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IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE, III,

Petitioner,

v. CASE NO. 85,136

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

PETITIONER'S INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief the Petitioner, **JERRY JAY CHICONE, III**, will be referred to as "**MR. CHICONE**." The Respondent, the State of Florida, will be referred to as "the state."

The record on appeal consists of two initial volumes, plus three supplemental volumes. The first volume contains one transcript of several excerpts of the jury trial proceedings. The second volume contains one transcript of the sentencing proceeding, plus various pleadings and orders filed in this case. The first supplemental volume contains one piece of correspondence and a clerk's certificate. The second supplemental volume contains an excerpt from post-verdict proceedings. The third supplemental volume contains the trial court docket sheets. References to the first two volumes of record on appeal in this brief will be to the Roman numeral of the volume, followed by a slash, followed by the specific page(s) within that volume. References to the supplemental record will be by the letters "SR," followed by a slash, followed by the specific page(s) within that volume.

STATEMENT OF THE CASE AND OF THE FACTS

A.

PROCEEDINGS BELOW

This case is a direct appeal from a judgment and sentence entered against **MR. CHICONE** in a criminal case arising in the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida ("trial court").

On September 11, 1992, the State of Florida filed a criminal information charging **MR. CHICONE** with two counts (II/84). Specifically, Count One alleged

> ...that Jerry J. Chicone III, on the 4th day of August, 1992, in said County and State, did, in violation of Florida Statute 893.13(1)(f), actually or constructively possess Cocaine, or a mixture containing Cocaine, a substance controlled by Florida Statute 893.03(2)(a)(4).

Count Two alleged

> ...that Jerry J. Chicone III, on the 4th day of August, 1992, in said County and State, did, in violation of Florida Statute 893.147(1), use or possess drug paraphernalia, to-wit: a smoking device, with intent to use said paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body or process, prepare, pack, repack, store or contain a controlled substance, in violation Chapter 893 Florida Statute.

MR. CHICONE filed a motion to dismiss both counts of the criminal information, asserting among other things that neither count alleged all essential elements of the offense charged, because neither alleged the essential element of scienter or knowledge (II/85-89). That motion was denied prior to trial (II/91-92).

A trial occurred on August 9-11, 1993 (SR/182). On August 11, 1993, the jury returned verdicts of guilty as charged as to both counts (II/121-122). **MR. CHICONE's** post-verdict motions for new trial, arrest of judgment, and judgment of acquittal (I/70-71; II/124-129; SR/175-176) were denied (II/131-134).

At sentencing on October 6, 1993 (II/73-83), the trial court withheld formal adjudication of guilt, and placed **MR. CHICONE** on

one year of community control to be followed by three years of probation (II/73-83, 138, 139-144). The trial court did not orally pronounce separate sentences for Counts One and Two (II/78-82).

MR. CHICONE filed a timely notice of appeal (II/136-138), and an amended notice of appeal (II/154-162). On December 2, 1994, the Fifth District affirmed **MR. CHICONE'S** convictions, but reversed his sentence and remanded for resentencing. Chicone v. State, __ So.2d __ (Fla. 5th DCA 12/2/94) [19 Fla. L. Weekly D2538].

A Motion for Rehearing, Rehearing En Banc, or Certification to the Florida Supreme Court was filed, and denied by order dated January 12, 1995. The Fifth District issued its mandate on February 15, 1995.

On February 2, 1995, **MR. CHICONE** filed his Notice to Invoke the Discretionary Jurisdiction of this Court. That jurisdiction was granted by order dated June 14, 1995.

This Court has jurisdiction pursuant to Art. V, § 3(b)(3), Fla.Const., and Fla.R.App.P. 9.030(a)(2)(A)(iv).

B.

FACTS

At the jury charge conference (I/2-38), on the charge of possession of cocaine found in Count One, **MR. CHICONE** orally and in writing requested that the trial court add a fourth element to the standard jury charge. That element was "**MR. CHICONE** knew that the substance was cocaine" (I/28-29; II/100). The trial court refused

to do so, and, over objection, read the standard jury instruction (I/26-30).

As to Count Two, in addition to the language set forth in the standard jury instruction, **MR. CHICONE** orally and in writing requested that the jury be instructed that the third essential element which must be proved beyond a reasonable doubt was that "**MR. CHICONE** knew that the object was drug paraphernalia" (I/32; II/102). The trial court refused to do so, and, over objection, read the standard jury instruction (I/31-32).

At the October 6, 1993, sentencing hearing, the trial court orally pronounced a sentence of one year community control followed by three years of probation, as well as a number of conditions (II/77). The trial court did not specify what count that sentence applied to. The written order/court minutes filed that day set forth a period of one year community control on both counts, as well as certain conditions (II/135). The two written orders - one for each count - signed by the sentencing judge on November 12, 1993, specified that the one year of community control followed by three years of probation was to be served on both counts (II/139-144). Additionally, the November 12, 1993, written orders differ from the October 6, 1993 oral pronouncements of the court and set forth conditions which were neither announced by the trial court on October 6, nor included within the standard conditions in Florida Statutes (I/77-82; II/139-144).

C.

FIFTH DISTRICT'S DECISION

As to the sufficiency of the criminal information, the Fifth District affirmed the denial of the motion to dismiss and stated:

> The state neither had to prove, nor allege in its information, that Chicone knew the substance he possessed was cocaine, or that he knew the object he possessed was drug paraphernalia.

19 Fla. L. Weekly D2538. As for the denial of the requested defense instructions, the Fifth District stated:

> Because "knowledge" of the nature of the substance or object possessed was not an essential element of either count, the trial judge refused to instruct the jury that the state had to prove that Chicone knew the substance was cocaine and that he knew the object was drug paraphernalia. The trial judge did not err.

Id. As for the sentencing issue, the Fifth District stated:

> We do, however, remand the case for resentencing. ... The trial judge did not state to which count or both probation applied, or to which count or both community control applied. Subsequently, the court entered a written order which ordered that Chicone serve the same conditions of probation on each count, the sentences to run concurrently. Additional conditions not announced orally were also included in the written order. We reverse.
>
> In this case, because the trial judge imposed an illegal sentence on the misdemeanor offense of possession of drug paraphernalia, and because the special conditions which were not orally announced were included in the written order, we quash the sentencing order

and remand for sentencing and resolution of the discrepancies. Cleveland v. State, 617 So.2d 1166 (Fla. 5th DCA 1993).

Id.[1]

SUMMARY OF ARGUMENTS

I.

JUDGMENTS MUST BE VACATED WHERE BOTH COUNTS OF INFORMATION FAILED TO ALLEGED ESSENTIAL ELEMENT OF KNOWLEDGE

The Fifth District erred in affirming the trial court orders which denied **MR. CHICONE's** pre-trial motion to dismiss and post-trial motion for arrest of judgment where neither count of the criminal information alleged the essential element of scienter or knowledge. As knowledge of the illicit nature of the item possessed was both an essential element of the possession of cocaine offense and the possession of drug paraphernalia offense, the judgments must be reversed.

