IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE III,

Petitioner,

v.

CASE NO. 85,136

STATE OF FLORIDA,

Respondent.
_____/

On Notice To Invoke Discretionary Jurisdiction To Review A Decision Of The Florida Fifth District Court Of Appeal

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MR. CHICONE'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief, the Petitioner, **JERRY JAY CHICONE, III**, will be referred to as "**MR. CHICONE.**" The Respondent, State of Florida, will be referred as the "state." The appendix attached to this brief will be referred as "App.," followed by the appropriate letter and page number. The record on appeal will be referred to by the volume number, followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

This case is based upon an appellate decision involving two judgments withholding adjudication of guilt and written orders and sentences of probation entered against **MR. CHICONE** in a criminal case arising in the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida ("trial court") - Case No. CR92-8163.

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). At trial, as to Count One **MR. CHICONE** orally and in writing requested the trial court add a fourth element to the standard drug possession instruction. 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, **MR. CHICONE** orally and in writing requested that the jury be instructed that a third element to be proven 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). 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 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 his timely notices of appeal to the Fifth District Court of Appeal. In the appeal, **MR. CHICONE** claimed 1) that the trial court erred in failing to dismiss the information for failure to allege the essential scienter elements; 2) that the trial court erred in failing to include the element of knowledge of the illegal nature of the substance and paraphernalia in its jury instructions; and 3) that the trial court had erred in entering its November 12, 1993, sentencing order, which imposed enhanced conditions of probation which were not imposed at the original sentencing hearing on October 6, 1993. **MR. CHICONE** claimed that the additional conditions of probation imposed in the November 12, 1993, sentencing order must be stricken.

On December 2, 1994, the Fifth District entered its opinion (App. A). Chicone v. State, __ So.2d __ (Fla. 5th DCA 12/2/94) [19 Fla. L. Weekly D2538]. The court affirmed the convictions, vacated **MR. CHICONE's** sentence, and remanded the case "for resentencing and resolution of the discrepancies," because the trial court had imposed special conditions of probation in written sentences which were not orally pronounced at sentencing. On December 19, 1994, **MR. CHICONE** filed a Motion for Rehearing, Rehearing En Banc, or Certification to the Florida Supreme Court (App. B). On January 12, 1995, the Fifth District denied that motion (App. C).

SUMMARY OF THE ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER APPELLATE COURTS ON THE ISSUES OF SCIENTER AND THE SENTENCING REMAND

This Court has jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., to review cases which expressly and directly conflict with decisions of this Court or other district courts of appeal on the same question of law. This Court should exercise that jurisdiction and accept **MR. CHICONE's** case for review because the Fifth District's decision expressly and directly conflicts with numerous decisions on the issues of a) whether the information and jury instructions must include the essential element of knowledge of the illicit nature of the substance or paraphernalia involved and b) the proper remedy for dealing with special conditions of probation illegally imposed in a subsequent written sentencing order which were not orally pronounced at sentencing, were imposed without notice or hearing, were imposed after the commencement of the original sentence, and which enhance the original sentence.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER APPELLATE COURTS ON THE ISSUES OF SCIENTER AND THE SENTENCING REMAND

A. Scienter

In its opinion, the Fifth District stated that the possession statute - § 893.13(1)(f), Fla.Stat. (1991) - under which **MR. CHICONE** was charged does not require "knowing" possession of a controlled substance in order to obtain a conviction (App. A, p. 2). For that proposition it cited State v. Ryan, 413 So.2d 411

(Fla. 4th DCA), rev. denied, 421 So.2d 518 (Fla. 1982); and State v. Medlin, 273 So.2d 394 (Fla. 1973). Again, citing those two cases, the court further ruled that the state neither had to prove, nor allege in its information, that **MR. CHICONE** knew that the substance he possessed was cocaine, or knew that the object he possessed was drug paraphernalia (App. A, p. 3).

The Fifth District's holding conflicts with the entire line of constructive possession cases which are applicable to **MR. CHICONE's** situation because he was not in actual possession of either the cocaine or drug paraphernalia at the time of his arrest. All Florida appellate courts 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 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.

