IN THE SUPREME COURT OF FLORIDA

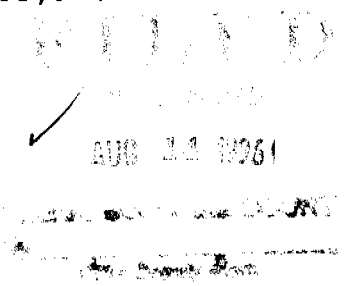
JOHN F. CURRY,

Petitioner,

v. FSC Case No. 85,910

STATE OF FLORIDA,

Respondent.
_____/



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

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, John F. Curry, will be referred to as "Petitioner." Respondent, the State of Florida, will be referred to as "the State" or "Respondent." Citations to the record on appeal will be referred to by the symbol (R) followed by the appropriate page number(s). The opinion of the Second District Court of Appeal is reported at Curry v. State, 656 So. 2d 521 (Fla. 2d DCA 1995).

SUMMARY OF ARGUMENT

I.

The Second District Court of Appeal affirmed Petitioner's sentence, but remanded the case to the trial court to modify certain conditions of Petitioner's community control followed by probation. The Second District certified conflict regarding a condition of Petitioner's community control requiring Petitioner to submit at his own expense to evaluation and treatment programs for alcohol and/or drug problems. As to Petitioner's first issue on appeal, the Second District Court of Appeal did not discuss the alleged impropriety of Petitioner's former trial counsel testifying at Petitioner's sentencing hearing. The court stated "Curry raised other points on appeal which we have concluded did not constitute reversible error." Thus, this Honorable Court should limit its discretionary review to the issue raised by the certified conflict and refuse to address Petitioner's first and third issues on appeal.

Even if this Court reviews Petitioner's first issue, the State submits that the trial court properly allowed Petitioner's former trial counsel to testify at the sentencing hearing. Counsel was entitled to respond to the allegations of misconduct concerning his withdrawal from Petitioner's case. The

allegations were made at Petitioner's plea and sentencing hearings, and were also the subject of an earlier Florida Bar grievance filed against Petitioner's former trial counsel by Petitioner. Consequently, Petitioner waived the attorney-client privilege as to communications concerning his former counsel's reasons for withdrawing from his case.

II.

The Second District Court of Appeal certified conflict with the First District Court of Appeal based on condition eighteen (18) of Petitioner's community control. Condition 18 requires Petitioner to submit to and pay for evaluation to determine whether he has a problem with alcohol and/or illegal drugs. If he is identified as having a problem, then he must submit to and pay for a recommended treatment program. Respondent submits that this condition is merely a more definitive statement of a general condition of probation contained in Florida's statutory law. As such, the trial court was not required to orally pronounce this condition of community control. Accordingly, this Court should reverse the Second District Court of Appeal's decision striking condition 18 of Petitioner's community control.

Petitioner also challenges in his brief conditions six (6) and nineteen (19) of his community control. The portion of

condition 6 not struck by the Second District is a valid general condition of community control which Petitioner had constructive knowledge of based on Form 3.986(e) contained in the Florida Rules of Criminal Procedure. Condition 19, requiring Petitioner to pay fifty dollars ($50) a month towards court costs in the amount of three hundred dollars ($300), is merely a more specific wording of the general condition requiring defendants to pay court costs. Accordingly, these conditions are valid conditions of community control and this Court should affirm the Second District's decision as it relates to these conditions.

III.

Petitioner claims that the court erred in imposing unspecified attorney fees and costs of defense without giving Petitioner notice of the attorney fees and costs. Once again, Petitioner argues an issue to this Court that was not addressed in the Second District Court of Appeal's opinion. Consequently, Respondent questions whether this issue is properly before this Court.

If this Court reviews this issue, Respondent submits that Petitioner had constructive notice of the attorney fees based on Florida statutory law. Furthermore, Petitioner had actual notice based on the three affidavits of insolvency that he signed

detailing his waiver of any notice of attorney fees. Accordingly, this Court should affirm the trial court's imposition of the attorney fees and costs of defense.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ALLOWED PETITIONER'S FORMER TRIAL COUNSEL TO TESTIFY AT PETITIONER'S SENTENCING HEARING.