II.

JUDGMENTS MUST BE VACATED WHERE OFFENSE JURY INSTRUCTIONS OMITTED ESSENTIAL ELEMENT OF KNOWLEDGE.

MR. CHICONE was denied his fundamental rights to due process and a fair trial due to inaccurate jury instructions. First, as to the charge of knowing possession of cocaine, the trial court failed to instruct the jury that it must find that **MR. CHICONE** knew the substance was cocaine. Second, as to the charge of knowing

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[1] **MR. CHICONE** raised an additional issue on appeal to the Fifth District, that of the adequacy of the trial court's reasonable doubt instruction. That issue is not raised in this Court.

possession of drug paraphernalia, the trial court failed to instruct the jury that it must find that **MR. CHICONE** had knowledge of the illicit nature of the paraphernalia. These errors require that **MR. CHICONE** be granted a new trial.

III.

SENTENCES MUST BE REVERSED DUE TO A) IMPOSITION OF GENERAL SENTENCE, B) IMPOSITION OF ILLEGAL SENTENCE ON COUNT TWO, AND C) DIFFERENCES BETWEEN ORAL PRONOUNCEMENT AND WRITTEN ORDERS

The sentences must be reversed for numerous errors. First, the Fifth District correctly ruled that trial the court orally imposed a general sentence, without specifying a sentence on each count. Second, possession of drug paraphernalia is a misdemeanor of the first degree. As community control is not available as a sentence for misdemeanors, the imposition of one year of community control for the drug paraphernalia offense was improper. Additionally, the November 12, 1993, order places **MR. CHICONE** on one year of community control to be followed by three years of probation for the drug paraphernalia offense. As this exceeds the statutory maximum of one year, the Fifth District correctly ruled that the sentence on Count Two is invalid. Third, there were numerous differences between the oral pronouncement of the court on October 6 and the written order imposing conditions of community control and probation entered on November 12, 1993. However, the Fifth District erred in remanding for resolution of the "discrepancies" between the written orders and oral pronouncements.

All special conditions of probation which were not orally announced were required to be stricken and cannot be imposed on remand.

ARGUMENTS

I.

JUDGMENTS MUST BE VACATED WHERE BOTH COUNTS OF INFORMATION FAILED TO ALLEGED ESSENTIAL ELEMENT OF KNOWLEDGE

This Court must reverse the Fifth District's ruling on the sufficiency of the criminal information. The judgments in this case must be vacated because the criminal information upon which the two verdicts of guilty are based failed to allege the essential element of "scienter." Because a judgment cannot rest on an information which contains an insufficient allegation, neither judgment can stand.

The criminal information filed in this case alleged that **MR. CHICONE:**

> Count One: "... on the 4th day of August, 1992, . . . , did, in violation of Florida Statute 893.13(1)(f), actually or constructively possess Cocaine, or a mixture containing Cocaine, a substance controlled by Florida Statute 893.03(2)(a)(4)."
>
> Count Two: "... on the 4th day of August, 1992, . . . , did, in violation of Florida Statute 893.147(1), use or possess drug paraphernalia, to-wit: a smoking device, with intent to use said paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body or process, prepare, pack, repack, store or contain a controlled substance, in violation of Chapter 893 Florida Statute." (II/84).

MR. CHICONE filed a pre-trial motion to dismiss alleging the information was insufficient due to its failure to allege the essential element of scienter and knowledge (II/85-89). A hearing was held on the motion, after which it was denied (II/91-92). A post-trial oral motion for arrest of judgment raising this issue was made (SR/175-176), accompanied by a legal memorandum (II/124-129). That post-trial motion was denied (II/131-134).

It is fundamental tenet of Florida and federal constitutional due process that a person may not be convicted of a crime for which he was not charged and tried. Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948); Long v. State, 92 So.2d 259, 260 (Fla. 1957). As the United States Supreme Court stated in De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937), "Conviction upon a charge not made would be sheer denial of due process." Achin v. State, 436 So.2d 30, 31 (Fla. 1982); Ray v. State, 403 So.2d 956, 959 (Fla. 1981). **MR. CHICONE** therefore cannot be convicted of and sentenced for knowing possession of cocaine and drug paraphernalia since the criminal information did not adequately charge him with those crimes.

Under both the United States and Florida Constitutions, a fundamental right of due process which every defendant possesses is the right to notice of the nature of the accusation against him. Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); State v. Sykes, 434 So.2d 325, 328 (Fla. 1983); Amend. VI and XIV, U.S. Const.; Art. I, § 16, Fla. Const. It is to the charge for which a defendant has been put on notice,

and it alone, that a defendant must prepare his defenses and for which he may ultimately be convicted. As the United States Supreme Court stated in Cole, supra:

> [N]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

68 S.Ct. at 517.

The criminal information in **MR. CHICONE's** case failed to allege the essential element of "scienter" in both counts and failed to provide adequate notice that **MR. CHICONE** was charged with knowing possession of cocaine and knowing possession of drug paraphernalia since it did not allege the essential element of scienter.

To be valid, an information must allege each essential element, and no essential element may be left to inference. State v. Dye, 346 So.2d 538, 541 (Fla. 1977).

Although the trial court denied **MR. CHICONE's** pre-trial motion to dismiss, it explicitly recognized that scienter was an element of the two charges to be proved at trial when it instructed the jury that it must find that **MR. CHICONE** had knowledge of the presence of the alleged cocaine and the presence of the drug paraphernalia (I/40-41). But merely instructing the jury on the element of scienter is not enough. It is equally important that the information in this case allege all essential elements. Dye, supra.

Scienter is an essential element of a criminal possession charge. Knowledge of the nature of the matter being possessed, i.e., that the matter possessed is illegal, has long been an essential element of Florida offenses. It is simply not enough to know that a certain item is present. To be charged with and convicted of a criminal offense of possession a defendant must not only know the presence of an item, but know of its illicit nature. Not all white powdery substances are cocaine. Not all green leafy substances are marijuana. Not all soda cans and pipes are drug paraphernalia. Not all books and magazines are obscene. Not all sexually explicit films contain scenes involving minors. For that reason, courts have held that an essential element of crimes of possession of any of these objects is the defendant's knowledge of the illegal contents of the item involved. See e.g., United States v. X-Citement Video, Inc., __ U.S. __, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994)(defendant must know that one performer in film was a minor to be convicted of crime prohibiting knowingly transporting a visual depiction of a minor engaged in sexually explicit conduct); Staples v. United States, 511 U.S. __, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)(government must prove that defendant knew that weapon had characteristics that brought it within statutory definition of machine gun); Cohen v. State, 125 So.2d 560 (Fla. 1960)(implied element of sale of obscene material is knowledge of the obscene character of the material); Dubose v. State, 560 So.2d 323 (Fla. 1st DCA 1990)(state failed to prove that rolling papers constituted drug paraphernalia); Williams v. State, 529 So.2d 345

(Fla. 1st DCA 1988)(state failed to prove that triple-beam scale was drug paraphernalia); Rutskin v. State, 260 So.2d 525 (Fla. 1st DCA 1972)(knowledge of presence of illegal substance is essential element of possession of marijuana).

In State v. Dominguez, 509 So.2d 917, 918 (Fla. 1987), this Court reiterated that knowledge of the nature of the illegal substance was a necessary element of a drug trafficking offense.[2] This Court made it clear in Way v. State, 475 So.2d 239, 241 (Fla. 1985), that lack of knowledge of the nature of the substance is a defense in a trafficking charge. Of course, one of the components of trafficking under § 893.135, Fla.Stat. (1991), is possession. The only difference between trafficking and possession is the amount of the substance involved. Dominguez and Way therefore dictate that knowledge is an essential element of a possession prosecution under § 893.13, Fla.Stat. (1991).

As has been noted in a number of cases, knowledge is an essential element of all possession of controlled substance charges. Dominguez, 509 So.2d at 918; Way, 475 So. 2d at 240-241; Agee v. State, 522 So.2d 1044, 1046 (Fla. 2d DCA 1988); Howard v. State, 467 So.2d 445, 446 (Fla. 1st DCA 1985). Knowledge that paraphernalia would be used for an illicit purposes is an essential element of the possession of drug paraphernalia charge. Baldwin v. State, 498 So.2d 1385, 1386 (Fla. 5th DCA 1986); Florida Standard Jury Instructions in Criminal Cases, Offense Instruction for

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[2] In contrast to the possession offenses found in § 893.13, the trafficking statute, § 893.135, specifically includes the term "knowingly."

§ 893.147(1) (1993 ed.). The reason for this rule in drug cases is clearly set forth in Rutskin v. State, 260 So.2d 525 (Fla. 1st DCA 1972). In Rutskin, the defendant was in possession of a mail parcel which contained marijuana. In reversing the conviction, the First District stated:

> There was no evidence that the appellant had knowledge that the unopened parcel contained marijuana. The fact that he happened to be the addressee of the parcel obviously does not supply the evidence that he knew that the parcel contained marijuana or any other contraband. If this were not so, any innocent person could be convicted of possession of marijuana just because he happens to be the recipient of a package containing marijuana.

Id. at 526.

The cases relied upon by the Fifth District do not support its decision. Neither State v. Medlin, 273 So.2d 394 (Fla. 1973), nor State v. Ryan, 413 So.2d 411 (Fla. 4th DCA), rev. denied, 421 So.2d 518 (Fla. 1982), mandate the result reached. First of all, neither is a possession case. Second, Medlin discussed, and distinguished, both Rutskin, supra, and Frank v. State, 199 So.2d 117 (Fla. 1st DCA 1967). It did not overrule either case. Yet in those cases, as well as the post-Medlin cases of Camp v. State, 293 So.2d 114 (Fla. 4th DCA), cert. denied, 302 So.2d 413 (Fla. 1974), and Doby v. State, 352 So.2d 1236 (Fla. 1st DCA 1977), the appellate courts explicitly ruled that knowledge of the presence of narcotic drugs was an essential element of possession charges. It is important to note that the Florida Supreme Court denied certiorari in Camp after Medlin had been decided.

The Fifth District even failed to follow its own precedents. In State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), the Fifth District was confronted with the issue of whether a statute which made it unlawful to introduce into, or possess upon, the ground of any county detention facility certain contraband items was unconstitutional due to a lack of a scienter element. In discussing this issue, the court discussed the existence of the knowledge element in possession offenses as follows:

> Knowledge of possession is generally considered a part of the definition of possession as used in criminal statutes making possession a crime. Section 893.13, Florida Statutes (1981), prohibiting the actual or constructive possession of a controlled substance, and its predecessors, have never specifically required "knowing" possession, yet possession has always been defined to include knowledge of the same. A similar construction has been placed on other criminal possession statutes.

417 So.2d at 290; footnotes omitted. In concluding the statute was constitutional, the court stated:

> Further, possession in the context of this statute means possession and knowledge of the same, and appellee's knowledge (or lack of knowledge) of his possession is, subject to an appropriate instruction, an issue for the jury.

Id. at 291; footnote omitted.

In Drain v. State, 601 So.2d 256, 260 (Fla. 5th DCA 1992) the defendant was charged with a violation of § 817.564(3), Fla.Stat., which made it unlawful for any person to possess with intent to sell any imitation controlled substance. Id. at 257. The defendant filed a pretrial motion to dismiss the information, which

motion was denied. He then entered a plea of no contest reserving the right to appeal the denial of his motion to dismiss. Id. at 258-259. The Fifth District reversed the trial court's order denying the motion to dismiss, and remanded with directions that the trial court grant the motion and dismiss the information. Id. at 262-263.

What is instructive about Drain is its discussion of the state's failure to allege the essential element of scienter. Drain recognized:

> The supreme court has held that **knowledge** of the nature of a substance possessed is an essential implied element of every crime of possession of a controlled substance and that even in a case involving a genuine controlled substance the accused must be shown to have known what the substance actually was, see State v. Dominguez, 509 So.2d 917 (Fla. 1987); likewise and for even better reasons, surely, when charged with the felony possession of an **imitation** controlled substance, **the State must allege and prove that the accused knew what the substance was that he possessed** and that it was an imitation controlled substance.

Id. at 260; emphasis in original and added. The court went on to acknowledge that both federal and state constitutional provisions require the essential facts constituting the offense charged be set forth in the charging document. Id. at 261. The information was defective for failing to allege a number of elements, but one element it failed to allege was

> ...the defendant's essential knowledge of the imitative character of the substance in question. In addition the information should clearly allege the defendant's intent to

> deceive and to cause the imitation substance to be mistaken for some specified controlled substance.

Id. at 262.

As in Drain, absence of the allegations of the essential element of knowledge rendered both counts of the criminal information insufficient as a matter of law to support the verdicts, judgments, and sentence. Because the criminal information was insufficient, the judgments and sentence must be vacated.

II.

JUDGMENTS MUST BE VACATED WHERE BOTH COUNTS OF INFORMATION FAILED TO ALLEGED ESSENTIAL ELEMENT OF KNOWLEDGE

This Court must reverse the Fifth District's ruling as to the adequacy of the jury instructions on the possession counts. The erroneous jury instructions utilized deprived **MR. CHICONE** of his right to have the jury fully and fairly consider the charges and defenses raised in this case, and therefore denied him a fair trial.

It is a fundamental component of the due process clauses of both the Florida and federal Constitutions that the jury be complete and accurately instructed on each element of a criminal offense, and that the element must be proved beyond a reasonable doubt. See Amend. V & XIV, U.S. Const.; Art. I, §9, Fla.Const.; In Re: Winship, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1967); Gerds v. State, 64 So.2d 915, 916 (Fla. 1953). Materially erroneous jury instructions which adversely affect the defense

constitute reversible error. Motley v. State, 20 So.2d 798, 800 (Fla. 1945); Hayes v. State, 564 So.2d 161, 163 (Fla. 2d DCA 1990).