The Fifth District's ruling on the failure to plead or instruct the jury on the knowledge issue also directly and

expressly conflicts with numerous other rulings. First, this Court has made clear that lack of knowledge of the nature of a substance is a defense in a trafficking charge. Way v. State, 475 So.2d 239, 241 (Fla. 1985. See also State v. Dominquez, 509 So.2d 917 (Fla. 1987). The only difference between drug trafficking and drug possession is the amount of the substance involved, so lack of knowledge of the nature of a substance must also be a defense to a simple possession charge.

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 possessed a mail parcel which contained marijuana. In reversing the conviction for possession of marijuana, 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.

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 it cites State v. Medlin, 273 So.2d

394 (Fla. 1973), one of the cases cited by the Fifth District for exactly the opposite proposition in Chicone.

Neither Medlin nor State v. Ryan, 413 So.2d 411 (Fla. 4th DCA), rev. denied, 421 So.2d 518 (Fla. 1982), relied upon by the Fifth District for its decision, mandate the result reached. First, neither are possession cases. 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 two 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 is an essential element of possession charges. It is important to note that this Court denied certiorari in Camp after Medlin had been decided. See also United States v. X-Citement Video, Inc., __ U.S. __, 115 S.Ct. 464, __ L.Ed.2d __ (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 the statutory definition of machine gun).

Drug and paraphernalia possession offenses are numerous throughout this state. The Fifth District's decision on the sufficiency of the information and jury instructions expressly and directly conflicts with the Florida decisions cited at pages 5-7,

supra. It is respectfully submitted that the Court should accept jurisdiction over Chicone to bring the Fifth District in line with other appellate courts on this important point of law.

B. Sentence

The Fifth District erred in remanding **MR. CHICONE's** case to the trial court for resentencing, instead of striking the illegal November 12, 1993, sentencing order. This decision directly conflicts with holdings of this Court and other district courts of appeal which require subsequently imposed and enhanced terms of probation to be stricken. By remanding this case for resentencing, the Fifth District's decision allows the trial court to again illegally enhance **MR. CHICONE's** sentence by imposing special conditions of probation which were not part of his original sentence of October 6, 1993.

Once a defendant has begun serving a sentence, a trial court cannot increase the punishment. Dailey v. State, 575 So.2d 237, 238 (Fla. 2d DCA 1991); Bickowski v. State, 530 So.2d 470 (Fla. 5th DCA 1988); Tessier v. Moe, 485 So.2d 46 (Fla. 4th DCA 1986). As the United States Supreme Court has noted, the guarantee against double jeopardy is comprised of three distinct constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.*

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)(footnotes omitted)(emphasis added).

MR. CHICONE began serving the community control, and complying with its standard and special conditions, on October 6, 1993. The addition of eight new special conditions of community control five weeks later (November 12, 1993) illegally enhanced **MR. CHICONE's** sentence, as each of these conditions imposed some additional restriction on his liberty. The Fifth District's order remanding the case to the trial court for resentencing is in direct 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).

In Clark, Lippman, and Chicone, there was a second sentencing order which enhanced the original sentence. Clark holds:

> [B]efore probation or community control may be enhanced, either by extension of the period or by addition of terms, a violation of probation or community control must be formally charged and the probationer must be brought before the court and advised of the charge following the procedures of section 948.06. Absent proof of a violation, the court cannot change an order of probation or community control by enhancing the terms thereof . . . .

579 So.2d at 110-111. Lippman holds:

> [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.

633 So.2d at 1064 (citations omitted).

The current practice of the Fifth District treating these unconstitutional enhanced sentences as mere "discrepancies" between the original and subsequent sentencing orders is a misuse of the

English language.[1/] Cleveland v. State, 617 So.2d 1166, 1167 (Fla. 5th DCA 1993); Anderson v. State, 616 So.2d 200 (Fla. 5th DCA 1993). A subsequent, enhanced sentence, entered without notice or hearing, is not a mere "discrepancy"; it is an illegal and void sentence violative of the due process and double jeopardy guarantees contained within the Florida and United States Constitutions. Lippman, 633 So.2d at 1064, and cases cited therein.

