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IN THE SUPREME COURT OF FLORIDA

LAURIE G. JUSTICE,

Petitioner,

v. CASE NO. 86,264

STATE OF FLORIDA,

Respondent.
_____/

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

PETITIONER'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, Laurie G. Justice, will be referred to as "Ms. Justice." The Respondent, the State of Florida, will be referred to as "the state."

The record on appeal in this case consists of eight volumes. Volumes one through three contain pleadings, orders, and other documents filed in the trial court. Volumes four through seven contain transcripts of the trial. Volume eight contains a transcript of the sentencing proceeding. In this brief, the record on appeal will be referred to by the Roman numeral of the volume, followed by a slash, followed by the appropriate page number. An appendix containing the original opinion of the Fifth District, Ms. Justice's Motion for Rehearing, etc., and the En Banc Opinion of the Fifth District is attached hereto. It will be referred to as "App." followed by the appropriate page reference.

STATEMENT OF THE CASE OF THE FACTS

A. PROCEEDINGS BELOW

This case is a direct appeal from a judgment of conviction and sentence imposed upon Laurie G. Justice in the Circuit Court, Fifth Judicial Circuit, Lake County, Florida ("trial court").

On March 26, 1991, the state filed a criminal information charging Ms. Justice with four counts (I/1-2). Count One charged organized fraud, in violation of § 817.034(4)(a)3, Fla.Stat. Count Two charged Ms. Justice with grand theft of the third degree in violation of § 812.014(1) and (2)(c)1, Fla.Stat. Counts Three and Four charged Ms. Justice with forgery, in violation of § 831.01,

Fla.Stat. The Office of the Public Defender, Fifth Judicial Circuit, was appointed to represent Ms. Justice (I/39).

On September 24, 1991, the state filed an amended information adding Ms. Justice's husband, Thomas Richard Justice, as a defendant on the organized fraud count (I/81-82).

On December 11, 1991, Ms. Justice filed a motion to suppress evidence based on an illegal search and seizure (I/177-81, 187-200; II/217-18, 231-37). After a hearing, the trial court granted the motion to suppress (II/241-42). The state appealed that order (II/248-49), and the proceedings were stayed pending resolution of that appeal (II/256-57). On September 28, 1993, the Fifth District entered an opinion reversing the trial court's suppression order. State v. Justice, 624 So.2d 402 (Fla. 5th DCA 1993).

On December 22, 1993, the state again amended the information, this time dropping Thomas Justice as a defendant, and dropping the grand theft charge (II/327-28).

On January 5, 1994, the state filed another amended information, this time dropping the organized fraud count (II/351-52). It was this information, charging two counts of forgery, upon which Ms. Justice went to trial.

A trial was held on January 10, 11, and 13, 1994. The state presented testimony from four witnesses, and the defense presented testimony from nine witnesses, including Ms. Justice. Three exhibits were entered on behalf of the state, and two on behalf of the defense. The jury returned verdicts of guilty as to both

counts (II/393-94; VIII/691). A post-trial motion for new trial (II/400-01) was denied (VIII/697).

On February 14, 1994, the trial court adjudicated Ms. Justice, a first-time offender, guilty of both counts (III/498-500; VIII/713). She was placed on a period of three years of supervised probation, ordered to pay costs totaling $750.00, and ordered not to maintain a checking account as a special condition of probation (III/502-05; VIII/713). A written judgment and cost order was entered that date (III/498-500).

A timely notice of appeal was filed on February 28, 1994 (III/506). Later that same date a written order setting forth conditions of probation was filed (III/502-05). It contained special conditions not orally announced at sentencing. Two motions to stay the probation order pending appeal (III/514-15, 524-25) were denied by the trial court (III/517, 526). The Fifth District subsequently denied a motion to stay the probation during the pendency of the appeal, and Ms. Justice is presently complying with the written order of probation.

A timely notice of appeal (III/506) and amended notice of appeal (III/527) were filed. The Fifth District affirmed Ms. Justice's convictions, and reversed her sentence and remanded for resentencing (<u>see</u> Part C <u>infra</u>, pp. 8-9). Ms. Justice filed her notice to invoke the discretionary jurisdiction of this Court on August 3, 1995.

This Court has jurisdiction pursuant to Art. V, § 3(b)4, Fla.Const., and Fla.R.App.P. 9.030(a)(2)(A)(v).

B. FACTS

1. GOD'S LOVE CENTER

God's Love Center was founded in May 1986 by Laurie Justice (V/397). It initially operated out of the Justice home (V/397). Its mission was to help the needy people of Lake County by providing emergency aid, called "outreach" (V/398). This aid consisted of food and clothing primarily (VI/402), but also could entail other aid such as financial aid (V/299). One example is the Thanksgiving community dinner the center held (VI/558, 579). The center was founded with the philosophy of providing quick aid without bureaucratic red tape which prevented people from getting quick assistance from governmental agencies (VI/572). One Lake County attorney, Jefferson Ray, testified that God's Love Center was a "tremendous ministry" for helping the poor (VI/542).

In the beginning, there were three members of the Board of Directors: Laurie Justice, her husband Tom Justice, and Andrew Ward (V/397-98). However, Laurie Justice ran virtually the entire operation (V/397).

In December, 1986 God's Love Center moved to Tavares (V/399). In January, 1988 the center purchased a lease option on an old church in Eustis (VI/403). The Justices personally paid the $2,400.00 required to obtain that lease option (VI/408).

In 1988 Janice Reynolds joined God's Love Center as a secretary, and eventually a board member. She became Laurie Justice's right arm (V/320). Between the two of them, they handled most of the day to day requests for aid. They were given freedom

to make judgment calls (V/314). The bylaws specified that any expenditure over $65.00 must be approved by either the director or the board (V /297). Laurie Justice was the director (VI/566). She had virtual autonomy in making emergency financial decisions (VI/573).

As far as aid or outreach was concerned, staffers could be eligible for aid if a need existed. In fact, aid was common to the staff (V/330). Janice Reynolds testified that her family received aid (V/329). Various members of the Board of Directors agreed that electricity being turned off could be an emergency that would justify aid (V/331-32, 360).

2. JUSTICE FAMILY FINANCIAL STATUS

Laurie and Tom Justice have two teen-age daughters (VI/517). Tom Justice has worked as a number of years at Sta-Con, Inc. in Apopka (VI/405). During the time periods relevant to this case (1986-1990), Laurie Justice did not work at a salaried job. In the period 1986-1990, Laurie Justice estimated that she and her husband put more than $10,000.00 into God's Love Center, and had been reimbursed $4,000.00 (VI/503).

In late 1988 Laurie Justice inherited $60,000.00 (VI/446). That money was used to pay off debts, to secure the option on their home, to buy cars, computers, and clothing (VI/499). Three thousand dollars was loaned to God's Love Center (VI/516). Some more money was given away. By August 1989 the entire inheritance had been depleted (VI/521).

In 1989, Tom Justice was in bad health for large portion of the year due in part to a hernia problem (VI/493). He spent some time in the hospital, and was not working (VI/493). He went back to work in November, 1989 (VI/424). When he was working, he brought home approximately $1,400.00 to $1,500.00 per month (VI/494).

Because of financial problems, the Justice family obtained outreach at various times (V/331; VI/431, 481-92, 509-17).

3. TWO CHECKS

During the relevant time period (1990) of this case, there were four signatories on the God's Love Center checking account: Tom Justice, Laurie Justice, Janice Reynolds, and Andrew Ward (V/319, VI/405). The checks all required at least two signatures (VI/405). Often, Tom Justice would sign checks in blank because he was seldom at the center (V/333). Janice Reynolds would also often sign checks in blank (V/333).

God's Love Center check number 1644 was made out to the City of Mount Dora in the amount of $97.72 (II/364). It bore the date of January 10, 1990. One of the two signatures was that of Laurie Justice (VI/427-28). Laurie Justice had signed Janice Reynolds' name as the second signature (VI/428).