A. TRIAL COURT FAILED TO ADEQUATELY INSTRUCT AS TO COUNT ONE

By his plea of not guilty, **MR. CHICONE** placed all factual elements of the crimes charged at issue. In its instructions to the jury on the charge of possession of cocaine, the trial court instructed the jury as follows:

> Certain drugs and chemical substances are by law known as controlled substances. Cocaine is a controlled substance. Before you can find Mr. Chicone guilty of possession of cocaine, the State of Florida must prove the following three elements beyond a reasonable doubt.
>
> One, Mr. Chicone possessed a certain substance. Two, the substance was cocaine. Three, Mr. Chicone had knowledge of the presence of the substance. (I/40).

The trial court then went on to define the term "possess":

> To possess means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.
>
> Possession may be actual or constructive. If a thing is in the hand of or on the person or in a bag or container in the hand of or on the person or is so close as to be within ready reach, it is under the control of the person, it is in the actual possession of that person. If a thing is in a place over which the person has control, or in which the person has hidden or concealed it, it is in the constructive possession of that person.
>
> If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed (I/40-41).

MR. CHICONE objected to the "standard" instruction as read by the trial court (I/26-30). Instead, **MR. CHICONE** requested orally and in writing that the trial court to instruct the jury as to the three elements set forth by the trial court, plus the fourth element that "**MR. CHICONE** knew that the substance was cocaine" (I/28-29; II/100). The trial court refused to do so (I/28-30). That refusal was reversible error.

Additionally, in his proposed instructions on possession and knowledge, both rejected by the trial court (I/25-30), **MR. CHICONE** requested that the jury be instructed that to convict the state must prove beyond all reasonable doubt that **MR. CHICONE** knew of the illegal nature of the substance claimed to be cocaine and the objects claimed to be drug paraphernalia (II/105-106, 108). The trial court further denied a theory of the defense instruction which asserted that **MR. CHICONE's** defense, in part, was that the evidence failed to prove that he knew the substance involved was cocaine or that the objects involved were drug paraphernalia (I/24-25; II/109). The denial of those instructions compounded the error committed by the trial court.

As the trial court itself recognized (I/3), the standard instructions promulgated by the Florida Supreme Court are not necessarily accurate. See e.g., State v. Dominquez, 509 So.2d 917 (Fla. 1987); Yohn v. State, 476 So.2d 123 (Fla. 1985).

The authorities set forth in Argument I concerning the knowledge element are equally applicable to this argument. More specifically, in Way v. State, 475 So.2d 239 (Fla. 1985), this

Court stated that knowledge of the nature of the substance to be possessed is an essential element to the crime of trafficking. This Court noted that the statute requires "knowing" possession of cocaine and, therefore, lack of knowledge that the substance is cocaine would be a defense. The same would apply to a possession offense. While the Florida Standard Jury Instruction for § 893.13 does not include as an element of possession of a controlled substance that the defendant must know of the illicit nature of the substance, the Standard Jury Instruction does state in a note to the judge that if the defendant seeks to show lack of knowledge as to the nature of the drug, then an additional instruction may be required. For that proposition the Standard Jury Instruction cites State v. Medlin, 273 So.2d 394 (Fla. 1973). It is important to note that Medlin is one of the cases cited by the Fifth District for exactly the opposite proposition in Chicone, 19 Fla. L. Weekly at D2538.

The Fifth District's opinion overlooks the entire line of constructive possession cases which are applicable to **MR. CHICONE's** situation because he was charged with constructive possession of cocaine (I/84) and because he was not in actual possession of either the cocaine or drug paraphernalia at the time of his arrest. All appellate courts in this state, including this Court, have ruled that the state must prove beyond a reasonable doubt in constructive possession cases that the defendant 1) had dominion and control over the contraband, 2) knew the contraband was within his presence, and 3) knew of the illicit nature of the contraband.

Brown v. State, 428 So.2d 250, 252 (Fla.), cert. denied, 463 U.S. 1209 (1983); Skelton v. State, 609 So.2d 716, 717 (Fla. 2d DCA 1992); Cordero v. State, 589 So.2d 407, 409 (Fla. 5th DCA 1991); Moffatt v. State, 583 So.2d 779, 781 (Fla. 1st DCA 1991); Kuhn v. State, 439 So.2d 291, 293 (Fla. 3d DCA 1983); Wale v. State, 397 So.2d 738, 739 (Fla. 4th DCA 1981). Since a defendant must know of the illicit nature of the contraband in a constructive possession case, it is fundamentally clear that a jury must be instructed on that knowledge element in order to comply with fundamental due process. The jury was not so instructed on either count in **MR. CHICONE's** case.

Additionally, Drain v. State, 601 So.2d 256 (Fla. 5th DCA 1992), made clear that knowledge of the imitative character of the substance was an essential element in a § 817.564 offense. For the same reasons, knowledge of the illicit nature of the substance, i.e., knowledge that it was cocaine, was an essential element in **MR. CHICONE's** case. Id. at 260 (even in a case involving a genuine controlled substance, the accused must be shown to have known what the substance actually was).

This Court has recently proposed for comment an amended instruction to be used in actual and constructive possession drug abuse cases. See The Florida Bar News, June 1, 1995, p. 3. In its entirety, the proposed instruction, which would substitute for two paragraphs of the current instruction, reads:

> Possession may be actual or constructive.

Actual possession means
(a) the thing is in the hand of or on the person, or
(b) the thing is in a container in the hand of or on the person, or
(c) the thing is so close as to be within ready reach and is under the control of the person.

Give if applicable

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Give if applicable

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.

Comment: The committee feels the current standard instruction is not a complete statement of the law on actual possession and may lead the jury to mistakenly draw an inference of ability to control simply from the fact of mere proximity. See Jean v. State, 638 So.2d 995 (Fla. 4th DCA 1994). Additionally, the committee believes the proposed instruction on constructive possession more clearly sets forth the essential elements that must be proven to establish guilt. See Poiter v. State, 525 So.2d 472 (Fla. 5th DCA 1988); Harris v. State, 647 So.2d 206 (Fla. 1st DCA 1994).

This proposed instruction makes its clearer that in constructive possession cases the state must prove beyond a reasonable doubt that the defendant had knowledge of the illicit nature of the item possessed. In the context of **MR. CHICONE's** case, it would mean that the state must prove that **MR. CHICONE** had

knowledge that the items he possessed were cocaine, or a mixture containing cocaine, and drug paraphernalia.

At no time was **MR. CHICONE's** jury instructed that one element that the state had to prove was knowledge of the illicit nature of the items possessed. Therefore, this Court must reverse the decision of the Fifth District and remand for a new trial.