This Court's holdings on this issue have been recognized and followed in a number of district court decisions. See Washington v. State, __ So.2d __ (Fla. 4th DCA 1/25/95)[20 Fla. L. Weekly D252]; Williams v. State, 646 So.2d 264 (Fla. 2d DCA 1994); Catholic v. State, 632 So.2d 272 (Fla. 4th DCA 1992); 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). The Fifth District's decision in Chicone expressly and directly conflicts with each of these cases.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court should grant **MR. CHICONE's** petition for review, and order briefing on the merits.

Respectfully submitted this 13th day of February, 1995, at Orlando, Orange County, Florida.

1/ "Discrepancy" is defined as: A difference between two things which ought to be identical, as between one writing and another; a variance (*q.v.*). Also discord, discordance, dissonance, dissidence, unconformity, disagreement, difference. See Black's Law Dictionary, p. 419 (5th Ed. 1979).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 13th day of February, 1995, by U.S. Mail to **ANTHONY J. GOLDEN**, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida, 32118, with the original and five copies being sent by Federal Express to **SID J. WHITE**, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399.

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IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE III,

Petitioner,

v. **CASE NO.**

STATE OF FLORIDA,

Respondent.
_____/

On Notice To Invoke Discretionary Jurisdiction To Review A Decision Of The Florida Fifth District Court Of Appeal

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APPENDIX TO MR. CHICONE'S BRIEF ON JURISDICTION

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

JERRY JAY CHICONE, III,

Appellant,

v. Case No. 93-2659

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed December 2, 1994

Appeal from the Circuit Court
for Orange County,
James C. Hauser, Judge.

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P.A., and Terrence E. Kehoe of
Law Office of Terrence E. Kehoe,
Orlando, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee and
Anthony J. Golden, Assistant
Attorney General, Daytona Beach,
for Appellee.

THOMPSON, J.

Jerry Jay Chicone, III, was tried and convicted of possession of cocaine, a felony,[1] and possession of drug paraphernalia, a first degree misdemeanor.[2] He appeals the trial court's order withholding adjudication of guilt and the disposition imposed. We affirm the conviction and reverse the disposition.

Chicone argues that the trial court erred, first by not

[1] § 893.13(1)(f), Fla. Stat. (1991).

[2] § 843.147(1), Fla. Stat. (1991).

dismissing the information because neither count of the information alleged the essential element of knowledge, and, second, because the court did not instruct the jury that the state had to prove Chicone knew the substance he possessed was cocaine and knew that the object he possessed was drug paraphernalia. Chicone relies upon State v. Dominguez, 509 So. 2d 917 (Fla. 1987) and Drain v. State, 601 So. 2d 256 (Fla. 5th DCA 1992), however, these cases do not support Chicone's arguments.

In Dominguez, the defendant was charged with trafficking in cocaine, a violation of section 893.135(1)(b), Florida Statutes. Because the trafficking statute explicitly required knowledge, the Florida Supreme Court held that the state had to plead and prove that the defendant knew the substance was a controlled substance. Unlike the trafficking statute, the possession statute under which Chicone was charged does not require "knowing" possession of a controlled substance in order to obtain a conviction. State v. Ryan, 413 So. 2d 411 (Fla. 4th DCA) (the state is not required to prove intent or knowledge in a simple delivery or possession of a controlled substance case), review denied, 421 So. 2d 518 (Fla. 1982); State v. Medlin, 273 So. 2d 394 (Fla. 1973).

In Drain, the only issue before this court was the proper interpretation to be given section 817.564(3), Florida Statutes, which makes it unlawful for any person to possess with intent to sell any "imitation controlled substance." This court held that the amended information entirely failed to adequately allege an offense pursuant to section 817.564 because the amended information failed to state

several essential facts constituting a violation of the statute, including "the defendant's essential knowledge of the imitative character of the substance in question." Id. at 62. Unless the state alleged and proved that the defendant knew the substance was counterfeited, he could not be convicted. We reversed. Those are not the facts here. This case involves simple possession. 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. Ryan, 413 So. 2d 411; Medlin, 273 So. 2d 396. We affirm the ruling of the trial court.

