IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 91,851
DCA No. 96-02082

DENNIS LYNN HUFF, :

Respondent. :

:

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, DENNIS LYNN HUFF, was the defendant in the trial court and Appellant in the District Court of Appeal of Florida, Second District. Respondent will be referred to also by name as Mr. Huff or as the Defendant. Petitioner, THE STATE OF FLORIDA, was the prosecuting authority in the trial court and Appellee in the District Court of Appeal. The symbol "R" designates the original record on appeal, while the symbol "T" designates the transcript of the trial from the record on appeal. The symbol "V" designates the volume of the record on appeal together with the number identifying the particular volume, i.e., V1.

STATEMENT OF THE CASE AND FACTS

Respondent, Dennis Lynn Huff, generally accepts Petitioner's representations regarding the Statement of the Case and Facts. Additionally, Mr. Huff notes the following the relevant fact for the Court's consideration. Condition (8) was listed together with other conditions of probation under a section titled:

> IT IS FURTHER ORDERED THAT YOU SHALL COMPLY WITH THE FOLLOWING CONDITIONS OF PROBATION AND OR COMMUNITY CONTROL:
>
> ....
>
> (8) You will submit to and pay for random testing as directed by the supervising officer or professional staff of the treatment center where you are receiving treatment to determine the presence of alcohol or controlled substances.

(V1, R97).

SUMMARY OF THE ARGUMENT

The requirement that a defendant pay for drug testing should not be treated as a general condition of probation. Section 948.09(6), Florida Statutes (1995) does not provide constructive notice to any criminal defendant that he may be required to pay for any and all random drug testing as set out in probation condition (8). Instead, requiring a defendant to pay for drug testing should continue to be treated as a special condition of probation requiring oral announcement at sentencing. Section 948.09(6), Florida Statutes (1995) provides constructive notice only that a criminal defendant, while under any form of supervision by the Department of Corrections, may be required to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program.

ARGUMENT

ISSUE I

SHOULD THE REQUIREMENT THAT A DEFENDANT PAY FOR DRUG TESTING BE TREATED AS A GENERAL CONDITION OF PROBATION FOR WHICH NOTICE IS PROVIDED BY SECTION 948.09(6), FLORIDA STATUTES (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

Any requirement that a defendant pay for drug testing should continue to be treated as a special condition of probation that requires oral announcement at sentencing. Typically, the issue arises in the context where the trial court in the particular circuit is using an order of probation form other the one approved by this Court for such use. See Fla. R. Crim. P. 3.986(e). Such a form was used by the trial court in Polk County in Mr. Huff's case. (V1, R97-98). The type set probation order form contained standard or general conditions, special conditions, and several conditions that combine standard or general conditions with special conditions of probation. See § 948.03(1), Fla. Stat. (1995) in particular, and §§ 948.03-034, Fla. Stat. (1995) in general; see also Brock v. State, 688 So. 2d 909, 912 n.4 (Fla. 1996). Probation condition (8) is an example of such a standard or general condition modified by the addition of a special condition in which the Defendant, Mr. Huff, was required to pay for the costs relating to the general or standard condition. (V1, R97). See § 948.03(1)(k)1, Fla. Stat. (1995).

In Mr. Huff's case, the trial court failed to orally announce condition (8) relating to the requirement that he submit to and pay

for random testing. (V1, R85-87). The written order of probation, however, provided:

> (8) You will submit to and pay for random testing as directed by the supervising officer or professional staff of the treatment center where you are receiving treatment to determine the presence of alcohol or controlled substances.

(V1, R97). (Emphasis added.). Written condition (8), by preprinted form, contained a payment requirement for the Defendant, Mr. Huff, that was not announced at the sentencing hearing as required by law. See Hart v. State, 668 So. 2d 589, 591-93 (Fla. 1996). Moreover, the written condition contained no language referring to urinalysis testing for determining drug usage as part of a rehabilitation program. See § 948.09(6), Fla. Stat. (1995).