B. INACCURATE DRUG PARAPHERNALIA INSTRUCTIONS

As to Count Two, the charge of possession of drug paraphernalia, the trial court instructed the jury, in part, as follows:

> The second count in this particular case is the offense of possession of drug paraphernalia. Before you can find Mr. Chicone guilty of possession of drug paraphernalia, the state must prove the following two elements beyond a reasonable doubt. One, that Mr. Chicone used or had in his possession with intent to use drug paraphernalia. Two, that Mr. Chicone had knowledge of the presence of the drug paraphernalia (I/41).

The trial court then went on to define "possess" exactly as it did for Count One, see page 17, supra, and "drug paraphernalia" (I/42-43).

MR. CHICONE objected to the instruction as given (I/31-32). Also, **MR. CHICONE** requested orally and in writing that the jury be instructed on a third essential element which must be proved beyond a reasonable doubt, that "**MR. CHICONE** knew that the object was drug paraphernalia" (I/32; II/102). The trial court refused to do so. The failure to add this essential element to the instruction was reversible error. Additionally, the denial of **MR. CHICONE's**

proposed instructions on possession, knowledge, and theory of the defense, see page 18, supra, compounded the trial court's error.

The authorities cited above in connection with Argument I and Argument II.A. are equally applicable to this claim. Also, in Wade v. State, 558 So.2d 107 (Fla. 1st DCA 1990), the court made clear that knowledge of the illicit nature of the contraband was an essential element of both a possession of controlled substance and possession of paraphernalia charges. See also Dubose v. State, 560 So.2d 323, 325 (Fla. 1st DCA 1990). Failure to include this essential element in the drug paraphernalia instruction requires this Court to reverse the Fifth District's decision and remand for a new trial on Count Two also.

III.

SENTENCES MUST BE REVERSED DUE TO A) IMPOSITION OF GENERAL SENTENCE, B) IMPOSITION OF ILLEGAL SENTENCE ON COUNT TWO, AND C) DIFFERENCES BETWEEN ORAL PRONOUNCEMENT AND WRITTEN ORDERS

This Court must affirm the Fifth District's decision that the sentences on both counts must be reversed due to numerous sentencing errors. However, the instruction to resolve the discrepancies on remand must be stricken.

A. IMPOSITION OF A GENERAL SENTENCE

In Florida, imposition of a general sentence is illegal. A trial court must impose a specific sentence for each count on which a defendant is to be sentenced. § 775.021(4)(a), Fla.Stat. (1993); Lagemann v. State, 400 So.2d 1041 (Fla. 2d DCA 1981)(imposition of a general sentence requires reversal).

In **MR. CHICONE's** case, the trial court orally imposed the sentence as follows:

> I'm going to place the defendant on one year of community control followed by three years of probation (II/78).

The rest of the oral pronouncement went on to discuss conditions of the probation and community control. The trial court did not specify in its oral pronouncement which count of the information that sentence was to apply to. That portion of the Fifth District's opinion which vacated the sentences on both counts must therefore be affirmed.

B. IMPOSITION OF ILLEGAL SENTENCE ON COUNT TWO

At sentencing, the trial court stated that it was placing **MR. CHICONE** on one year of community control, followed by three years of probation (II/78). The trial court did not distinguish between Count One (the felony possession of cocaine offense) and Count Two (the misdemeanor possession of drug paraphernalia offense). The October 6 written order/court minutes did specify one year of community control on both counts (II/135). The November 12, 1993, written order for Count Two does specify that **MR. CHICONE** is placed on one year of community control, to be followed by three years of probation (II/142-144).

Possession of drug paraphernalia is a misdemeanor of the first degree. § 893.147(1), Fla.Stat. (1991). Community control cannot be imposed in connection with a misdemeanor. Community control is only applicable to felony offenses. § 948.01(1), (3), (6), Fla.Stat. (1993). Applying this statute, courts have held that a

sentence of community control for a misdemeanor offense is invalid. See e.g., Mitchell v. State, 614 So.2d 671, 672 (Fla. 2d DCA 1993); York v. State, 599 So.2d 199 (Fla. 2d DCA 1992); Young v. State, 509 So.2d 1339, 1341 (Fla. 1st DCA 1987).

The November 12 written order which requires **MR. CHICONE** to serve a one year period of community control, to be followed by a three year term of probation, on the drug paraphernalia charge is illegal. It is fundamental that the a sentence cannot exceed the statutory maximum of the crime involved. See e.g., State v. Holmes, 360 So.2d 380, 383 (Fla. 1978); Peeples v. State, 376 So.2d 287, 288 (Fla. 5th DCA 1979); Swift v. State, 362 So.2d 723, 724 (Fla. 2d DCA 1978). The four year penalty imposed on **MR. CHICONE** for a misdemeanor of the first degree is clearly illegal. That portion of the Fifth District's opinion which vacated the sentences must be affirmed, because the sentence as applied to Count Two is clearly illegal.

C. DIFFERENCES BETWEEN ORAL PRONOUNCEMENT AND WRITTEN ORDERS

The Fifth District was correct in ruling that the November 12 written order setting forth conditions of community control and of probation must be vacated because it is inconsistent with the conditions orally announced at sentencing.

On October 6, 1993, **MR. CHICONE** was sentenced in this case (CR92-8163) and in CR91-3308[3] (II/73-83). At that time, the trial

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[3] That case was appealed to the Fifth District Court of Appeal, and remanded for resentencing due to a "discrepancy" in the sentence. Chicone v. State, 644 So.2d 532 (Fla. 5th DCA 1994), rev. denied, 651 So.2d 1192 (Fla. 1995).

court orally imposed in this case a sentence of one year of community control to be followed by three years of probation. The trial court also orally set forth some conditions of the community control and the probation. That same day, the trial court signed a written order/court minutes which was intended to reflect the court's ruling (II/135). Subsequently - without notice to or the presence of **MR. CHICONE** or his legal counsel - the trial court signed two orders placing defendant on community control followed by probation (one for each count), dated November 12, 1993, nunc pro tunc October 6, 1993 (II/139-144), five weeks after the commencement and execution of the sentence.

In order to understand the differences between the trial court's oral pronouncements, the order entered on October 6, and the orders entered on November 12, the following chart has been prepared:

SENTENCE	**10-6-93 ORAL PRONOUNCEMENT (II/77-82)**	**10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)**	**11-12-93 WRITTEN ORDERS (II/139-144)**
community control	one year community control (to run concurrent with any other sentence now being served)	1 year community control on both counts, concurrent	Community Control for 1 year for Count I. Also 1 year for Count II, does not say concurrent with Count I
probation	3 years probation	3 years probation with conditions	3 years probation concurrent with CR91-3308/A. Count II, 3 years concurrent with Count I.

SENTENCE	10-6-93 ORAL PRONOUNCEMENT (II/77-82)	10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)	11-12-93 WRITTEN ORDERS (II/139-144)
fine	$1000	$1000 fine and $50 surcharge	¶ 23 - $1000 fine and $50 surcharge in Count I.
court costs	$255	$50 to CCF $200 to CJTF	¶ 16 - $200 to court costs in Count I. ¶ 18 - $50 to crime compensation trust fund in Count I.
other costs/fine	$100 to any agency that does drug rehabilitation work	$100 to DAF	¶ 24 - $100 to Drug Abuse Trust Fund in Count I
community service	300 hours community service work - consecutive to any other community service	300 hrs. ACS consec. w/ CR91-3308/A	¶ 10 - 300 hours public service work, consecutive to CR91-3308/A in Count I
costs of supervision			¶ 2 - $50 to State of Florida plus 4% surcharge per month

SENTENCE	10-6-93 ORAL PRONOUNCEMENT (II/77-82)	10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)	11-12-93 WRITTEN ORDERS (II/139-144)
urinalysis/ chemical tests	undergo random urinalysis and/or attend and complete any drug program that your community control/proba-tion officer feels appropriate. However, so long as you're receiving mental health counseling and/or you are receiving random urinalysis with the counselor that you're receiving at this time, the court does not have any objections that continue to be random urinalysis of the community control officer or probation officer.		¶ 12 - urinalysis, breathalyzer or blood tests at any time requested by community control officer or professional staff at treatment center. ¶ 22 - you will submit to chemical tests (breath, urine and blood) on request of Community Control Officer ¶ 26 (Count One) and ¶ 24 (Count Two) - submission to random urinalysis.
mental health and drug treatment programs	he is able to continue with the same drug treatment and mental health program he's going through right now.	defendant will be permitted to continue his mental health counseling.	¶ 25 (Count One) and ¶ 23 (Count Two) - be permitted to continue mental health program.

SENTENCE	10-6-93 ORAL PRONOUNCEMENT (II/77-82)	10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)	11-12-93 WRITTEN ORDERS (II/139-144)
report to probation officer			¶ 1 - not later than 5th day of each month
residence			¶ 3 - not change residence or employment or leave the county of residence without first procuring the consent of Community Control Officer
firearms and weapons			¶ 4 - can't possess, carry or own weapons or firearms
violation of probation			¶ 5 - live and remain at liberty without violating any law.
intoxicants			¶ 6 - not use intoxicants to excess or visit places where intoxicants are unlawfully sold, dispensed or used
employment			¶ 7 - you will work diligently at lawful occupation
inquiries/visits by Community Control			¶ 8 - truthfully answer all inquiries, allow Community Control Officer to visit your home, employment or elsewhere and comply with all instructions he may give

SENTENCE	10-6-93 ORAL PRONOUNCEMENT (II/77-82)	10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)	11-12-93 WRITTEN ORDERS (II/139-144)
report to Community Control			¶ 9 - shall report at least 1 time a week or if unemployed report as directed. (deleted upon successful completion of community control)
confined to residence			¶ 11 - remain confined to approved residence except for ½ hour before and after approved employment ... (deleted upon successful completion of community control)
daily log			¶ 13 - maintain an hourly accounting of all your activities on a daily log which you will submit to your Community Control Officer upon request. (deleted upon successful completion of community control)
self-improvement programs			¶ 14 - participate in self-improvement programs as determined by the Court or Community Control Officer
restitution			¶ 15 - restitution language with blanks for amounts

SENTENCE	10-6-93 ORAL PRONOUNCEMENT (II/77-82)	10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)	11-12-93 WRITTEN ORDERS (II/139-144)
court jurisdiction			¶ 17 - court retains jurisdiction to place you in Probation and Restitution Center upon recommendation of Probation Officer without finding of violation of probation
electronic monitoring			¶ 19 - DOC may at its discretion place you on Electronic Monitoring for which you are financially responsible
electronic monitoring			¶ 20 - you will submit to Electronic Monitoring of your whereabouts . . . and will reimburse the State of Florida Electronic Monitoring Trust Fund . . . at a rate of $30 per month. (deleted upon successful completion of community control)
possess marijuana			¶ 21 - you will not possess or use any marijuana or any other controlled substances . . .

SENTENCE	10-6-93 ORAL PRONOUNCEMENT (II/77-82)	10-6-93 WRITTEN ORDER/COURT MINUTES (II/135)	11-12-93 WRITTEN ORDERS (II/139-144)
search without warrant			¶ 22 - you will submit to a reasonable search, without a warrant, by the Community Control Officer ...

There are obvious differences between the oral sentence imposed on **MR. CHICONE** by the trial court on October 6, 1993, and the conditions set forth in the written sentencing orders of October 6 and November 12, 1993. In situations where the oral pronouncement differs from the written order, the oral pronouncement governs. Johnson v. State, 627 So.2d 114 (Fla. 1st DCA 1993); Lester v. State, 563 So.2d 178, 179 (Fla. 5th DCA 1990). Any written conditions which conflict with the oral pronouncements, or which were not orally announced, must be stricken. Cumbie v. State, 597 So.2d 946, 947 (Fla. 1st DCA 1992); Tillman v. State, 592 So.2d 767, 768 (Fla. 2d DCA 1992). Additionally, it is error to add conditions in a subsequent written order. Skiff v. State, 627 So.2d 614 (Fla. 4th DCA 1993).

In a probation or community control setting, the courts have carved an exception to this general rule. Because the standard conditions of probation and community control are set forth in Florida Statutes § 948.03, § 948.031, § 948.032, and § 948.034, the courts have held that a probationer or community controlee is placed on notice as to the standard conditions set forth in those statutes. Therefore, no oral pronouncement need be made of

standard conditions. Gaal v. State, 599 So.2d 723, 724-725 (Fla. 1st DCA 1992); Cumbie, supra. However, any special conditions, not set forth in the statutes, must be explicitly pronounced at sentencing or they are invalid. Dycus v. State, 629 So.2d 275 (Fla. 2d DCA 1993). Various of the conditions set forth in **MR. CHICONE's** written orders fail to comply these rules, and therefore must be stricken.[4]

1. COURT COSTS:

While the trial court orally imposed court costs in the amount $255.00, both written orders specify only $250.00. On remand the amount owed should be corrected to $255.00.

2. POSSESSION OF FIREARMS:

Paragraph four of the November 12 orders states: "You will neither possession, carry or own any weapons or firearms." This is not a statutorily authorized condition and the trial court did not pronounce orally at the sentencing hearing. **MR. CHICONE** is not a convicted felon. Therefore, applying the rationale of Quinonez v. State, 634 So.2d 173 (Fla. 2d DCA 1994), this condition must be stricken. See e.g., Evans v. State, 653 So.2d 1103, 1104 (Fla. 2d

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[4] By order dated June 22, 1995, this Court accepted Hart v. State, 651 So.2d 112 (Fla. 2d DCA 1995), for review. State v. Hart, Supreme Court Case No. 85,168. Hart involves a related issue concerning notice to probationers of certain unannounced conditions of probation.

DCA 1995); Hamilton v. State, 653 So.2d 1068, 1069 (Fla. 2d DCA 1995).