The second issue raised by Chicone is similar to the first issue. Chicone argues that the trial judge should have read his special jury instructions. He proffered instructions that required the jury to find on the issue of "knowledge" that the substance possessed by Chicone was known to him to be cocaine and that the object he possessed was known to him to be drug paraphernalia in order for there to be a conviction. The trial court denied these instructions and gave the standard jury instruction for section 893.13(1)(f)[3] and section 893.147(1)[4] along with the standard jury instructions on reasonable doubt, which the trial judge read twice. 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

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[3] Fla. Std. Jury Instr. (Crim.) 227.

[4] Fla. Std. Jury Instr. (Crim.) 245.

substance was cocaine and that he knew the object was drug paraphernalia. The trial judge did not err. See Williams v. State, 591 So. 2d 319 (Fla. 3d DCA 1991) (granting or denying a jury instruction is addressed to the sound discretion of the trial judge, and it is within the trial judge's discretion to deny a defendant's special instruction where the standard instructions adequately cover the issue). We affirm the trial court's denial of the special instructions.

The supplemental argument of Chicone, that the standard instruction does not adequately define "reasonable doubt," has been addressed and rejected by the Florida Supreme Court. In Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 498 U.S. 992, 111 S. Ct. 537, 112 L. Ed. 2d 547 (1990), abrogated on other grounds, Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), the court held that the standard reasonable doubt instruction, read in its totality, "adequately" defines "reasonable doubt" and does not dilute the quantum of proof required to meet the reasonable doubt standard. This ruling is supported by the Supreme Court's recent decision in Victor v. Nebraska, __ U.S. __, 114 S. Ct. 1239, 127 L. Ed. 583 (1994) which held that where, "taken as a whole," the instruction correctly conveys the concept of reasonable doubt to the jury, there is no constitutional violation.

We do, however, remand the case for resentencing. After his conviction, Chicone was scheduled for sentencing. At the sentencing hearing, the court orally announced that it was withholding adjudication and placing Chicone on one year of community control to

be followed by three years of probation. The trial court orally announced several special conditions of probation and community control. 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 resentencing and resolution of the discrepancies. Cleveland v. State, 617 So. 2d 1166 (Fla. 5th DCA 1993).

Conviction AFFIRMED; Sentencing REVERSED.

HARRIS, C.J. and GRIFFIN, J., concur.

Appendix B

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JERRY JAY CHICONE, III,

Appellant,

v. CASE NO. 93-2659

STATE OF FLORIDA,

Appellee.
_____/

MR. CHICONE'S MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION TO THE FLORIDA SUPREME COURT

The Appellant, **JERRY JAY CHICONE, III,** through undersigned counsel and pursuant to Fla.R.App.P. 9.330 and 9.331, hereby moves the Panel to reconsider its December 2, 1994, opinion, this Court to reconsider the December 2 opinion En Banc, or to certify this case to the Florida Supreme Court. In support of this motion, **MR. CHICONE** shows this Court as follows:

In an opinion filed December 2, 1994, this Court upheld **MR. CHICONE's** convictions for possession of cocaine and possession of drug paraphernalia. His sentence was reversed and remanded for resentencing. Chicone v. State, __ So.2d __ (Fla. 5th DCA 12/2/94) [19 Fla. L. Weekly D2538].

I. CONVICTIONS

A. REHEARING

The Panel should reconsider its decision because it misapprehends the applicable law on the scienter issues.

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., United States Supreme Court Case No. 93-723 (opinion filed 11/29/94)(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); William 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).

The Florida Supreme Court has made clear that lack of knowledge of the nature of the substance is a defense in a trafficking charge. Way v. State, 475 So.2d 239, 241 (Fla. 1985). The only difference between trafficking and possession is the amount of the substance involved.

The reason for this rule in drug cases is clearly set forth in Rutskin. 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 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.

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 it cites State v. Medlin, 273 So.2d 394 (Fla. 1973), one of the cases cited by this Court for exactly the opposite proposition in Chicone.

Neither Medlin nor State v. Ryan, 413 So.2d 411 (Fla. 4th DCA), rev. denied, 421 So.2d 518 (Fla. 1982), relied upon by this Court for its decision mandate the result reached. First of all, neither are possession cases. 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.

In State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982), this Court 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, this 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.

Id. 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.

Additionally, this Court's opinion overlooks the entire like line of constructive possession cases which are applicable to **MR. CHICONE's** situation 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. It is respectfully submitted that the Court should reconsider its opinion in light of these authorities.

