IN THE SUPREME COURT OF FLORIDA

CLIFTON BROCK, :

Petitioner, :

v. : CASE NO. 87,529

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Record citations in this brief follow the form of the initial brief. References to the answer brief appear as (AB[page number]).

STATEMENT OF THE CASE

In reply to respondent's facts supporting its rump issue concerning the public defender fee, petitioner notes that he was never informed of his right to contest the amount of the fee. (R38-42) It is also noteworthy that the state did not object to the absence of a request for the fee by trial counsel.

ARGUMENT

I. A CONDITION OF PROBATION OR COMMUNITY CONTROL REQUIRING SUBMISSION TO ALCOHOL TESTING IS INVALID WHEN NOT REASONABLY RELATED TO CRIMINAL CONDUCT OR ORALLY PRONOUNCED.

Respondent's suggestion of mootness rests on material which is outside the record, and on which it has not requested judicial notice pursuant to sections 90.201-90.203, Florida Statutes. Moreover, the pendency of an appeal from revocation of the community control at issue in this case cuts against the suggestion of mootness. If the revocation of community control is reversed -- it is an issue in DCA No. 95-2928 -- petitioner will be restored to community control and the validity of a condition thereof will remain relevant. Additionally, as respondent acknowledges, (AB6) the certified conflict prompting supreme court review transcends this case.

Next, respondent has misread Biller v. State, 618 So. 2d 735 (Fla. 1993), as limiting the requirement of a connection between a probation condition and criminal conduct to conditions not published in Florida Statutes. (AB7-8) The court in Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994), did not read Biller in that way, for it struck the condition of alcohol testing unrelated to criminal conduct though it acknowledged Nunez had received constructive notice of the condition.

However, in State v. Hart, 668 So. 2d 589 (Fla. 1996), this Court defined all conditions published in the rules and statutes as general or standard conditions which need not be orally pronounced. The Hart opinion contains no discussion of either Nunez or Hayes v. State, 585 So. 2d 397 (Fla. 1st DCA), rev. denied, 593 So. 2d 1052 (Fla. 1991), two cases in

conflict in the validity of standard conditions unrelated to past criminal conduct. The question thus devolves into whether failure to object to a published condition which is not orally pronounced insulates the condition from a challenge to its validity based on lack of connection to past criminal conduct. The answer should be: Not in the abstract, and particularly not where the state fails to assert that the lack of an objection renders the issue unpreserved.

The constructive notice by publication discussed in Hart is given to apprise a potential offender of the possible consequences of his or her actions. 668 So. 2d at 592. While the implied concept of fair warning has some validity as applied to exposure to death or terms of imprisonment, it is no more than a useful fiction when applied to tangential consequences such as court costs and conditions of probation or community control. When an offender at sentencing faces such of these consequences as are within the trial court's discretion, appellate courts have held that due process requires notice of the specific sanction contemplated and notice of an opportunity to contest the sanction. See, e.g, Bryant v. State, 661 So. 2d 1315 (Fla. 1st DCA 1995); Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995); McGowan v. State, 648 So. 2d 1225 (Fla. 4th DCA 1995); Madison v. State, 664 So. 2d 1140 (Fla. 5th DCA 1995)(discretionary costs). As to those conditions not obviously "directed toward supervision and rehabilitation," Biller, the probationer's failure to divine that the court will impose the condition when no mention is made at sentencing should not preclude him from challenging the condition on grounds it is unrelated to criminal conduct.

In any event, Hart was decided long after the sentencing hearing in this case, and therefore should not retroactively apply. Additionally, to the extent that the lack of an objection creates a potential procedural bar, the state has not claimed that bar either in the

district court or here. Therefore, it is waived. See Thomas v. State, 599 So. 2d 158, 159 n.1 (Fla. 1st DCA), rev. denied, 604 So. 2d 488 (Fla. 1992)(contention that issue not preserved improperly made for first time on rehearing).

Finally, the state relies on another argument it did not make in the district court, that record evidence of an active warrant for cultivation of cannabis supports the probation condition.(AB10) If the Court excuses the state's procedural default on this argument, it nonetheless should be rejected on the merits. In no way does an allegation concerning cannabis relate to a condition authorizing testing for use of alcohol or legal drugs. Brock's probation was not revoked for cultivation of cannabis, and of course no revocation may turn on this mere allegation. Hines v. State, 358 So. 2d 183 (Fla. 1978); Palmer v. State, 603 So. 2d 535 (Fla. 4th DCA 1992). It follows that no new condition of supervision may rest on the bare fact of the warrant. Additionally, the state fails to explain how testing for alcohol, a legal drug subject to abuse, or for other legal drugs, is reasonably related to an allegation of cultivation of cannabis, a substance almost universally illegal regardless of its use.

In summary, this issue is not moot and will recur in other cases; constructive notice by publication is insufficient to prompt an offender to object to a condition of supervision not orally pronounced; and a mere arrest warrant for cultivation of cannabis does not render a probation condition requiring testing for the use of alcohol or legal drugs reasonably related to criminal conduct. Accordingly, petitioner urges this Court to quash the decision of the district court on this issue, approve Nunez, supra, and remand with directions to delete the condition requiring submission to testing for the use of alcohol and drugs.

II. RESPONDENT HAS IMPROPERLY RAISED A NONJURISDICTIONAL ISSUE WITHOUT ADEQUATE NOTICE; THE DISTRICT COURT CORRECTLY QUASHED A PUBLIC DEFENDER FEE IMPOSED WITHOUT NOTICE AS TO EITHER THE AMOUNT OR AN OPPORTUNITY TO CONTEST THE AMOUNT.

Respondent has filed no cross-notice stating its intent to raise this issue, which would have given this Court the option to decline to entertain it or issue a schedule calling for briefs. Without question, this Court has authority to either address the issue or ignore it. Petitioner suggests that the state's lack of notice, as well as the district court's refusal to certify the question, warrants the latter course.

On the merits, it is significant that the decisions to impose attorney's fees and to set the amount of fees are both discretionary. Sec. 27.56(1), Florida Statutes (1993). The requirements of notice of amount and of the right to contest that amount are consistent with the requirement of notice for assessment of discretionary fees, a principle well settled in Florida's district courts. See Bryant v. State, 661 So. 2d 1315 (Fla. 1st DCA 1995); Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995); McGowan v. State, 648 So. 2d 1225 (Fla. 4th DCA 1995); Madison v. State, 664 So. 2d 1140 (Fla. 5th DCA 1995).

Respondent's chief quarrel is with appointed counsel who fail to request the fees. In asking this Court to reiterate previous holdings, respondent should have brought to these proceedings a record in which it objected to the perceived failure of defense counsel at the trial level. The contemporaneous objection rule works both ways, and respondent is in no position to cast stones.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court quash the district court decision, approve Nunez, supra, and remand with directions that submission to testing for drugs and alcohol be deleted as conditions of community control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Daniel A. David, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 10th day of May, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER