IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,553

CHARLES BURDO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

THE SPECIAL CONDITIONS OF COMMUNITY CONTROL AND PROBATION IMPOSED BY THE TRIAL COURT WITHOUT ORAL PRONOUNCEMENT MUST BE STRICKEN.

This Court's recent decision in *State v. Hart*, 668 So. 2d 589 (Fla. 1996), appears to resolve the issue concerning the unannounced conditions of community control and probation which prohibited the defendant from using intoxicants to excess.[1] However, *Hart* did not address whether unannounced special conditions of community control should be stricken from a sentence. In the instant case, the Court must resolve whether the unannounced special condition requiring the maintenance of a daily log should be stricken from the community control order.

The State argues that it "doesn't matter" that the trial judge in the instant case did not orate the special community control condition (condition thirteen), which required the defendant to maintain a daily log during his probation period. (Respondent's Brief at 6). (R. 13). This position is squarely against established state law. Conditions of community control which are designated as "special conditions" must be pronounced orally. *Hart*, 668 So. 2d 589 (Fla. 1996). See *Vinyard v. State,*

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[1] *State v. Hart*, 668 So. 2d 589 (Fla. 1996) holds that defendants facing imposition of probation are on constructive notice of conditions one through eleven set forth in the order of probation found in Florida Rule of Criminal Procedure 3.986(e). However, it does not specifically address whether defendants are on constructive notice of any of the conditions set forth in the order of community control found in the same rule. This case addresses the probation and community control conditions which prohibit the defendant from using intoxicants to excess found in condition seven of the form order of probation and condition seven of the form order of community control.

586 So. 2d 1301 (Fla. 2d DCA 1991) (special condition requiring maintenance of daily log struck in absence of oral pronouncement). This Court recently held that special conditions of probation which are not set forth in the general conditions portion of the order of probation form found rule 3.986(e) must be specifically pronounced by the trial judge at sentencing. *Hart*, 668 So. 2d 589 (Fla. 1996). Because the daily log requirement set forth in special condition thirteen is listed as the sixth entry under the heading of "special conditions" on the form, the trial court erred by including that condition as part of the sentence and such condition should be struck from the defendant's sentence.

The State's argument that sufficient notice to the defendant was given with respect to the unannounced condition is not well founded. The State misapprehends the record where it argues that the defendant "informed the court of his acknowledgment and acceptance" of the special condition. (Respondent's Brief at 6). On the contrary, the record indicates that the trial judge asked if the defendant had reviewed the *"standard conditions"* for community control and probation, to which the defense attorney replied, "I *believe* so." (T. 191). Although, the defense attorney's response is not definitive, the record thereby elucidates, at best, that the defendant reviewed the *standard*, not the *special* conditions of community control and probation. Additionally, the State's argument that the defendant's signature of receipt of the conditions is of little avail because the record is bereft of the defendant's literacy skills. Hence, acknowledgment of receipt does not acknowledge an understanding and acceptance of the special conditions and highlights the necessity for oral

pronouncement of the conditions.

Even if this Court holds that Petitioner received sufficient notice of the unannounced special condition, this condition should be stricken. To permit the trial court to amend its sentence by appending unannounced conditions to the sentence, violates the principle of double jeopardy and engages in a waste of judicial labor. Because this Court holds a probationary term to be a type of criminal sentence, *Larson v. State*, 572 So. 2d 1368, 1370 (Fla. 1991), the addition of more restrictive conditions of probation enhances a defendant's sentence and fundamentally violates double jeopardy. *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *Lippman v. State*, 663 So. 2d 1061 (Fla. 1994). It is well established that a lawfully imposed sentence cannot be increased after the defendant has begun serving a sentence. *Troupe v. Rowe*, 283 So. 2d 857 (Fla. 1973); *Hinton v. State*, 446 So. 2d 712 (Fla. 2d DCA 1984); *Beckom v. State*, 227 So. 2d 232 (Fla. 2d DCA 1969); *Michell v. State ex rel. Callahan*, 154 So. 2d 701, 704 (Fla. 2d DCA 1963). Once sentenced, a defendant is entitled to know just what the limits of his punishment are and should be able to rely upon the sentence orally pronounced and transcribed in written form without the fear that a court will subsequently return to the sentence and impose a more harsh punishment. See *State v. Bateh*, 110 So. 2d 7 (Fla. 1959).

Furthermore, a holding which would permit a trial court to re-visit the sentence and correct it would be contrary to established Florida case law which mandates that a written record must conform to the orally pronounced sentence. It is axiomatic that a criminal sentence must be orally pronounced. Fla. R. Crim. P. 3.700(b) (sentences

"*shall* be *pronounced* in *open court*"). The written transcription of a sentence is considered to be a mere record of the actual sentence pronounced in open court. Hence, all written transcriptions of a sentence must conform to the sentence orally pronounced. *Bartlett v. State*, 638 So. 2d 631 (Fla. 4th DCA 1994); *Christobal v. State*, 598 So. 2d 325 (Fla. 1st DCA 1992); *Bivens v. State*, 454 So. 2d 723 (Fla. 1st DCA 1984); *Toombs v. State*, 404 So. 2d 766, 768 (Fla. 3d DCA 1981).

In the instant case, the written orders did not conform to the trial judge's oral pronouncement. Indeed, the court clearly delineated the special conditions imposed when the trial judge stated, "Mr. Burdo, in addition to these standard conditions, there are going to be some special conditions." The special condition requiring that the defendant maintain a daily log for submission to the community control officer was not within the catalog of special conditions orally pronounced by the trial judge. Hence, it is reasonable to conclude that the trial court did not wish to make the maintenance of a daily log a part of the defendant's community control order. Certainly, the addition of the condition on the written order constitutes a transgression of Florida law requiring the written record to conform to a trial judge's oral pronouncement.

Hence, Petitioner urges this Court to follow the standard enunciated by the First, Second and Fourth District Courts of Appeal and declare that the unannounced community control condition subsequently imposed by a written order must be stricken. *Vasquez v. State*, 665 So. 2d 339 (Fla. 4th DCA 1995); *Bartlett*, 638 So. 2d 631 (Fla. 4th DCA 1994); *Truchario v. State*, 616 So. 2d 539 (Fla. 2d DCA 1993); *Cristobal*, 598 So. 2d 325 (Fla. 1st DCA 1992).

CONCLUSION

Based on the foregoing facts, authorities and arguments, Petitioner urges this Court to respond to the certified question by declaring that an unannounced special condition of community control which subsequently appears in the written order must be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Roberta Mandel, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 23rd day of May, 1996.

SUZANNE M. FROIX
Assistant Public Defender