God's Love Center check number 1699 was issued to the City of Mount Dora in the amount of $151.46 (II/366). It bore the date of February 14, 1990. One of the signatures was that of Laurie Justice (VI/461). Laurie Justice admitted to signing Janice Reynolds' name for the second signature (VI/462).

As to the February check, Ms. Justice explained that on that date she came home and her power was shut off (VI/425). The money had to be paid by 5:00 p.m. in order to have the electricity turned back on (VI/425). Due to recent health and marital problems concerning her husband, she could not wait to the next day to have the electricity turned on. She attempted to find Janice Reynolds to obtain her signature (VI/426-27). When she could not, she signed Janice Reynolds' name (VI/428). She considered it emergency outreach (VI/476, 529).

As to the January check, Ms. Justice did not recall the specifics (VI/432). Because of the notation of the bottom of the check, she believed it was used to replace a bounced check to pay the utilities (VI/432).

Ms. Justice testified that under the circumstances, she believed it was okay to sign Janice Reynolds' name and that she had done nothing wrong (VI/475). She believed that Janice Reynolds would have signed it had Janice Reynolds been available (VI/475). She believed that she had the implied authority to sign Janice Reynolds' name based on her relationship with God's Love Center and with Ms. Reynolds (VI/526). On February 16, 1990 Laurie Justice repaid God's Love Center with $400.00 for reimbursement of the two utility checks (V/375, 381).

Janice Reynolds testified that those were not her signatures on either check number 1699 (V/321-22) or check number 1644 (V/325-26). She did not recall providing Ms. Justice with authorization (V/326). She testified that if Ms. Justice had been able to

contact her, she would have signed the check or told the city to honor the check with only one signature (V/336).

Charles McArthur, a Lake County Pastor who was on the Board of God's Love Center for nine months, during which time he was chairman of the finance committee (V/293), testified that the board never authorized either of these two checks (V/300). He further testified that the Justice situation would have warranted help (V/313).

The state presented testimony from an employee of the City of Mount Dora utilities to show that no record existed of any shut-off order (V/350) and no record existed to show that any reconnect fee had been charged for turning the utility back on (VI/631-32).

C. FIFTH DISTRICT'S DECISIONS

On appeal, Ms. Justice raised four issues: 1) the denial of her "theory of the defense" instruction on authority to sign the checks, 2) the denial of Ms. Justice's request to speak with her attorney while the jury was not in the courtroom, and the denial of her attorney's request for a recess; 3) the increased sentence due to Ms. Justice's refusal to waive her appellate rights; and 4) the inclusion of special conditions of probation which were not orally announced at sentencing.

On March 3, 1995, the Fifth District issued a per curiam opinion, with a special concurrence and a dissent (App. A). The majority ruled that Ms. Justice's claims of error concerning her judgment of conviction and length of sentence were rejected as lacking merit (App. A, p. 1). It remanded the sentence for

resolution of the discrepancy between the record of the oral pronouncement and the written order (App. A, pp. 1-2). In his special concurrence, Chief Judge Harris set forth his rationale for why the Fifth District handled such sentencing "discrepancy" cases differently from the other district courts of appeal (App. A, pp. 3-5). In dissent, Judge Griffin also noted the conflict with the First, Second, and Fourth Districts. She would follow the other districts and require the striking of unannounced special conditions of probation, rather than permitting them to be reimposed at resentencing (App. A, pp. 6-8).

Ms. Justice filed a motion for rehearing, rehearing en banc or certification to the Florida Supreme Court (App. B). On July 21, 1995, the Fifth District issued an en banc opinion (App. C). The majority opinion, authored by Judge Harris, again recognized conflict with other district courts of appeal (App. C, p. 2). It permitted the trial court, at resentencing, to impose any special conditions of probation, whether imposed at the initial sentencing or not. It certified the following question to this Court:

> **WHERE A SENTENCE IS REVERSED BECAUSE THE TRIAL COURT FAILED TO ORALLY PRONOUNCE CERTAIN SPECIAL CONDITIONS OF PROBATIONS WHICH LATER APPEARED IN THE WRITTEN SENTENCE, MUST THE COURT SIMPLY STRIKE THE UNANNOUNCED CONDITIONS, OR MAY THE COURT ELECT TO "REIMPOSE" THOSE CONDITIONS AT RESENTENCING?** (App. C, p. 6).

The lone dissenter, Judge Griffin, reiterated her belief that the unannounced special conditions of probation must be stricken, and cannot be reimposed at resentencing (App. C, pp. 7-12).

SUMMARY OF ARGUMENTS

I.

NON-STANDARD CONDITIONS OF PROBATION WHICH WERE NOT ORALLY PRONOUNCED MUST BE STRICKEN

The February 28, 1994, written order imposing conditions of probation sets forth a number of conditions which were not orally pronounced at the sentencing on February 14, 1994. All non-standard conditions of probation which were not orally pronounced must be stricken.

II.

DENIAL OF PROPOSED DEFENSE INSTRUCTION ON AUTHORITY TO SIGN CHECKS DENIED MS. JUSTICE A FAIR TRIAL

Ms. Justice was denied her fundamental rights to due process and a fair trial due to the trial court's denial of her proposed jury instruction on the defense of authority.

ARGUMENTS

I.

NON-STANDARD CONDITIONS OF PROBATION WHICH WERE NOT ORALLY PRONOUNCED MUST BE STRICKEN

On February 14, 1994, Ms. Justice was sentenced in this case. At that time, the trial court orally imposed a sentence of three years of supervised probation. The trial court also orally set forth conditions of the probation. Those were payment of certain costs and not having a checking account (VIII/713). There is no discrepancy as to what the trial court orally pronounced. Neither side has contested the correctness of the transcript on this point.

Subsequently, the trial court filed a written order placing Ms. Justice on probation on February 28, 1994[1] (III/502-05).

There are obvious differences between the oral sentence imposed on Ms. Justice by the trial court on February 14 and the conditions set forth in the written probation order of February 28. 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 was error to add conditions in the subsequent written order. Skiff v. State, 627 So.2d 614 (Fla. 4th DCA 1993). First, the trial court lacked jurisdiction to amend or modify the sentence after the notice of appeal was filed. Gorman v. State, 636 So.2d 203 (Fla. 1st DCA 1994). More importantly, it was illegal for the trial court to enter a written order imposing numerous additional special conditions of probation two weeks after the sentencing hearing. See Lippman v. State, 633 So.2d 1061, 1064 (Fla. 1994); Clark v. State, 579 So.2d 109, 110-11 (Fla. 1991). If the trial court wanted to impose the special conditions of

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1 In its body, the written order does not specify whether Ms. Justice was adjudicated guilty or not. Since it is clear that the trial court did adjudicate Ms. Justice guilty, this written order must be corrected to properly reflect the trial court's judgment.

probation, it was under a legal duty to do on February 14, 1994, in the presence of Ms. Justice, her counsel, and the prosecutor.

Once a defendant has begun serving a sentence, a trial court cannot increase the punishment. Troupe v. Rowe, 283 So.2d 857 (Fla. 1973); 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). In Ms. Justice's case, she had begun serving the probation and had begun complying with the standard and special conditions set forth on February 14. The addition of numerous new special conditions two weeks later certainly increased Ms. Justice's sentence, as each of these conditions imposed some restriction on her liberty.

One of the procedures discussed by the en banc majority in Justice is that of calling the defendant back for a second sentencing hearing in the presence of counsel where the trial court wishes to announce additional special conditions of probation. It should be noted, of course, that did not happen in Ms. Justice's case. There was never any attempt to set a second sentencing hearing. Instead, the additional, special conditions of probation were simply added in the written order. Neither counsel nor Ms. Justice were notified of the special conditions until the trial court entered its written order on February 28, 1994.