B. REHEARING EN BANC

Undersigned counsel express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court:

1) Drain v. State, 601 So.2d 256 (Fla. 5th DCA 1992). In Drain, this Court stated, albeit in dicta that:

> 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);...

Id. at 260. That statement in Drain cannot be squared with the following statement from Chicone:

> 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.

Slip opinion at p. 3.

2) Cordero v. State, 589 So.2d 407, 409 (Fla. 5th DCA 1991). In Cordero this Court acknowledged that knowledge of the illicit nature of contraband is an essential element of all constructive possession cases. Chicone fails to acknowledge or follow that authority.

3) State v. Oxx, 417 So.2d 287 (Fla. 5th DCA 1982). In Oxx this Court acknowledged that in § 893.13, possession has always been defined to include knowing possession of the controlled substance. In Chicone, this Court has read that knowledge element out of the statute.

4) Baldwin v. State, 498 So.2d 1385 (Fla. 5th DCA 1986). In Baldwin, this Court ruled that the state must show that the defendant knew or should have known that the drug

paraphernalia would be used for an illegal purpose. Id. at 1386. The Chicone opinion fails to acknowledge that knowledge element.

C. CERTIFICATION

Should the panel not reconsider its December 2 opinion, and the Court not reconsider the December 2 opinion en banc, **MR. CHICONE** respectfully requests this Court to certify the following issues of great public importance:

1) In a possession of cocaine case, is knowledge that the substance is cocaine an essential element which must be alleged in the information and set forth in the jury instruction?

2) In a possession of drug paraphernalia case, is knowledge that the item is drug paraphernalia an essential element which must be alleged in the information and set forth in the jury instruction?

Should the panel not reconsider its December 2 opinion, and the Court not reconsider the December 2 opinion en banc, **MR. CHICONE** respectfully requests this Court to certify that the Court's opinion conflicts with the following opinions on the same issue of law: Doby v. State, 352 So.2d 1236 (Fla. 1st DCA 1977); Camp v. State, 293 So.2d 114 (Fla. 4th DCA), cert. denied, 302 So.2d 413 (Fla. 1974); Rutskin v. State, 260 So.2d 525 (Fla. 1st DCA 1972); Frank v. State, 199 So.2d 117 (Fla. 1st DCA 1967); Brown v. State, 428 So.2d 250 (Fla.), cert. denied, 463 U.S. 1209 (1983); Skelton v. State, 609 So.2d 716 (Fla. 2d DCA 1992); Moffatt v.

State, 583 So.2d 779 (Fla. 1st DCA 1991); Kuhn v. State, 439 So.2d 291 (Fla. 3d DCA 1983); Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1981).

* * *

II. SENTENCE

A.1. DOUBLE JEOPARDY AND MR. CHICONE'S DUE PROCESS RIGHTS

It is respectfully submitted that this case must be reconsidered by the panel because its holding is in conflict with case law from the United States and Florida Supreme Courts, and presents double jeopardy problems.

Six weeks after sentencing, the trial court imposed several special conditions of probation in a written probation order which were not orally pronounced at sentencing. By vacating **MR. CHICONE's** sentence and remanding the cause for resentencing, this Court would allow the trial court to impose those special conditions of probation which were not originally orally pronounced at sentencing. Allowing these special conditions to be reimposed at the resentencing would result in a harsher sentence, and therefore would violate state and federal double jeopardy law and **MR. CHICONE's** 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 "[t]he 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 the Florida Supreme Court holding in Lippman v. State, 633 So.2d 1061 (Fla. 1994). That 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.

By remanding this cause for resentencing, this Court 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.

2. AUTHORITY IN CONFLICT WITH THE OPINION FILED BY THIS COURT

The holding of this Court is in conflict with the Florida Supreme 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 this Court in its opinion, cannot be squared with those Florida Supreme Court holdings.

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 follow the lead of the Florida Supreme Court in Clark and Lippman, and vacate the second sentencing order, striking any additionally imposed special terms of probation. 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 (citations omitted).

The Supreme Court's holding in Clark has been embraced 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).