3. USE OF INTOXICANTS:

Paragraph six of the November 12 orders states that: "You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used."

The first portion of this condition, related to use of intoxicants to excess, is not statutorily authorized and the trial court did not pronounce it orally at the sentencing hearing. Therefore, this condition must be stricken. See e.g., Evans, supra; Hamilton, supra; Quinonez, supra; Gregory v. State, 616 So.2d 174 (Fla. 2d DCA 1993).

4. EMPLOYMENT:

Paragraph seven of the two orders requires **MR. CHICONE** to work diligently in a lawful occupation. The standard condition set forth in § 948.03(1)(c) requires a defendant to work faithfully at suitable employment insofar as may be possible. A mandatory employment requirement is improper. Armstrong v. State, 620 So.2d 1120, 1121-1122 (Fla. 5th DCA 1994); Walls v. State, 596 So.2d 811, 812 (Fla. 4th DCA 1992).

5. INQUIRIES/VISITS BY COMMUNITY CONTROL OFFICER

In part, paragraph eight of the two orders requires **MR. CHICONE** to allow the community control officer to visit him at his

home or place of employment, and requires **MR. CHICONE** to comply with all instructions he may be given by that officer. The visitation requirement is a standard condition and not objected to. However, the requirement that **MR. CHICONE** comply with all instructions that the community control officer or probation officer give him is not a standard condition, and is too vague and indistinct to be a lawful condition. While **MR. CHICONE** must obviously comply with instructions of the probation and community control officer which specifically relate to the various conditions imposed upon **MR. CHICONE**, he is under no obligation to comply with all instructions without limitation.

6. DAILY LOG:

Paragraph 13 of the two orders requires an hourly accounting of all activities on a daily log. That condition was not specifically announced at sentencing. It is not a standard condition of probation or community control, and must therefore be stricken. Roberson v. State, __ So.2d __ (Fla. 2d DCA 5/12/95) [20 Fla. L. Weekly D1154]; Vincent v. State, 600 So.2d 1292 (Fla. 1st DCA 1992).

7. SELF-IMPROVEMENT PROGRAMS

Paragraph 14 of the two orders requires **MR. CHICONE** to participate in self-improvement programs as determined by the court or community control officer. Other than counseling and drug treatment, which were specifically set forth as conditions

elsewhere on the orders, no such self-improvement program was determined by the court. Only the trial court can order **MR. CHICONE** to participate in a self-improvement program. The community control officer has no authority to do so. Since the provision that **MR. CHICONE** participate in self-improvement programs as determined by the community control officer is illegal, that portion of condition 14 must be stricken.

8. COURT JURISDICTION

Paragraph 17 of the two orders state that the trial court retains jurisdiction to place **MR. CHICONE** in the probation or restitution center upon recommendation of the community control officer without a finding of violation of probation. The court did not orally pronounce this condition at sentencing. It is not a standard condition, and must be specified by the trial court. It therefore must be stricken.

9. SEARCH WITHOUT WARRANT

Paragraph 22 of the two orders requires **MR. CHICONE** to submit to a reasonable search, without warrant, by the community control officer of his person, effects, residence, or business premises or vehicles for alcoholic beverages, controlled substances, weapons, or firearms. This is not a standard condition of probation or community control, and was not a special condition announced at sentencing. It must therefore be stricken. Since the weapons or firearms provision is invalid, see section III.C. 2, supra,

permitting someone to search for those items would be illegal. Additionally, as it is not illegal for **MR. CHICONE** to possess alcoholic beverages, a search for those items would similarly be illegal.

10. ELECTRONIC MONITORING

Paragraphs 19 and 20 of the two orders permits the Department of Corrections to place **MR. CHICONE** on electronic monitoring, and require him to wear the anklet at all times. This condition was not orally announced at sentencing. It is a condition which can only be ordered by the trial court. See e.g., Carson v. State, 531 So.2d 1069, 1070 (Fla. 5th DCA 1988). Since it was not specifically ordered by the court, both paragraphs 19 and 20 dealing with electronic monitoring must be stricken.

D. SCOPE OF REMAND

The Fifth District remanded this case for resentencing and resolution of the "discrepancies". In remanding for a resolution of the discrepancies between the conditions of probation orally announced at sentencing on October 6th, and those found in the November 12 written orders entered by the court, the Fifth District has carved its own, incorrect, legal remedy.

Outside of the Fifth District, the uniform law in the State of Florida is that if a special condition of probation was not orally announced at sentencing, it must be stricken from the written order of probation. See Justice v. State, __ So.2d __ (Fla. 5th DCA

3/3/95)[20 Fla. L. Weekly D546] (Harris, C.J., concurring)[5], wherein Judge Harris discussed the conflict between the Fifth District and that of the other districts. Chief Judge Harris' concurrence makes it clear that the Fifth District intends to permit the trial court to conduct a new sentencing hearing so that it can properly announce and impose any conditions that it feels appropriate. Therefore, such a "resentencing" would evolve into a wide-open procedure at which the trial court could impose virtually any probation condition it wanted, whether it had been previously imposed against the defendant or not. As made clear by the cases cited above from other district courts of appeal, see pages 32-33, supra, the other courts of appeal do not remand for any resolution of a "discrepancy." Instead, the trial court is ordered to strike any special condition which has not previously been orally announced to the defendant at the sentencing hearing.

It should be noted that the Fifth District is not consistent on this issue. Where a special condition is not authorized, and not orally announced, the Fifth District has ordered it stricken, instead of being remanded for any resolution of a "discrepancy." See e.g., Nesbitt v. State, __ So.2d __ (Fla. 5th DCA 6/16/95) [20 Fla. L. Weekly D1424](striking payment to First Step); Botts v.

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[5] As of the time this brief is being filed, Ms. Justice's motion for rehearing, rehearing en banc, or certification to the Florida Supreme Court is still pending before the Fifth District.

State, 634 So.2d 197 (Fla. 5th DCA 1994)(same); Gomez-Rodriqueq v. State, 632 So.2d 709 (Fla. 5th DCA 1994)(special condition that defendant consume no alcoholic beverages must be stricken).

Yet in another case, Elmore v. State, 636 So.2d 183 (Fla. 5th DCA 1994), a panel of the Fifth District handled a similar issue in a contrary manner. That issue in Elmore was the imposition of a special condition of probation requiring payment of a certain amount of money to Flagler Hospital as restitution. It was not orally announced at the sentencing hearing, although it appeared in the written order of probation rendered after the hearing. The Elmore panel remanded for the purpose of addressing this "discrepancy." In so doing, the court stated:

> [W]e therefore remand this cause to the trial court to resolve this discrepancy. If the omission of the Flagler Hospital's restitution was a mistake, and Elmore was aware it should have been included with the others, the trial court shall make such a finding and reimpose the list as written. If not, the condition should be stricken. See Walls v. State, 609 So.2d 83, (Fla. 1st DCA 1992); Boone v. State, 608 So.2d 564 (Fla. 1st DCA 1992).[6]

Id. at 184.