Secondly, and most importantly, the calling back of a defendant for a second sentencing hearing, and the addition of more conditions of probation, would clearly violate the dictates of Lippman, supra; Clark, supra; and Troupe, supra. See also, Zepeda

v. State, __ So.2d __ (Fla. 5th DCA 8/11/95)[20 Fla. L. Weekly D1829, D1830]; C. M. v. State, __ So.2d __ (Fla. 2d DCA 8/9/95)[20 Fla. L. Weekly D1811]; Johnson v. State, __ So.2d __ (Fla. 3d DCA 7/26/95)[20 Fla. L. Weekly D1702].

The en banc majority in Justice seems to believe that there was no "sentence" until the entry of a written order some two weeks after the sentencing hearing (App. C, pp. 3-4). However, a sentence is the pronouncement of the court, Fla.R.Crim.P. 3.700(a), and begins as soon as the sentencing hearing is completed. Troupe, supra. Surely the state does not contend that if Ms. Justice had been arrested for a new offense in the two weeks between the sentencing and the filing of the written order, that she would not be subject to a violation of probation. Ms. Justice began serving her sentence when she walked out of the courtroom on February 14, 1994. Under well-established state and federal double jeopardy and due process principles, that sentence could not thereafter be increased except for limited circumstances such a violation of probation. Troupe, Clark, and Lippman, all prevent the trial court and the state from a second "bite of the apple" at a second sentencing, or a resentencing, contrary to the contentions of the en banc majority.

In a probation setting, the courts have carved an exception to the general rule of notice. Because the standard conditions of probation are set forth in Florida Statutes, § 948.03, § 948.031, § 948.032, and § 948.034, the courts have held that a probationer 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. 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 Ms. Justice's written order fail to comply these rules, and therefore 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, 1121-22 (Fla. 5th DCA 1993). See also Dycus, supra; Olvey v. State, 609 So.2d 640 (Fla. 2d DCA 1992); Cumbie, supra.

A. POSSESSION OF WEAPONS AND FIREARMS:

Paragraph four of the February 28 order states: "You will neither possess, 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. As a convicted felon, Ms. Justice may not possess any firearm. However, there is no such proscription against possession of weapons other than firearms. Therefore, applying the rationale of Quinonez v. State, 634 So.2d 173 (Fla. 2d DCA 1994), this condition must be stricken. Second, as this could include virtually anything other than a common pocketknife, the condition is over-broad. Third, as there is no indication that violence was involved, this condition bears no relationship to the facts of the case and must be stricken.

B. USE OF INTOXICANTS:

Paragraph six of the February 28 order states, in part, 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." This condition 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.; Quinonez, supra; Gregory v. State, 616 So.2d 174 (Fla. 2d DCA 1993).

C. EMPLOYMENT:

Paragraph seven of the February 28 order requires Ms. Justice to work at a lawful occupation, and notify her employer of her probation status. Paragraph three of that order requires that she not change her employment without the consent of the probation officer. 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. Walls v. State, 596 So.2d 811, 812 (Fla. 4th DCA 1992). For the same reason, the requirement that Ms. Justice not change her employment without the consent of the probation officer is also improper. A change in employment is not always voluntary. Instead, the trial court should have ordered Ms. Justice to maintain or actively seek lawful employment. There should not be any requirement that Ms. Justice notify her employer of her probation. This condition must be modified on remand.

D. INQUIRIES/VISITS BY PROBATION OFFICER

In part, paragraph eight of the February 28 order requires Ms. Justice to allow the probation officer to visit her at her home or place of employment, and requires Ms. Justice to comply with all instructions she may be given by that officer. The visitation requirement is a standard condition and not objected to. However, the requirement that Ms. Justice comply with all instructions that the probation officer give her is not a standard condition, and is too vague and indistinct to be a lawful condition. While Ms. Justice must obviously comply with lawful instructions of the probation officer which specifically relate to the various conditions imposed upon Ms. Justice, she is under no obligation to comply with all instructions without limitation.

E. CONSUMPTION OF ALCOHOL

In part, paragraph 6 of the February 28 order states that Ms. Justice will not use intoxicants to excess. Putting aside the fact that she does not drink alcohol at all, this is not a standard condition of probation, and was not orally pronounced at sentencing. It must therefore be stricken from the probation order.

F. SEARCH WITHOUT WARRANT

Paragraph 9 of the February 28 order requires Ms. Justice to submit to a search, without warrant, by the probation officer of her person, residence, and/or property. This is not a standard condition of probation and was not a special condition announced at sentencing. It must therefore be stricken.

G. PAYMENT FOR FIRST STEP, INC.

Paragraph 12 of the February 28 order requires Ms. Justice to pay $1.00 per month for each month of supervision to First Step, Inc. of the Fifth Circuit. It is not statutorily authorized. Additionally, condition was not announced by the trial court at sentencing. It must be stricken. See e.g., Botts v. State, 634 So.2d 197 (Fla. 5th DCA 1994); Catholic v. State, 632 So.2d 272 (Fla. 4th DCA 1994)(written condition requiring probationer to pay for certain tests must be deleted where not announced at sentencing).

H. DRUG TESTING AND TREATMENT

Paragraph 10 of the February 28 order requires Ms. Justice to submit to and be financially responsible for drug testing and participate in a drug treatment program, including residential and aftercare, as directed by the probation officer. That condition was not orally announced by the trial court at sentencing. This case is not a drug case, and there is no indication that Ms. Justice has any history of involvement with drugs. This condition therefore bears no relationship to the offenses for which she was convicted. It must be stricken. Additionally, the condition requiring her to pay for the testing or treatment must be stricken. Catholic, supra.

* * *

This is an important issue for the Court to address because it happens fairly frequently that the written order of probation includes matters not orally announced at sentencing. The Fifth District has recognized the importance of the issue by certifying

it to this Court. This Court has a recognized the importance of the issue by accepting three cases for review which discuss this issue. See, Ms. Justice's Notice of Similar Cases, dated September 11, 1995. It is also clear that the Fifth District's decision conflicts with decisions of other courts of appeal on the same issue. Because of the important due process and double jeopardy principles involved in this issue, this Court should accept jurisdiction over this case and reach the merits of the issue. Based on the arguments and authorities set forth above, this Court must reverse the Fifth District's decision, and remand with instructions that no "resentencing" occur, but rather that all special conditions of probation which were not announced on February 14, 1994, must be stricken from Ms. Justice's probation.

II.

DENIAL OF PROPOSED DEFENSE INSTRUCTION ON AUTHORITY TO SIGN CHECKS DENIED MS. JUSTICE A FAIR TRIAL

A. JURISDICTION.

Once this Court has determined to accept jurisdiction over a case, it has the authority to consider and decide all legal issues properly preserved and presented. In Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982), this Court clearly stated that:

> Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case. See, Whitted; Miami Gardens, Inc. v. Conway, 102 So.2d 622 (Fla. 1958); Vance v. Bliss Properties, Inc., 109 Fla. 388, 149 So. 370 (1933).

Two and one-half years later, this Court again clearly stated its position in Tillman v. State, 471 So.2d 32, 34 (Fla. 1985):

> The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction, in its discretion, to review the district court's "decision." Art. V, § 3(b)(4), Fla. Const. Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and presented. See, e.g., Trushin v. State, 425 So.2d 1126 (Fla. 1983).

In Reed v. State, 470 So.2d 1382, 1383 (Fla. 1985), this Court stated:

> We first address the issue of our scope of review. Respondent urges that we limit our review to the certified question and not reach the issue of whether the United States Constitution grants petitioner the right to a jury trial. We decline to do so. First, our scope of review encompasses the decision of the court below, not merely the certified question. Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976); Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

Again, in Lee v. State, 501 So.2d 591, 592 (1987), the Court stated:

> Although we have jurisdiction to consider issues ancillary to those directly before this court in a certified case, we decline to entertain Lee's Glosson claim, as we have determined the claim would not affect the outcome of the petition. See Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983).

