waivers. The attorney general, however, did not appeal Holcombe

and Ford. Now, further evidence comes from the second district that this practice is becoming widespread. Accordingly, this court should accept this case for further review, because the issue raised has substantial impact on the procedures used to regulate the conduct of probationers in this state.

CONCLUSION

Petitioner asks this court to accept this case for further review.