This Court's jurisdiction is based on article V, section 3(b)(4) of the Florida Constitution. This section allows this Court to review any decision of a district court of appeal that is certified to be in direct conflict with a decision of another district court of appeal. Art. V, § 3(b)(4), Fla. Const. In the instant case, the Second District Court of Appeal certified conflict with the First District Court of Appeal on the issue of a condition of community control. See Curry v. State, 656 So. 2d 521, 522 (Fla. 2d DCA 1995) (certifying conflict with Navarre v. State, 608 So. 2d 525 (Fla. 1st DCA 1992) on a condition of community control requiring Petitioner to submit to and pay for evaluation and treatment of any alcohol or drug problem).

Petitioner appeals his sentence to this Court and reargues issues raised in his direct appeal to the Second District Court of Appeal that were not addressed by the district court in determining the certified conflict. Specifically, Petitioner raises the alleged impropriety of the trial court's decision to allow Petitioner's former trial counsel to testify at

Petitioner's sentencing hearing. The Second District stated in its opinion that "Curry raised other points on appeal which we have concluded did not constitute reversible error." Curry, 656 So. 2d at 522 n.1.

Respondent submits that this issue is not properly before this Court based on this Court's limited jurisdiction in deciding the certified conflict. The district courts of appeal were meant to be courts of final, appellate jurisdiction. Lake v. Lake, 103 So. 2d 639 (Fla. 1958). In Lake, this Court stated

> Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Id. at 642. This Court further opined that when a district court certifies conflict with a decision of another district court of appeal on the same point of law, this Court may grant certiorari, and after careful study, "the decision of the district court of appeal may be quashed or modified *to the end that any conflict may be reconciled.*" Id. at 643 (emphasis added). In the instant case, Petitioner would have this Court review the decision of the Second District on an issue not related to the certified

conflict. Petitioner simply "is not entitled to two appeals." Lake, 103 So. 2d at 642.

Petitioner's reliance on State v. Smith, 573 So. 2d 306 (Fla. 1990) is misplaced. See Initial Brief of Petitioner at 11, Curry v. State (Case No. 85,910). In Smith, the State petitioned this Court to answer questions certified by the Second District Court of Appeal and the defendant filed a cross-petition alleging additional errors. Smith, 573 So. 2d at 309. This Court reviewed and found merit in the issues raised in Smith's cross-petition. Id. at 312.

The Smith case is distinguishable from the instant case in that in Smith, both sides obviously briefed and argued all of the issues to this Court in the defendant's cross-petition, and the Second District Court of Appeal addressed the defendant's issues in its written opinion. See generally Smith v. State, 539 So. 2d 514 (Fla. 2d DCA 1989). As this Court stated in Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982), "once we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues *properly raised and argued* before this Court."

Respondent would argue that Petitioner's first issue is not properly raised in the instant case given the fact that the

Second District Court of Appeal did not address the issue of the trial court's decision to allow Petitioner's former trial counsel to testify at his sentencing hearing. It would be pure speculation to attempt to find a basis for the district court's decision in regards to this issue. The Second District could have found that Petitioner waived his attorney-client privilege when he alleged impropriety against his counsel or, the district court could have found waiver based on the undisputed testimony that Petitioner filed a Florida Bar grievance against his counsel or, the district court may have concluded that even if the trial court erred, it was harmless error given the testimony at Petitioner's sentencing hearing. Consequently, this Court should find that this issue is not properly raised.

Even if this Court does review this issue, Respondent submits that the trial court properly allowed Petitioner's former trial counsel to testify at his sentencing hearing. It was undisputed at the sentencing hearing that Petitioner filed a Florida Bar grievance against his former trial counsel, Paul Levine, and that at least one of the allegations in the grievance involved the reasons for counsel's earlier withdrawal from the case. (R.167,173). In addition, Petitioner raised allegations during his plea and sentencing hearings that the trial court

appropriately interpreted as an attack on Mr. Levine's representation of Petitioner. (R.121-122;173-174).

Florida courts have consistently followed the rule that "a lawyer who represents a client in any criminal proceeding may reveal communications between him and his client when accused of wrongful conduct by his client concerning his representation where such revelation is necessary to establish whether his conduct was wrongful as accused." Turner v. State, 530 So. 2d 45, 46 (Fla. 1987) (quoting Wilson v. Wainwright, 248 So. 2d 249, 259 (Fla. 1st DCA 1971)). Florida Statutes, section 90.502(4)(c) states that "[t]here is no lawyer-client privilege under this section when: . . . (c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to his lawyer, arising from the lawyer-client relationship." § 90.502(4)(c), Fla. Stat. (1995); see also R. Regulating Fla. Bar 4-1.6(c)(2) & (4).