The further point made in Lee is that this Court does not have to consider ancillary issues where the issue directly before the Court has been decided in favor of the petitioner. In Lee, this Court decided the issue directly before it in favor of Mr. Lee by

allowing him to withdraw his plea of guilty, and thereby nullifying his conviction and sentence. Consequently, it was unnecessary for this Court to decide the other issues since they "would not affect the outcome of the petition."

A decision on the sentencing issue raised by Ms. Justice does not eliminate the need to determine the jury instruction issue. If this Court decides the jury instruction issue discussed below in Ms. Justice's favor, a reversal of her convictions and sentence will occur and a new trial will be ordered. This decision will therefore "affect the case." Trushin, 425 So.2d at 1130. Therefore, the scope of review encompasses this jury instruction issue.

B. THE MERITS

At trial, Ms. Justice admitted signing both her name and Janice Reynolds' name to the two checks at issue. One facet of her defense was that she signed Ms. Reynolds' name on authority of God's Love Center or on authority of Ms. Reynolds. Evidence was presented to support that defense (V/333; VI/446, 475, 526, 566, 573).

Ms. Justice had the authority to approve payments under $65.00 (V/297). In fact, Ms. Justice had the authority to approve expenditures over $65.00 also. The bylaws specified that any expenditure over $65.00 must be approved by either the director or the board (V/297). Ms. Justice was the director (VI/566-67), and therefore had the authority to approve by herself expenditures over $65.00. The philosophy behind God's Love Center was to provide emergency aid quickly, without any red tape (VI/572). Ms. Justice

had virtual autonomy in making emergency financial and spending decisions (VI/573). Utilities were considered emergency outreach (V/360).

The testimony concerning the relationship between Janice Reynolds and Laurie Justice would also support an authority defense. Janice Reynolds testified that she often signed checks in blank so that Ms. Justice could make payments or outreach disbursements when Ms. Reynolds was not there (V/333). This demonstrated that Ms. Reynolds' signature was perfunctory, not a matter of an oversight or second approval for the expenditure. Ms. Justice testified that she believed that her signing of Ms. Reynolds' name was proper (VI/526). She testified that she believed that she had the implied authority to sign Janice Reynolds' name based on her relationship with God's Love Center and Ms. Reynolds (VI/526). Ms. Reynolds testified that had she been contacted by Ms. Justice that Ms. Reynolds would have either signed the check or told the city to honor the check (V/336). With these facts, there was certainly evidence to support the defense of authority.

In connection with that defense, Ms. Justice requested the trial court instruct the jury as follows:

> If you find Laurie Justice had authority, implied or actual, to write the check, then you must find Laurie Justice not guilty of the crime charged. (VII/676-77).

The trial court refused to do so (VII/677-78).

A defendant is entitled to have the jury properly instructed on any valid defense supported by the evidence. Palmes v. State,

397 So.2d 648 (Fla. 1981). If any evidence is presented to support the defendant's theory of the defense, a jury instruction on that defense must be given, no matter how weak or improbable the defense may be. Campbell v. State, 577 So.2d 932, 935 (Fla. 1991), cert. denied, 462 U.S. 1145 (1992); Bryant v. State, 412 So.2d 347, 350 (Fla. 1982); Palmes, 397 So.2d at 652; Solomon v. State, 436 So.2d 1041 (Fla. 1st DCA 1983). See also Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 610-11, 112 L.Ed.2d 617 (1991). It does not matter if the evidence comes from the defendant or some other witness.

A good faith belief that one has authorization or authority to sign another's name is a valid defense to forgery or uttering a forged document since it negates the falsity and intent to defraud elements. Barker v. State, 83 So. 287 (Fla. 1919); Perkins, Criminal Law, pp. 427-29 (3d ed. 1992). In Barker, an utterance of a forgery prosecution, the trial court refused to give the requested instruction on the defense of authority. This Court reversed the conviction, pointing out that this defense was not covered in the other instructions given by the trial court. Id. at 589.

More recently this issue arose in Perkins v. State, 463 So.2d 481 (Fla. 2d DCA 1985), a case involving three counts of uttering a forged check. There the trial court denied a defense request for an instruction on the defense of authority. The Second District affirmed because 1) the defense was adequately and fairly presented to jury in the trial court's standard jury instruction on uttering a forgery, and 2) the proposed instruction contained unnecessary

comment on the evidence. Id. at 482-83. Barker, although distinguished by the Second District in Perkins, is still the governing authority on this issue in the state of Florida. Hoffman v. Jones, 280 So.2d 431, 433-34 (Fla. 1973).

In Ms. Justice's case, the jury was instructed that the state must prove two elements beyond a reasonable doubt: 1) that Laurie Justice falsely made the check at issue, and that 2) Ms. Justice intended to injure or defraud some person or firm. The trial court further instructed the jury that it was not necessary that Ms. Justice intended to use the check herself or to profit herself from its use. It is sufficient if she intended that some person use it to injure or defraud. The jury was also instructed that it was not necessary to prove what person Ms. Justice intended to be injured or defrauded if she intended that some person would be injured or defrauded (VII/678-79).

Although Ms. Justice (VII/649-50) and the state (VII/670) were able to address the authority defense in closing argument, the fact the defense was argued to the jury does not eliminate the requirement of an actual instruction on a valid offense being included in the instructions to the jury. Unless a jury is actually told by the trial court that "authority" is a valid defense to a forgery charge, since it negates the falsity and intent to defraud elements, it may choose to ignore the argument of counsel on that point. See Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)(argument of counsel is no substitute for a proper instruction by court). While a jury is free to disregard argument of counsel, it is not free to disregard

an instruction by the trial court. Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 1200, 109 L.Ed.2d 316 (1990). Most importantly, a defendant is entitled to have a jury properly instructed on the legality of the defense in order to give defense counsel's argument credibility based on the jury instruction.

With all respect to the Second District and its decision in Perkins, the standard forgery instruction given to Ms. Justice's jury does not adequately address the defense of authority. There is absolutely no mention whatsoever in the standard forgery instruction of the defense of authority. While one can infer that someone who "falsely" made a document did not have authority, a jury must be told that authority is a viable, legal defense to the charge of forgery. Ms. Justice's jury was not told that at her trial, despite a specific request that such an instruction be given. Unlike the proposed instructions in Perkins, the Justice proposed instruction did not contain any impermissible comment on the evidence. It simply advised the jury as to the defense of authority, without any extraneous verbiage.

Due to the Fifth District's failure to give any reason for its decision on this jury instruction issue, all parties are left to wonder as to the basis for its decision. However, based on the arguments above, its decision cannot be squared with existing case law, and most particularly this Court's decision in Barker. Due to the trial court's refusal to instruct the jury on the legally viable defense of authority, this Court must reverse the judgments and sentence and remand this case for a new trial on both counts.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must vacate the judgments and remand with instructions that Ms. Justice be given a new trial on both counts. Should this Court uphold the convictions, the case must be remanded with instructions that the trial court strike the unannounced, special conditions of probation.

RESPECTFULLY SUBMITTED this 11th day of September, 1995, at Orlando, Orange County, Florida.

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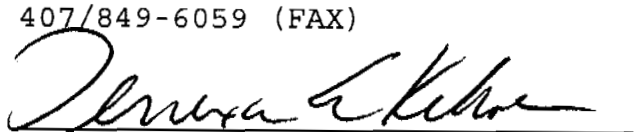
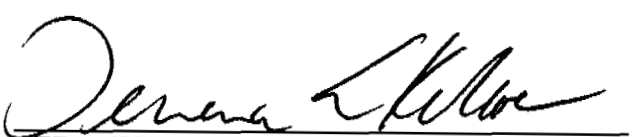


TERRENCE E. KEHOE
Florida Bar No. 0330868

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing with attached appendix has been furnished on this 11th day of September, 1995, by U.S. Mail, to Kellie A. Nielan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.