As to probation condition (8), the Second District Court of Appeal, in Wallace v. State, 682 So. 2d 1139 (Fla. 2d DCA 1996), ruled that requiring the defendant to pay for random testing as written in paragraph (8) above was reversible error since the payment part of the probation condition amounted to a special condition that had not been orally pronounced. In so doing, the court observed:

> The state concedes that the portion of probation condition eight which requires appellant to pay for random drug testing is a special condition of probation that must be orally pronounced at sentencing. Because it was not orally pronounced in this case, it is stricken. See Malone v. State, 652 So. 2d 902 (Fla. 2d DCA 1995); Nank v. State, 646 So. 2d 762 (Fla. 2d DCA 1994).

Wallace v. State, 682 So. 2d at 1139. Similarly, in Mr. Huff's case, the trial court failed to orally pronounce the payment requirement for the random testing and so that portion of paragraph

(8) relating to payment must be stricken. (V1, R85-87, 97).

Thus, plainly, in Mr. Huff's case, the trial court committed the sentencing error outlined above with regard to requiring the Defendant to pay for the costs of "random drug testing" imposed by condition (8) of the trial court's written order of probation. This payment requirement portion of condition (8) of the probation order was properly held to be error and reversed by the Second District Court of Appeal, in Huff v. State, No. 96-02082 (Fla. 2d DCA Oct. 22, 1997), and may not be reimposed on resentencing. See Justice v. State, 674 So. 2d 123 (Fla. 1996). In so doing, the Second District Court of Appeal acknowledged this Court's decision in Curry v. State, 682 So. 2d 1091 (Fla. 1996) and its own previous decisions in Wallace v. State, 682 So. 2d 1139 (Fla. 2d DCA 1996) (drug testing); Malone v. State, 652 So. 2d 902 (Fla. 2d DCA 1995) (alcohol testing). See Huff v. State, No. 96-02082 at slp op. 1. Petitioner correctly acknowledges that the district courts of appeal have routinely stricken probation conditions requiring criminal defendants to submit to and pay for random drug testing where that special condition, i.e. requiring the defendant to pay, has not been announced in open court. The Second District Court of Appeal has numerous decisions striking the payment requirement where the condition of probation combined the general condition of probation that the defendant submit to random drug testing, see § 948.03(1)(k)(1), Fla. Stat. (1995), with the additional special condition that the defendant be required to pay for that "random drug testing." In addition to those Second District Court of

Appeal decision cited herein, see also Smith v. State, No. 96-03383 (Fla. 2d DCA Nov. 12, 1997); Williams v. State, 700 So. 2d 750 (Fla. 2d DCA 1997); Phelps v. State, 696 So. 2d 1307 (Fla. 2d DCA 1997); Martin v. State, 696 So. 2d 821 (Fla. 2d DCA 1997); Jennison v. State, 696 So. 2d 793 (Fla. 2d DCA 1997); Gant v. State, 682 So. 2d 1137 (Fla. 2d DCA 1996); Norton v. State, 681 So. 2d 1186 (Fla. 2d DCA 1996); Caraway v. State, 681 So. 2d 723 (Fla. 2d DCA 1996); Ringling v. State, 678 So. 2d 1339 (Fla. 2d DCA 1996); Holmes v. State, 675 So. 2d 995 (Fla. 2d DCA 1996); Hinkle v. State, 675 So. 2d 621 (Fla. 2d DCA 1996); Gipson v. State, 670 So. 2d 1097 (Fla. 2d DCA 1996); Wyman v. State, 670 So. 2d 1080 (Fla. 2d DCA 1996); Golden v. State, 667 So. 2d 933 (Fla. 2d DCA 1996); Bristol v. State, 667 So. 2d 486 (Fla. 2d DCA 1996); Green v. State, 667 So. 2d 432 (Fla. 2d DCA 1996); Daughtery v. State, 654 So. 2d 1209 (Fla. 2d DCA 1995).

Instead of dealing with any of the above cited Second District Court of Appeal decisions, Petitioner chooses to focus on Porchia v. State, No. 97-00348 (Fla. 5th DCA Dec. 5, 1997) as being typical of the reasoning underlying these decisions and suggests that the court's reliance on Justice v. State, 674 So. 2d 123 (Fla. 1996) was somehow misplaced because this Court's decision in Justice is usually used as precedent for the proposition that special conditions of probation once stricken for failure to be announced in open court may not be reimposed on resentencing. While this Court, in Justice, did not specifically deal with the exact condition of probation under consideration in this appeal, i.e.,

requiring defendant to submit to and pay for random drug testing, the law and analysis cited therein by this Court, nevertheless, applied. In Justice, this Court stated:

> Initially, we note the distinction that has been made in the case law between general and special conditions of probation. In State v. Hart, 668 So. 2d 589 (Fla. 1996), we held the order of probation form found in Florida Rule of Criminal Procedure 3.986(e) constitutes sufficient notice to probationers of those general terms of probation contained in conditions one through eleven of the form, such that oral pronouncement of these general conditions at sentencing by the trial court is unnecessary. However, under Hart, any other special conditions of probation not contained in paragraphs one through eleven of the rule 3.986(e) form, or in the Florida Statutes on probation, must be orally pronounced and imposed at sentencing.
>
> Justice's probation order contains numerous special probation conditions that were not orally pronounced, and that are not found within the Florida Statutes or contained within the general conditions of the rule 3.986(e) form. Consequently, under Hart, the trial court erred in adding special conditions of probation in the subsequent probation order that were not orally pronounced at the original sentencing hearing.
>
> The requirement that special conditions of probation be pronounced in open court at the time of sentencing arises in part from Florida Rule of Criminal Procedure 3.700(b), which mandates that the sentence or other final disposition "shall be pronounced in open court." The requirement also addresses due process concerns that a defendant have notice and an opportunity to object. See generally Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992). Application of the dictates of rule 3.700 to conditions of probation is consistent with our prior holdings that probation is among the sanctions that may be imposed in sentencing in criminal proceedings. See Lippman v. State, 633 So. 2d 1061 (Fla. 1994); Larson v. State, 572 So. 2d 1368 (Fla. 1991); see also Poore v. State, 531 So. 2d 161, 164 (Fla. 1988) (characterizing probation as one of the "five basic sentencing alternatives").
>
> Most of the decisions which strike special conditions of probation not imposed at the sentencing hearing appear to be grounded on a judicial policy that the actual oral imposition of sanctions should prevail

> over any subsequent written order to the contrary. Vasquez v. State, 663 So. 2d 1343, 1349 (Fla. 4th DCA 1995); see, e.g., Rowland v. State, 548 So. 2d 812 (Fla. 1st DCA 1989). Generally, courts have held that a written order must conform to the oral pronouncement as mandated by rule 3.700 because the written sentence is usually just a record of the actual sentence required to be pronounced in open court. Vasquez, 663 So. 2d at 1349. Consequently, when the written order conflicts with the oral pronouncement, the oral pronouncement prevails. Id.; see Johnson v. State, 627 So. 2d 114 (Fla. 1st DCA 1993) (holding that trial court's oral pronouncement that defendant would receive credit for time served since arrest controlled over resentencing form which erroneously credited him with only partial time served since arrest); Kelly v. State, 414 So. 2d 1117 (Fla. 4th DCA 1982) (holding that mandatory minimum sentence orally pronounced but not incorporated in written sentence was valid part of sentence because written sentence is merely record of actual sentence pronounced in open court).
>
> Some cases have held that the subsequent imposition of new conditions or terms to a sentence or order of probation violates a defendant's constitutional right against double jeopardy. In Lippman v. State, 633 So. 2d 1061 (Fla. 1994), the trial court modified the defendant's probation eight months into the defendant's probationary term. [FN2] In our review, we first indicated that the additional conditions imposed by the trial court constitute enhancements of the original sentence rather than modifications. Id. at 1064. We then held that the double jeopardy protection against multiple punishments for the same offense includes "the protection against enhancements or extensions of the conditions of probation." Id. Accordingly, we concluded that the trial court's enhancement of the terms of the defendant's probation violated the double jeopardy prohibition. Id.; see also Clark v. State, 579 So. 2d 109 (Fla. 1991) (holding that absent proof of violation, trial court cannot change order of probation or community control by enhancing terms thereof, even if defendant has agreed in writing to allow modification and has waived notice and hearing).

Justice v. State, 674 So. 2d at 125-26 (footnotes omitted). Clearly, the law and analysis set out by this Court in Justice applied to the court's decision in Porchia as it also applies to the issue before the Court in this appeal, i.e., whether requiring

a criminal defendant to pay for "random drug testing," is a special condition or not. (Emphasis added.). Respondent urges this Court not to get distracted by Petitioner's focus on the Fifth District Court of Appeal's decision in Porchia. Instead, the Court is urged to focus on the Second District Court of Appeal decisions cited herein and the question of whether requiring a criminal defendant to pay for any and all "random drug testing" is a special condition of probation as the Second District Court of Appeal has heretofore held or a general condition of probation, constructive notice of which was provided by section 948.09(6), Florida Statutes (1995).