In the instant case, the trial court properly allowed Mr. Levine to testify at Petitioner's sentencing hearing based on Petitioner's waiver of the attorney-client privilege. Respondent submits that Petitioner waived the attorney-client privilege by directing allegations of misconduct towards Mr. Levine in both a Florida Bar grievance, and at the plea and sentencing hearing.

It was undisputed at the sentencing hearing that Petitioner filed a Bar grievance against Mr. Levine, and at least one of the allegations related to Mr. Levine's withdrawal from Petitioner's case. (R.167, 173). In addition, Petitioner made allegations regarding Mr. Levine's withdrawal from the case that placed "a cloud over Mr. Levine's reputation." (R.171-173). Based on these allegations, the trial court properly found that Petitioner waived the attorney-client privilege with regards to the nature of Mr. Levine's withdrawal from the case.

Even if the trial court erred in admitting the testimony of Mr. Levine, Respondent submits that the error was harmless. The trial court's decision to sentence Petitioner to the Department of Corrections for ten years was based on the nature of the charges and on Petitioner's apparent refusal to accept responsibility for his inappropriate sexual actions and to sincerely seek treatment for his pedophilia problem. The trial court considered Petitioner's prior record as well as the testimony of several witnesses prior to imposing his sentence. (R.237-239). It was clear from the witnesses' testimony that Petitioner did not sincerely feel he had a problem that needed treatment. (R.215). Although the evidence established that Petitioner preyed on pre-pubescent males, gaining their affection

by supplying them with drugs, alcohol and gifts, Petitioner told a trusted friend prior to his arrest that he did not want to change his behavior towards the young boys. (R.178-204; 215-216).

Based on all of the testimony, the trial court concluded that Petitioner had never really addressed the underlying problem of his pedophilia. (R.238-239). The court found that Petitioner never sought help for his pedophilia until he was arrested and faced incarceration, despite the fact that Petitioner was aware of his problem for a number of years and was aware of the possible ramifications of his actions. (R.238-239). Given Petitioner's criminal background and numerous failed rehabilitation attempts, the trial court would have imposed the same sentence absent Mr. Levine's testimony. Consequently, Petitioner's sentence should be affirmed.

II.

THE SECOND DISTRICT COURT OF APPEAL ERRED IN STRIKING CONDITION 18 OF PETITIONER'S COMMUNITY CONTROL, BUT CORRECTLY AFFIRMED OR MODIFIED THE OTHER CHALLENGED CONDITIONS.

As part of Petitioner's sentence, the trial court placed Petitioner on community control followed by probation. (R.50-53). Petitioner claims on appeal to this Court that many of the conditions are special conditions which should have been orally pronounced at sentencing. See Initial Brief of Petitioner at 25-26, Curry v. State (Case No. 85, 910). Petitioner states that conditions 4, 5, 6, 8, 11, 15, 18 and 19 are all special conditions that should be struck. Id. at 26.

The Second District Court of Appeal struck conditions 4, 11, and 15 because they were special conditions not orally pronounced at sentencing. Curry v. State, 656 So. 2d 521, 522 (Fla. 2d DCA 1995). The court struck a portion of condition 6 requiring Petitioner not to use intoxicants to excess, but stated that the remainder of the condition was valid. Id. As to Condition 18, the Second District struck this condition but certified conflict to this Court based on Navarre v. State, 608 So. 2d 525 (Fla. 1st DCA 1992). The Second District modified condition 19 to reflect the proper amount of court costs imposed.

Although Petitioner challenges conditions 5, 6 and 8 of Petitioner's community control and alleges that these are special conditions of probation, this Court has held that these are general conditions of probation that need not be orally pronounced at sentencing. See State v. Hart, 668 So. 2d 589, 593 (Fla. 1996); Curry, 656 So. 2d at 523 n.2 (holding that the "trial court lawfully imposed these valid conditions").

The Second District Court of Appeal struck condition 18 of Petitioner's community control, but certified conflict with Navarre v. State, 608 So. 2d 525 (Fla. 1st DCA 1992). Condition 18 of Petitioner's community control states:

> You shall submit to and pay for an evaluation to determine whether or not you have any treatable problem with alcohol and/or illegal drug. If you have said problem, you are to submit to, pay for, and successfully complete any recommended treatment program as a result of said evaluation, all to be completed at the discretion of your Probation Officer. (R.52).

In Navarre, the First District Court of Appeal affirmed "the requirement that Appellant receive drug evaluation and screening and any necessary treatment, as that is a standard condition of probation that can be imposed on any probationer, irrespective of whether it reasonably relates to the type of offense." Id. at 528 (citations omitted).

As this Court stated in Hart, general conditions of

probation contained within the statutes need not be orally pronounced at sentencing. Hart, 668 So. 2d at 592. The rationale for this rule is that the statutes provide a defendant with "constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process." Id. (quoting Tillman v. State, 592 So. 2d 767, 768 (Fla. 2d DCA 1992)).

Respondent submits that condition 18 of Petitioner's community control is merely a more definitive statement of the general conditions of community control contained in Florida Statutes, sections 948.03(1)(k) and 948.03(4). But see Fla. R. Crim. P. 3.986(e) (listing under "Special Conditions" a condition requiring a defendant to "undergo a (drug/alcohol) evaluation and, if treatment is deemed necessary, you must successfully complete the treatment"). Florida Statutes, section 948.03(1)(k) states that, as a general condition of probation, a probationer must submit to random drug testing. § 948.03(1)(k), Fla. Stat. (1995). As the Navarre court correctly held, a condition mandating drug evaluation and any necessary treatment is a standard condition of probation based on the authority of Florida Statutes, section 948.03[k]. Navarre, 608 So. 2d at 528. In

addition, Florida Statutes, section 948.03(4) provides that a court shall require diagnosis and evaluation of a probationer to determine the need for treatment whenever a probationer pleads guilty to a lewd, lascivious, or indecent assault or act upon a child. § 948.03(4), Fla. Stat. (1995). Accordingly, this Court should follow Navarre and reverse the Second District Court of Appeal's decision with regard to condition 18 of Petitioner's conditions of probation. The remaining challenged conditions of probation should be affirmed.

III.

THE TRIAL COURT PROPERLY IMPOSED COSTS AGAINST PETITIONER.

Petitioner asserts in his brief that the court erred in imposing an unspecified amount of attorney's fees and costs without notice to the defendant. This issue was raised on direct appeal to the Second District Court of Appeal, but was not addressed in the court's written opinion. Thus, Respondent adopts the argument contained in its brief on the first issue regarding Petitioner's ability to argue an issue that was not addressed by the appellate court in its decision.

The Second District Court of Appeal addressed court costs imposed pursuant to the trial court's Judgment for Fine and Costs. (R.242). The court modified condition 19 of Petitioner's community control to show total statutory court costs in the amount of $253 instead of $300. The district court struck the $45 costs of prosecution and the $2 portion of the total $5 amount assessed for the Criminal Justice Trust Fund pursuant to section 943.25(13), Florida Statutes (1991). Curry v. State, 656 So. 2d 521, 522-23 (Fla. 2d DCA 1995). The district court did not address the issue of attorney fees and costs of defense.

Even if this Court reviews this issue, Respondent submits

that Florida Statutes, sections 27.56 and 948.03(1)(i) provide Petitioner with constructive notice of these costs. In addition, Petitioner signed three Affidavits of Insolvency which expressly waives the notice requirement of attorney fees. (R.3, 32, 60). If this Court finds that the attorney fees were improperly imposed, Respondent requests that the fees be stricken without prejudice to the trial court to reimpose them after notice and an opportunity to be heard. See Crawford v. State, 616 So. 2d 1158, 1160 (Fla. 2d DCA 1993).

CONCLUSION

Based on the Second District Court of Appeal's opinion, as well as the foregoing arguments and authorities, the State respectfully requests that this Honorable Court reverse the Second District Court of Appeal's opinion striking condition 18 of Petitioner's community control and affirm the remainder of the court's decision.

Respectfully submitted,

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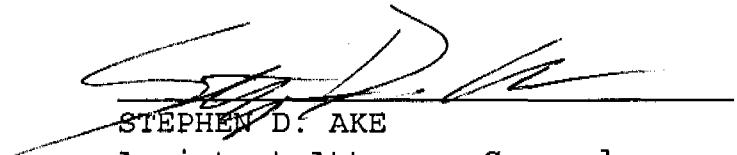

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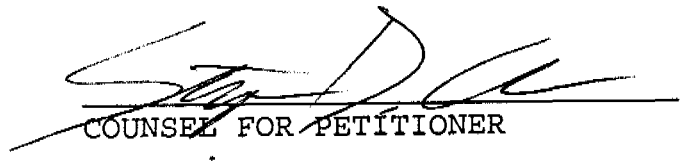
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeffrey E. Appel, Esquire, Holland & Knight, P.O. Box 32092, Lakeland, Florida, 33802-2092, on this 12th day of August, 1996.



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