TERRENCE E. KEHOE
Florida Bar No. 0330868

IN THE SUPREME COURT OF FLORIDA

LAURIE G. JUSTICE,

Petitioner,

v. CASE NO. 86,264

STATE OF FLORIDA,

Respondent.
_____/

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

APPENDIX TO PETITIONER'S BRIEF ON MERITS

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INDEX TO APPENDIX
ON PETITIONER'S BRIEF ON MERITS

Appendix A

20 FLW D546

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

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

LAURIE G. JUSTICE,

Appellant,

v.

CASE NO. 94-501

STATE OF FLORIDA,

Appellee.

_____/

Opinion Filed March 3, 1995

Appeal from the Circuit Court
for Lake County,
Mark J. Hill, Judge.

Terrence E. Kehoe, Law Offices of
Terrence E. Kehoe, Orlando,
for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General, Daytona Beach,
for Appellee.

PER CURIAM

The defendant's claims of error resulting in her judgment of conviction and the length of her sentence are rejected as lacking merit. Because the state has conceded that the written judgment contains several conditions of probation not orally announced, however, in line with *Cleveland v. State*, 617 So. 2d 1166 (Fla. 5th DCA 1993), we remand

for resolution of the discrepancy between the record of the oral pronouncement and the written order. Finding that a discrepancy exists, however, does not mean that the judge cannot impose the unannounced conditions. It merely means that if the court intends to condition probation on the written conditions not previously orally announced, it should, at "resentencing," make this intention known to the defendant and give her an opportunity to reject probation.

AFFIRMED in part; REVERSED in part and REMANDED.

THOMPSON, J., concurs.
HARRIS, C. J., concurs and concurs specially, with opinion.
GRIFFIN, J., dissents, with opinion.

HARRIS, C. J., concurring and concurring specially **CASE NO. 94-501**

I concur in the majority but I write to respond to the dissent's contention that the trial court, upon remand, is powerless to impose conditions not announced at the original sentencing hearing but considered essential to probation at the time the judgment was entered. All courts agree that special conditions cannot survive appeal if the defendant has not had the opportunity to object to them. In such instances, the cause must be reversed and remanded because the defendant was not given the opportunity to challenge the special conditions of probation. We disagree, however, with other appellate courts on how the problem may be corrected. The other appellate courts merely remand with directions to the sentencing court to delete the unannounced conditions from the judgment; we, on the other hand, permit the trial court, if it so desires, to conduct a new sentencing hearing so that it may properly announce and impose any conditions that it feels appropriate.

Although it is important that we know <u>what</u> the other appellate courts do on the issues that come before us, it is even more important that we know <u>why</u>. As an equal, independent court charged with the responsibility of determining what the law is in this district, we owe it to our litigants to make an independent determination. Most often we agree with the other appellate courts. But if we disagree, we should say so and explain our position. The supreme court will resolve the conflict.

Those courts that require that the unannounced conditions be stricken from the judgment do so because the "oral controls over the written." But they have not explained why the trial court cannot cure the problem by resentencing. We start from the proposition that sentencing, so long as it is within the statutory maximums, has traditionally been the

province of the trial court. This is also true of resentencing after remand. Certainly the resentencing may not be used to "punish" one for taking an appeal[1] nor may it be used (or abused) to avoid the consequences of statutory sentencing guidelines.[2] Neither is the case here. A sentence is not final until rendered -- reduced to writing and filed with the clerk. Fla. R. App. P. 9.020(g). Before that time, there is no sentence to "add to" or modify. This distinguishes this case from *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994), and *Clark v. State*, 579 So. 2d 109, 110 n.3 (Fla. 1991).

The imposition of unannounced conditions in the written judgment does not punish the defendant for exercising any constitutional right. The only "right" affected is the defendant's "due process" right to have the special conditions of probation announced in open court so that objections can be made. *Olvey v. State*, 609 So. 2d 640 (Fla. 2d DCA 1992). As the supreme court stated in *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Failing to announce conditions does not create a "gotcha" situation in which a trial court, on reflection prior to entry of the judgment, is precluded from imposing conditions it deems necessary even if they were not previously announced at the sentencing hearing. It merely means that the defendant must be given an opportunity to make his or her objections of record before such conditions are valid. It would be preferable if it intends to impose previously unannounced conditions for the court to call the defendant back for a new sentencing hearing prior to signing the

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[1] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

[2] *Pope v. State*, 561 So. 2d 554 (Fla. 1990).

judgment. If the court does not properly announce its special conditions, we have no alternative but to reverse for resentencing. But even after reversal, sentencing remains the trial court's function and the determination of what conditions are necessary for probation, if properly announced, should be left to it.

The dissent follows the path the supreme court took in *Pope v. State*, 561 So. 2d 554 (Fla. 1990), in which the court imposed a prophylactic rule to prevent "multiple appeals, multiple resentencings and unwarranted efforts to justify an original departure." *Pope*, 561 So. 2d at 556. We believe that such prophylactic rules limiting the authority of the trial court should be used only in the most extreme situations. We do not see unannounced conditions of probation as a major source of appeals. And the requirement of resentencing itself, because of the trial court's heavy docket, encourages the trial court to get it right the first time. Further, we do not perceive the trial bench as resisting the requirement to orally announce special conditions. This appears to be a problem of oversight created by the volume of criminal sentencings. It might be, because of large dockets, the trial court will sometimes prefer to merely strike the unannounced condition rather than resentence. But the trial court should have the authority, if it so desires, to impose such conditions as it deems appropriate after conducting a new sentencing hearing which provides the defendant with his or her right to object to the special conditions.

GRIFFIN, J., dissenting. 94-501

I respectfully dissent.

The First, Second, and Fourth Districts all have held that a written order containing unannounced conditions of probation must be amended to conform to the oral pronouncement of judgment and sentence by striking the unannounced conditions. *See, e.g., Bartlett v. State*, 638 So. 2d 631 (Fla. 4th DCA 1994); *Christobal v. State*, 598 So. 2d 325 (Fla. 1st DCA 1992); *Turchario v. State*, 616 So. 2d 539 (Fla. 2d DCA 1993). The lower court is not free at a resentencing to simply add the previously unannounced conditions.

As I understand our prior case law, on which *Cleveland v. State* was grounded, this court contemplated the possibility that where there was a discrepancy between the record of the oral pronouncement and the judgment and sentence as written down, the error might have, in fact, resided in the record of the oral pronouncement. *Harden v. State*, 557 So. 2d 926, 927 (Fla. 5th DCA 1990) (Cobb, J., concurring). Rather than mechanically apply the "oral prevails over the written" rule by ordering the written to conform to the oral, this court has preferred to send the matter back to the trial court to verify what was, in fact, orally pronounced. This procedure has no application in cases like this one, where the court has failed to announce multiple special conditions of probation that were later included in the written order.

Although the Florida Supreme Court has not considered a case such as this where the sentencing court attempted to add unannounced conditions of probation in the *original* written sentence, the court has clearly held that probation conditions cannot be added to

an existing sentence, absent a finding of violation of probation. *Lippman v. State*, 633 So. 2d 1061, 1063 (Fla. 1994). The addition of conditions of probation is as impermissible as any other enhancement of a previously announced sentence. *Id.* Just as the lower court cannot later add probation to an announced sentence, it cannot later add a condition of probation.[1] The court has explained that the sentencing court is authorized only to modify "theretofore imposed" terms. *Clark v. State*, 579 So. 2d 109, 110 n.3 (Fla. 1991).

An order of probation, like any other aspect of sentencing, ought not to be a sort of work in progress that the trial court can add to or subtract from at will so long as he or she

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[1] I add this footnote to respond to two points made by Judge Harris in his special concurrence. First, as to his twin contentions that a sentence does not exist and/or is not "final" until the written judgment, the definition of rendition for appeal purposes is not relevant to the issue before us. There most certainly *is* a sentence before a written judgment. Indeed, the very definition of "sentence" in Florida, first by statute and, for the last twenty-five years, by Florida Rule of Criminal Procedure 3.700 (a)(b) is:

> (a) **Sentence Defined.** The term sentence means the *pronouncement* by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty. [Emphasis supplied.]

The written sentence is merely a record of the actual sentence pronounced in open court. *Kelly v. State*, 414 So. 2d 1117 (Fla. 4th DCA 1982). *That* is "why" the other appellate courts of this state do what they do on this issue. Second, although I'm not sure how important it is to the debate, I take issue with the statement that the addition of unannounced conditions of probation is not a major source of appeals. It is and has been for several years. A few recent examples are: *Willis v. State*, 640 So. 2d 1188 (Fla. 5th DCA 1994); *Sweet v. State*, 644 So. 2d 176 (Fla. 5th DCA 1994); *Jamail v. State*, 637 So. 2d 362 (Fla. 1st DCA 1994); *Peterson v. State*, 645 So. 2d 84 (Fla. 2d DCA 1994); *Chicone v. State, 644 So. 2d 532 (Fla. 5th DCA 1994), review denied*, No. 84,780 (Fla. Feb. 2, 1995); *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994). Lots of older examples are interspersed with the other "oral over written" cases at West's key number "Criminal Law" 995(8).

brings the defendant back in and informs the defendant of the changes. To permit this would mean a lack of finality for no good reason and multiple appeals. It is not too much to ask of a sentencing judge to decide on and recite the special conditions of probation at the sentencing hearing, just as he does the balance of the sentence. If the court has omitted a condition it wishes it had imposed, its chance has passed unless the defendant violates probation.

I would follow the other districts and require the striking of unannounced special conditions of probation.

Appendix B

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

LAURIE G. JUSTICE,

Appellant,

v. CASE NO. 94-501

STATE OF FLORIDA,

Appellee.
_____/

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

The Appellant, LAURIE G. JUSTICE, through undersigned counsel and pursuant to Fla.R.App.P. 9.330 and 9.331, hereby moves the panel to reconsider its March 3, 1995, opinion, hereby moves this Court en banc to reconsider the March 3, 1995, opinion, or hereby requests the Court to certify this case to the Supreme Court of Florida. In support of this motion, Ms. Justice shows this Court as follows:

In its March 3, 1995, opinion, this Court unanimously affirmed Ms. Justice's convictions and the length of her sentence. By a 2-1 vote, this Court remanded for reconsideration of certain unannounced special conditions of probation. Justice v. State, __ So.2d __ (Fla. 5th DCA 3/3/95) [20 Fla. L. Weekly D546].

REHEARING

This case must be reconsidered by the panel because the majority misapprehended the law concerning striking of special conditions of probation which were not orally announced at sentencing. There is no "discrepancy" in this case. The full sentencing hearing was transcribed and is a part of this record. The trial court announced only one special condition - that Ms.

Justice have no checking account. The subsequent written order - filed two weeks later - contains numerous additional special conditions. Pursuant to Lippman v. State, 633 So.2d 1061, 1063 (Fla. 1994), and Clark v. State, 579 So.2d 109, 110 (Fla. 1991), these additional conditions are illegal and must be stricken.

Secondly the panel majority opinion is internally inconsistent. A "resentencing" contemplates a full and complete reopening of the sentencing process. Griffin v. State, 517 So.2d 669, 670 (Fla. 1987). That is not what is involved in this case. This Court has not vacated the order placing Ms. Justice on probation or the length of probation involved. Rejection of probation is therefore not an option. The Court has apparently remanded solely for a determination as to whether or not additional special conditions of probation now will be announced to and imposed on Ms. Justice.

REHEARING EN BANC

This Court, en banc, must consider its position on the issue of whether special conditions of probation which were not orally pronounced must be stricken by the trial court on remand, or available to the trial court on remand.

In Elmore v. State, 636 So.2d 183 (Fla. 5th DCA 1994)[1], a panel of this Court considered the identical issue as presented in Ms. Justice's appeal. At issue in Elmore was the imposition of a special condition of probation requiring payment of a certain

[1] Elmore, although cited to this Court in the state's answer brief at p. 9, was not cited in the Justice opinions.

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, which consisted of Judges Sharp, Diamantis, and Thompson, remanded for the purpose of addressing this "discrepancy." In so doing, the Court stated:

> We 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).[2]

Therefore, in Elmore, the remand inquiry concerned two issues: 1) whether the omission of the Flagler restitution was a mistake, and 2) whether the defendant was aware that it should have been included with the others. An option this Court 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. A full "resentencing," or a rejection of probation, were not options. Pursuant to Elmore, the only issue on remand in Justice should be

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[2] Walls and Boone, like the First District's case cited in Judge Griffin's dissent, Christobal v. State, 598 So.2d 325 (Fla. 1st DCA 1992), all involved situations where the case was remanded for the striking of unannounced special conditions, not for resolution of "discrepancy."

whether or not Ms. Justice was aware that the trial court intended to impose the additional special, unannounced conditions.

The panel's opinion is also inconsistent with prior decisions of this Court in Gomez-Rodriqueg v. State, 632 So.2d 709 (Fla. 5th DCA 1994)(special condition that defendant consume no alcoholic beverages must be stricken), Botts v. State, 634 So.2d 197 (Fla. 5th DCA 1994)(striking payment to First Step), and the numerous other cases from this Court striking payment to First Step. In none of those cases did this Court remand for resolution of a "discrepancy." Yet in Ms. Justice's case, this Court did not strike the payment to First Step, and will allow it to be reimposed upon "resentencing."

CERTIFICATION

Should the panel not reconsider its decision, or the Court not reconsider this case en banc, Ms. Justice respectfully requests this Court to certify that its decision is express and direct conflict with the Supreme Court of Florida's decisions cited above in Lippman v. State; Clark v. State.

* * *

This case is a prime candidate for certification to the Florida Supreme Court. Chief Judge Harris' special concurring opinion notes that there is conflict with other district courts of appeal, and that the Supreme Court will resolve the conflict (specially concurring opinion at p. 1). Judge Griffin's dissent explicitly acknowledges the conflict (dissent at pp. 1-2). The per curiam opinion, however, ignores any such conflict. The conflict should not be buried in the special concurrence and dissent. It

should be certified to the Florida Supreme Court so that Court can resolve it, as Chief Judge Harris suggests. Therefore, should the panel not reconsider its decision, or the Court not reconsider this case in en banc, Ms. Justice respectfully requests that this Court certify that its decision is in express and direct conflict with the following decisions of other district courts of appeal: Bartlett v. State, 638 So.2d 631 (Fla. 4th DCA 1994); Christobal v. State, 598 So.2d 325 (Fla. 1st DCA 1992); Turchario v. State, 616 So.2d 539 (Fla. 2d DCA 1993).

For the reasons stated above, should the panel not reconsider its decision, or the Court not reconsider this case en banc, Ms. Justice respectfully requests this Court to certify, as a matter of great public importance, the following issue: When the trial court has orally announced certain special conditions of probation at sentencing, and later enters a written order imposing additional, unannounced special conditions of probation, is the proper remedy to strike the additional, unannounced special conditions of probation or to remand to the trial court to resolve the discrepancy?

If the answer is to remand to the trial court for a resolution of the discrepancy, does a "resentencing" occur? Is the trial court limited to a determination of whether it intended to announce the omitted special conditions, and whether the defendant was aware of those conditions? Is the trial court permitted to impose those unannounced special conditions if the defendant was unaware of the trial court's intent to impose them?

RESPECTFULLY SUBMITTED this 17th day of March, 1995, at Orlando, Orange County, Florida.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this 17th day of March, 1995, by U.S. Mail, to Kellie A. Nielan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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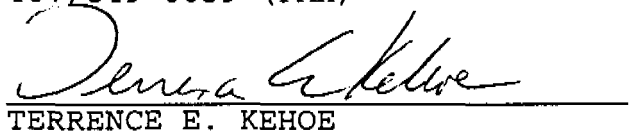

TERRENCE E. KEHOE
Florida Bar No. 0330868

Appendix C

20 FLW D 1699

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1995

LAURIE G. JUSTICE,

Appellant,

v. CASE NO. 94-501

STATE OF FLORIDA,

Appellee.