Therefore, in Elmore, the remand inquiry concerned two issues: 1) whether the omission of the Flagler restitution was a mistake,

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[6] Walls and Boone both involved situations where the case was remanded for the striking of unannounced special conditions, not for resolution of a "discrepancy."

and 2) whether the defendant was aware that it should have been included with the others. An option the Fifth District did not give the trial court in Elmore was to add that condition if it originally intended to make it a condition, regardless of whether Elmore was aware it should have been included in the probationary order. Elmore therefore recognized that if the defendant was not aware that the condition would be imposed, the trial court was required to strike it, and had no option to reimpose it on remand.

The Fifth District's "correct the discrepancy" remand remedy in **CHICONE** presents serious double jeopardy and due process concerns. See Amend. V and XIV, U.S. Const., Art. I, § 9, Fla. Const. Allowing special conditions to be reimposed at a resentencing would result in a harsher sentence, and therefore clearly violate **MR. CHICONE's** state and federal double jeopardy and due process rights.

Both the state and federal constitutions guarantee to the criminal defendant both procedural and substantive due process of law. The United States Supreme Court has held that the federal constitutional guarantee of due process does not allow the increase or enhancement of an original sentence, after appellate reversal, and upon a second sentencing. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Subsequently, the United States Supreme Court decided Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984), which clarified

the Pearce decision. Wasman allows an enhanced second sentence where there has been some intervening negative event in the life of the defendant since the first sentencing. Nothing negative has occurred in the life of **MR. CHICONE** between the oral sentencing, the subsequent written sentencing, and the date of this appeal.

The Third District Court of Appeal has written that "The imposition of a harsher sentence after a defendant has successfully attacked a conviction or sentence on appeal gives rise to a presumption of vindictiveness which may be overcome only by identification of information in the record which justifies the increased sentence." Weekley v. State, 584 So.2d 78, 81 (Fla. 3d DCA 1991). Likewise, other Florida courts have held that the increase of the sentence upon resentencing constitutes double jeopardy. Gartrell v. State, 609 So.2d 112, 116 (Fla. 4th DCA 1992).

Most importantly, **MR. CHICONE** draws this Court's attention to its holding in Lippman v. State, 633 So.2d 1061 (Fla. 1994). This Court held that:

> [P]robation is a sentence in Florida. ... Thus, the double jeopardy protection against multiple punishments includes the protection against enhancements or extensions of the conditions of probation. ... Before probation may be enhanced, a violation of probation must be formally charged and the probationer must be brought before the court and advised of the charge. ... Absent proof of a violation, the

> court cannot change an order of probation by enhancing the terms.

633 So.2d at 1064.

By remanding this cause for resentencing, the Fifth District would allow the trial court, despite no violation of probation, to impose special conditions of probation which were not part of the original sentence which **MR. CHICONE** received on October 6, 1993. The imposition of these additional special conditions of probation would result in **MR. CHICONE** receiving a harsher sentence upon resentencing, would result in a violation of **MR. CHICONE's** due process rights, and would constitute a double jeopardy violation.

The holding of the Fifth District is in conflict with this Court's holdings in Clark v. State, 579 So.2d 109 (Fla. 1991), and Lippman v. State, 633 So.2d 1061 (Fla. 1994). Cleveland v. State, 617 So.2d 1166 (Fla. 5th DCA 1993), which was cited by the Fifth District in its opinion, cannot be squared with those Florida Supreme Court holdings. See also, Delancey v. State, 653 So.2d 1062, 1064 (Fla. 4th DCA 1995).

Both Cleveland and Anderson v. State, 616 So.2d 200 (Fla. 5th DCA 1993), the case upon which the Cleveland court relied, dealt with situations where a "discrepancy" existed between the written sentence and oral sentence imposed upon the defendant. Cleveland, 617 So.2d at 1167. In both cases, the defendant's sentence was vacated and remanded for resolution of the "discrepancy." Id. The

circumstances of the instant case and the Clark case differ from those which existed in both Anderson and Cleveland.

In Clark, the trial court violated § 948.06 Fla. Stat., (1987), by enhancing the terms of Clark's community control without notice and hearing. In both Clark and the instant case, the defendant's sentence was enhanced ex parte, without any notice to the defendant. In the instant case, in Clark, and in Lippman, there was not merely a "discrepancy" between an oral and written sentence, but a second ex parte sentencing order, which enhanced an originally clear and unambiguous sentence. In this manner, the two cases differ from Anderson and Cleveland. Therefore, this Court should reconfirm the correctness of Clark and Lippman by vacating the second November 12, 1993, sentencing orders and striking any additionally imposed special terms of probation in the October 6, 1993, orders. As the Lippman Court held:

> [A]bsent proof of a violation, the court cannot change an order of probation by enhancing the terms. ... In the instant case, the court specifically found no violation of probation, yet proceeded to enhance the terms of Lippman's probation. This violated the double jeopardy prohibition against multiple punishments for the same offense. Thus, the order modifying probation must be vacated.

Lippman, 633 So.2d at 1064 (citation omitted).

This Court's holding in Clark has been followed in a number of other district court decisions. See Catholic v. State, 632 So.2d 272 (Fla. 4th DCA 1994); Dycus v. State, 629 So.2d 275 (Fla. 2d DCA

1993); Olvey v. State, 609 So.2d 640 (Fla. 2d DCA 1992); Cumbie v. State, 597 So.2d 946 (Fla. 1st DCA 1992).

It is fundamentally unfair to punish **MR. CHICONE** for succeeding in this appeal by allowing the imposition of additional special conditions of probation at a resentencing under the unconstitutional guise of "correcting discrepancies." It is fundamentally unfair to allow a trial court a second opportunity to impose special conditions upon **MR. CHICONE**. The law in this state, outside the Fifth District, is clear that any special condition of probation not orally announced at the first sentencing hearing must be stricken and cannot be imposed upon remand. That same rule must apply in the Fifth District. Therefore, the Fifth District's opinion on this sentencing issue must be modified by this Court so that at the resentencing hearing, any special conditions of probation which were not orally pronounced at the original sentencing hearing on October 6, 1993, cannot be imposed upon **MR. CHICONE**.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must reverse in part and affirm in part the decision of the Fifth District Court of Appeal. The Court must reverse the Fifth District and order the criminal information dismissed due to the insufficiency of the allegations.

If the Court does not order that the information be dismissed, it must nevertheless reverse the Fifth District and remand for a new trial due to the insufficiency of the jury instructions.

Should this Court not vacate the decision as to the first two issues, the Court must affirm the vacation of the sentence. However, the Court must vacate the October 6 and November 12, 1993, written orders placing **MR. CHICONE** on community control and probation, with instructions that all special conditions not orally pronounced on October 6, 1993, be stricken and not reimposed on remand.

RESPECTFULLY SUBMITTED this 10th day of July, 1995, at Orlando, Orange County, Florida.

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