B. REHEARING EN BANC

MR. CHICONE moves this Court to rehear this case en banc under the authority of Fla.R.App.P. 9.331. This case is proper for a rehearing en banc, as there is conflict and disagreement as to the proper remedy for dealing with special conditions of probation in a written sentence which were not orally pronounced at sentencing.

This Court has held that in situations where the oral pronouncement differs from the written order, the oral pronouncement governs. Lester v. State, 563 So.2d 178, 179 (Fla. 5th DCA 1990). Once a defendant has begun serving a sentence, a trial court cannot increase the punishment. Bickowski v. State, 530 So.2d 470 (Fla. 5th DCA 1988). In cases where it is clear that the special condition of probation was illegal or invalid, this Court has held that such a special condition must be stricken. See e.g., Gomez-Rodriqueq v. State, 632 So.2d 709 (Fla. 5th DCA 1994); Armstrong v. State, 620 So.2d 1120, 1121-1122 (Fla. 5th DCA 1993). Based on these authorities, it seems clear that an illegally imposed special condition must be ordered stricken and not reimposed on **MR. CHICONE** on remand.

As **MR. CHICONE** argued in his initial brief, certain of the subsequently imposed conditions of probation were invalid or illegal per se. The requirement that **MR. CHICONE** work diligently in a lawful occupation is improper, as it constitutes a mandatory employment. Armstrong; Walls v. State, 596 So.2d 811, 812 (Fla. 4th DCA 1992). For the same reason, the requirement that **MR. CHICONE** not change his employment without the consent of the

probation officer is also improper. The requirement that **MR. CHICONE** comply with all instructions that the probation officer give him is not a standard condition, and it is too vague and indistinct to be considered lawful. Were this Court not to strike the above mentioned conditions of probation, it would contravene its holdings in Gomez-Rodriqueq and Armstrong. However, this Court's opinion in Chicone fails to distinguish between conditions that are illegal per se and those which are illegal because not orally announced at sentencing. Undersigned counsel therefore expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court and that a full consideration by the Court is necessary to maintain uniformity of decisions in this Court: Lester v. State, 563 So.2d 178, 179 (Fla. 5th DCA 1990); Bickowski v. State, 530 So.2d 470 (Fla. 5th DCA 1988); Gomez-Rodriqueq v. State, 632 So.2d 709 (Fla. 5th DCA 1994); Armstrong v. State, 620 So.2d 1120, 1121-1122 (Fla. 5th DCA 1993).

C. PROPOSED QUESTIONS TO BE CERTIFIED TO THE FLORIDA SUPREME COURT

Should this Court choose not to reconsider its prior opinion, or rehear this case en banc, it is respectfully requested that the Court certify to the Florida Supreme Court, as an issue of great public importance, one or both of the following questions:

1. Where the trial court orally imposes special conditions of probation at sentencing, and in a subsequent written order imposes additional special conditions without notice to the defendant and counsel, is the proper remedy: 1) to remand for

resentencing; or 2) to strike the special conditions added in the subsequent written order?

2. Is it a violation of double jeopardy and the due process rights of a defendant to impose, in a subsequent order without notice to the defendant and counsel, special conditions of probation which were not orally pronounced at sentencing?

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 16th day of December, 1994, by U.S. Mail, to **ANTHONY J. GOLDEN, ASSISTANT ATTORNEY GENERAL**, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118; with the original being sent by Federal Express to the **HONORABLE FRANK HABERSHAW, CLERK, FIFTH DISTRICT COURT OF APPEAL**, 300 South Beach Street, Daytona Beach, Florida 32114.

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Appendix C

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

JERRY JAY CHICONE, III,
Appellant,

v. CASE NO. 93-2659

STATE OF FLORIDA,
Appellee.
_____/

DATE: January 12, 1995

BY ORDER OF THE COURT:

Inasmuch as the same was not previously briefed or argued, the cases cited were not previously provided, and there is no record basis therefore, it is

ORDERED that the argument on page five of Appellant's motion is stricken. It is further

ORDERED that the remainder of Appellant's MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFICATION TO THE FLORIDA SUPREME COURT, filed December 19, 1994, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Terrence E. Kehoe, Esq. and James M. Russ, Esq.
Office of the Attorney General, Daytona Beach