_____/

Opinion Filed July 21, 1995

Appeal from the Circuit Court
for Lake County,
Mark J. Hill, Judge.

Terrence E. Kehoe, Law Offices of
Terrence E. Kehoe, Orlando,
for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General, Daytona Beach,
for Appellee.

ON MOTION FOR REHEARING *EN BANC* AND CERTIFICATION

HARRIS, C. J.

We grant appellant's Motion for *En banc* Rehearing and Certification.

Even though the original panel reversed her sentence, Laurie Justice, takes issue with that portion of the original opinion that remanded the matter back to the trial court for resentencing rather than merely directing that the previously unannounced conditions of

probation be stricken. Because our practice is different from that of the other district courts, we agree that the issue should be certified to the supreme court.[1]

The issue, quite simply, is whether the trial court, after conducting the sentencing hearing, may thereafter add previously unannounced conditions of probation in its written judgment if it calls the defendant back into court to be advised of the new conditions before such written judgment is entered. We hold that the trial court has that authority.

Due to extremely heavy criminal case loads and constant pressure of time standards, trial judges often schedule several sentencing hearings during the same block of time. Appellate issues rarely occur because of this procedure. However, on occasion and after additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgment, a trial court may conclude that, in order for probation to have a reasonable chance to succeed, conditions other than those previously orally announced must be imposed. Such was the case here.[2]

It is appellant's position that, having successfully run the gauntlet at oral sentencing, she now enjoys immunity from corrective action even though the "sentence" has not been

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[1]We recognize that the other appellate courts, apparently without considering whether the trial court should have the option to resentence and properly add previously unannounced conditions, have merely remanded with directions that the sentencing court delete the unannounced conditions from the judgment. We think it is preferable to give the trial court the option to conduct a new sentencing hearing so that it may properly announce and impose any conditions that it deems appropriate.

[2]It may well be that the new conditions added in this case are invalid as not being sufficiently related to the crimes for which Justice was convicted. But suppose this was a case involving sexual abuse of a child in which the court forgot at the sentencing hearing to condition a probationary portion of the sentence on the defendant's undergoing counseling or avoiding contact with the victim or other children. Should it be precluded thereafter from adding these conditions? If the judge imposes previously unannounced conditions upon resentencing, then such conditions may be attacked the same as had they been pronounced at the original sentencing hearing.

rendered and thus has not yet begun to run. This position is based on a principle of law which this court and all of the other appellate courts in this state recognize: that the "oral pronouncement of sentence prevails over the written order" when there is a conflict..[3] This principle is based on due process concerns. As the court explained in *Olvey v. State*, 609 So. 2d 640 (Fla. 2d DCA 1992), special conditions of probation must be pronounced in open court so that the defendant will know the conditions and have an opportunity to object to them.

But *Olvey* does not explain why the oral pronouncement itself cannot be timely corrected. We know of no reason -- be it based on a constitutional provision, a statute, a rule or precedent -- that would prohibit a trial court from calling the defendant back into court to correct a previous sentence before the judgment of sentence is made final by the rendition of a valid written order and thus before the "sentence" is commenced. Due process concerns are satisfied because the defendant will then "know" of the added conditions and will have the same opportunity to object that he would have had if the conditions had been announced at his original sentencing. Further, his appeal period will not begin to run until the "corrected" sentence is reduced to writing and filed.

We start from the proposition that sentencing has traditionally been the exclusive province of the trial court and its sentence will not be disturbed so long as it is within the statutory maximums and otherwise comports with the requirements of law. This also should be true of resentencing after remand. Certainly the resentencing may not be used

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[3]Here there is no conflict in the sense that the later conditions alter or conflict with earlier announced conditions. The only "conflict" is that the new conditions simply were not mentioned at the sentencing hearing.

to "punish" one for taking an appeal;[4] nor may it be used (or abused) to avoid the consequences of statutory sentencing guidelines.[5] Neither is the case here. A sentence is not final until rendered -- reduced to writing and filed with the clerk. Before that time, there is no legal sentence to add to or modify. The fact that this sentence had not been rendered at the time the new conditions were added distinguishes this case from *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994), and *Clark v. State*, 579 So. 2d 109, 110 n.3 (Fla. 1991).

Nor does the imposition of previously unannounced conditions punish the defendant for exercising any constitutional right. The only "right" affected is the defendant's "due process" right to have the special conditions of probation announced in open court so that objections can be made. *Olvey* , *supra*. As the supreme court stated in *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Failing to pronounce conditions should not create a "gotcha" situation in which a trial court is precluded from imposing conditions it later, upon reflection, deems necessary merely because they were not previously pronounced at the sentencing hearing. It simply means that the defendant must be given an opportunity to make his or her objections of record before such conditions can be validly imposed. Therefore, if the court intends to impose previously unannounced conditions, it must call the defendant back into court for a new sentencing hearing prior to signing the judgment. If the court fails to do so, we have no

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[4] *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

[5] *Pope v. State*, 561 So. 2d 554 (Fla. 1990).

alternative but to reverse for resentencing. But even after reversal, sentencing remains the trial court's function, and the determination of what conditions are necessary for probation, if properly pronounced, should be left to it.

Appellant urges us to follow the path taken by the supreme court in *Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990), in which the court imposed a prophylactic rule to prevent "multiple appeals, multiple resentencings and unwarranted efforts to justify an original departure." We believe that such prophylactic rules which limit the authority of the trial court should be used only in the most extreme situations. We do not see the imposition of unannounced conditions of probation as a major source of appeals.[6] And the requirement of resentencing itself, because of the trial court's heavy docket, encourages the court to get it right the first time. Further, we do not perceive the trial bench as resisting the requirement to orally pronounce special conditions. Rather, this appears to be a problem of oversight created by the volume of criminal sentencings. It might be, because of large dockets, the trial court will sometimes prefer merely to strike the unannounced condition rather than resentence. But the trial court should have the authority, if it so desires, to impose such conditions as it deems appropriate after conducting a new sentencing hearing which provides the defendant with his or her due process right to object to the special conditions.

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[6]When we consider that there were 15,858 appeals filed in our intermediate appellate courts during the year 1994, the very few cases involving this issue show that this problem does not greatly impact the courts.

We therefore reject appellant's contention that she has a "right" to expect that her sentence, once orally pronounced, will be final and unchangeable. We are unaware of any such right and are unwilling to establish one in this case.

The defendant's only "right" at resentencing is to be sentenced within the statutory maximum and in accordance with the law. If these added conditions are contrary to the law (as they may well be), the defendant can object to them and appeal on that basis. If they are merely unacceptable to her, she may wish to reject probation. In any event, by requiring that the special conditions be announced in open court, the defendant will have the opportunity due process requires.

We agree that the cause must be reversed because these options were not given the defendant in this case. We hold, however, that on remand the trial court is free to impose such conditions as are appropriate so long as it pronounces such conditions at a new sentencing hearing.

We certify the following question:

WHERE A SENTENCE IS REVERSED BECAUSE THE TRIAL COURT FAILED TO ORALLY PRONOUNCE CERTAIN SPECIAL CONDITIONS OF PROBATION WHICH LATER APPEARED IN THE WRITTEN SENTENCE, MUST THE COURT SIMPLY STRIKE THE UNANNOUNCED CONDITIONS, OR MAY THE COURT ELECT TO "REIMPOSE" THOSE CONDITIONS AT RESENTENCING?

PETERSON, C.J, DAUKSCH, COBB, SHARP, W., GOSHORN, and THOMPSON, JJ., concur.
GRIFFIN, J., dissents, with opinion.

Our court's approach to a lower court's error in imposing written conditions of probation not orally announced is unique. The First, Second and Fourth Districts all have consistently held that where a defendant appeals a written order containing unannounced special conditions of probation, the order must be amended to conform to the oral pronouncement of judgment and sentence by striking the unannounced conditions. *See, e.g., Bartlett v. State,* 638 So. 2d 631 (Fla. 4th DCA 1994); *Christobal v. State*, 598 So. 2d 325 (Fla. 1st DCA 1992); *Turchario v. State*, 616 So. 2d 539 (Fla. 2d DCA 1993).[1] The lower court is not free at a sentencing to add the previously unannounced conditions.

Alone among the districts, under our prior decision in *Cleveland v. State*, 617 So. 2d 1166 (Fla. 5th DCA 1993), this court would vacate the sentence but would remand for the trial court to resolve the discrepancy between the oral pronouncement and the written order. If the lower court had "intended" to impose the written conditions that it had never orally announced, the court, on remand, could simply add these missing conditions.

As is reflected in prior case law of this court on which *Cleveland v. State* was grounded, this court contemplated the possibility that where there was a discrepancy between the record of the oral pronouncement and the judgment and sentence as written

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[1] *See also Williams v. State*, 653 So. 2d 407 (Fla. 2d DCA 1995); *Nank v. State*, 646 So. 2d 762 (Fla. 2d DCA 1994); *Peterson v. State*, 645 So. 2d 84 (Fla. 2d DCA 1994); *Chicone v. State*, 644 So. 2d 532 (Fla. 5th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995); *Sweet v. State*, 644 So. 2d 176 (Fla. 5th DCA 1994); *Willis v. State*, 640 So. 2d 1188 (Fla. 5th DCA 1994); *Jamail v. State*, 637 So. 2d 362 (Fla. 1st DCA 1994); *Skiff v. State*, 627 So. 2d 614 (Fla. 4th DCA 1993). By now, these cases appear so frequently in Florida Law Weekly that no effort has been made to catalogue them all.

down, the error might have, in fact, resided in the record of the oral pronouncement. *Harden v. State*, 557 So. 2d 926, 927 (Fla. 5th DCA 1990) (Cobb, J., concurring). Rather than mechanically apply the "oral prevails over the written" rule, by ordering the written to conform to the oral, this court has preferred to send the matter back to the trial court to verify what was, in fact, orally pronounced. This notion was quickly expanded, however, to provide that where there existed some unexplained conflict between the written sentence and the oral pronouncement, the lower court would be permitted to impose what it "intended" to pronounce even if it were not what was, in fact, pronounced.[2] *See, e.g., Whitfield v. State*, 569 So. 2d 528 (Fla. 5th DCA 1990).

Even at its most expansive, however, the underlying rationale of this prior case law has no application to the situation presented here. Here, there is no reasonable possibility either that the sentencing proceeding record erroneously failed to report the oral pronouncement of multiple special conditions of probation or that there is a "conflict" between the oral pronouncement and the written sentence. The special conditions simply were not pronounced at sentencing.[3]

The majority seems to suggest that a lower court has the unfettered power to alter sentences up until the moment the judgment and sentence are "rendered," *i.e.* signed and filed, by the simple expedient of calling the defendant back in and changing the sentence. Dubious as that proposition is, it is not what happened here. Here the trial court never

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[2] Also, this court's treatment of such cases has not been entirely consistent. *See Lowell v. State*, 649 So. 2d 364 (Fla. 5th DCA 1995); *Macon v. State*, 639 So. 2d 206 (Fla. 5th DCA 1994).

[3] The State implicitly concedes in its brief that the conditions at issue are "special" conditions that were not orally announced.

called the defendant back to pronounce the originally omitted conditions of probation before the judgment and sentence were rendered, before appellant began to serve the sentence or before the appeal was filed. The issue here is whether unannounced conditions that were properly struck on appeal because they had not been orally pronounced can be added, on remand, by invoking our "discrepancy" case law.

The definition of "sentence" in Florida found in Florida Rule of Criminal Procedure 3.700(a)(b) is:

> (a) **Sentence Defined.** The term sentence means the *pronouncement* by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty [emphasis supplied].

The written sentence is merely a record of the actual sentence pronounced in open court. *Kelly v. State*, 414 So. 2d 1117 (Fla. 4th DCA 1982).

The Florida Supreme Court has not considered a case such as this where the sentencing court has attempted to include in the *original* written sentence conditions of probation that were not announced, but the court has held that probation conditions cannot be added to an existing sentence, absent a finding of violation of probation. *Lippman v. State*, 633 So. 2d 1061, 1063 (Fla. 1994). The addition of conditions of probation is as impermissible as any other augmentation of a previously announced sentence. *Id.* It seems to follow that, just as the lower court could not later add probation to an announced sentence of a term of years, or increase the number of years of probation, it cannot later add a condition of probation. The court has explained that the sentencing court is authorized only to modify "theretofore imposed" terms. *Clark v. State*, 579 So. 2d 109, 110

n.3 (Fla. 1991). Consistent with these pronouncements of the high court, our sister district courts of appeal have correctly ordered stricken on appeal any special condition of probation not orally pronounced.

An order of probation, like any other aspect of sentencing, ought not be a work in progress that the trial court can add to or subtract from at will so long as he or she brings the defendant back in and informs the defendant of the changes. To permit this would mean a lack of finality for no good reason and multiple appeals. *See Pope v. State*, 561 So. 2d 554 (Fla. 1990). It is not too much to ask of a sentencing judge to decide on and recite the special conditions of probation at the sentencing hearing, just as is done with the balance of the sentence. If the court has omitted a condition it wishes it had imposed, its chance has passed unless the defendant violates probation. Even if the majority is correct that the sentencing judge can keep resentencing the defendant by bringing him back in and changing the sentence until he actually renders it by signing and filing it, surely the failure to do so by the time of rendition brings this opportunity to an end.

The majority posits that this case illustrates why the trial court ought to have the ability to add additional conditions of probation after the sentencing hearing -- that during the time of "additional reflection afforded by the delay between the sentencing hearing and the preparation of the written judgment, a trial court may conclude that, in order for probation to have a reasonable chance to succeed, conditions other than those previously orally announced must be imposed." Whatever may be the justification for a delay in rendering the sentence, in fact, this case illustrates the opposite. Here, the initially imposed conditions were valid and relevant; it is the non-standard conditions contained in

the written order that are almost entirely invalid. *See Biller v. State*, 618 So. 2d 734 (Fla. 1993).

Laurie Justice was the founder of God's Love Center, a mission established to help needy people in Lake County by providing emergency aid, called "outreach," consisting primarily of food and clothing. It was a small operation, partly financed by Justice, through an inheritance she had received, and by her husband. The by-laws of the Center, however, required two signatures for any expenditure over $65. Laurie Justice wrote two checks from the Center bank account to the City of Mount Dora to pay her home electric bill because the City was threatening to turn off her power. When she was unable to contact another authorized signatory to obtain the second signature, she forged the signature of another board member. Forgery of the signatures on those two checks is the crime for which she was prosecuted and convicted.

Initially, the trial court orally imposed only two probation conditions -- that Justice pay certain costs and that she not have a checking account. Also contained in the written order, however, are special conditions such as a prohibition against the possession of "any weapon" and a prohibition against using "intoxicants to excess." Far from illustrating the beneficial effect of allowing the trial court time for reflection to improve on their probationary scheme, this case appears, instead, to illustrate that it can, and in this case did, have the opposite effect.[4] If these later conditions[5] were not subject to being stricken

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[4] Truth to tell, what almost certainly happened in this case is that the trial judge simply entered the local form order without considering whether its "standard" conditions were, in fact, non-standard. To some extent, this case presents a problem like the one discussed in *Hart v. State*, 651 So. 2d 112 (Fla. 2d DCA), *review granted*, No. 85,168 (Fla. June 22, 1995).

for the reason we have already held, they should have been stricken anyway. *Biller.* I would simply strike any unannounced special conditions of probation.

[5] Other special conditions include a requirement to submit to a warrantless search of her person, residence or property; a requirement that she undergo drug testing at her expense and participate in a drug treatment program as directed by the probation officer; and payment of $1 for each month of supervision to First Step, Inc.