In Smith v. State, No. 96-03383 (Fla. 2d DCA Nov. 12, 1997), another Second District Court of Appeal decision certifying the same question to this court, the Second District Court stated the following as rationale for striking the payment requirement special condition:

> [A]s we stated in our recent opinion in Williams v. State, No. 96-01923 (Fla. 2d DCA Oct.8, 1997), section 948.09(6), Florida Statutes (1995), provides that a defendant on supervision may be required by the Department of Corrections to pay for drug urinalysis and that the failure to pay may be considered a ground for revocation by the court. This provision supports a conclusion that the probation condition requiring a defendant to pay for drug testing is a general condition that need not be orally announced. See State v. Hart, 668 So. 2d 589 (Fla. 1996). Because both this court and the Florida Supreme Court have stated otherwise, see Brock v. State, 688 So. 2d 909, 912 n. 4 (Fla. 1997); Curry v. State, 682 So. 2d 1091 (Fla. 1996), we adhere to those cases and hold that requiring a defendant to pay for drug testing is a special condition of probation, as we did in Williams. Accordingly, we strike this special condition of probation.

Smith v. State, No. 96-03383 at slp op. 1. Giving the Department of Corrections the discretion to require that offenders under any

form of supervision submit to and pay for "urinalysis testing" to identify drug usage as part of the rehabilitation program, see § 948.09(6), Fla. Stat. (1995), was not the same as requiring a criminal defendant to submit and pay for "random drug testing" inasmuch as "random drug testing" encompassed a potentially larger range of testing for the presence of drugs, e.g., breathlyzer and blood testing, than does "urinalysis testing."

Apparently, however, the Second District Court of Appeal appeared persuaded that Section 948.09(6), Florida Statutes (1995), granting discretion to the Department of Corrections to require a defendant on supervision to submit to and pay for urinalysis testing, provided constructive notice sufficient to support the conclusion that the probation condition requiring a defendant to submit to and pay for drug testing was a general condition in total that need not be orally announced. See Huff v. State, No. 96-02082 at slp op. 1.; see also Smith v. State, No. 96-03383 (Fla. 2d DCA Nov. 12, 1997); Williams v. State, 700 So. 2d 750 (Fla. 2d DCA 1997) as additional cases certified by the Second District Court of Appeal to this Court, case numbers 91,852 and 91,655, respectively. Thus, the Second District Court of Appeal certified the question to this Court:

> SHOULD THE REQUIREMENT THAT A DEFENDANT PAY FOR DRUG TESTING BE TREATED AS A GENERAL CONDITION OF PROBATION FOR WHICH NOTICE IS PROVIDED BY SECTION 948.09(6), FLORIDA STATUTES (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

Huff v. State, No. 96-02082 at slp op. 1. Mr. Huff urges this Court to answer the first part of the certified question in the

negative, thereby, affirming this Court's previous decision, in Curry v. State, 682 So. 2d 1091, 1092 (Fla. 1996), that requiring a defendant to pay for drug testing should be treated as a special condition of probation requiring oral announcement at sentencing. See also Brock v. State, 688 So. 2d 909, 912 (Fla. 1997). Moreover, Respondent, hereby, adopts and incorporates herein the arguments presented in Respondent's Answer Brief on the Merits, State v. Williams, (No. 91,655) now pending.

In Petitioner's brief on the merits, Petitioner argues, in summary, that Section 948.09(6) of the Florida Statutes (1995) provides sufficient notice and authorization for requiring a defendant to pay for "drug testing" as a general condition of probation. Plainly, Section 948.09(6) of the Florida Statutes (1995) did not put the Defendant, Mr. Huff, in this case, on notice that he should pay for all costs of "drug testing" without oral announcement. Finally, Section 948.09(6) of the Florida Statutes (1995) did not put the Defendant, Mr. Huff, on notice that, as a general condition, he should be required to pay for urinalysis testing to identify drug usage as argued by Petitioner, other than as particularly set out therein the statute. To suggest otherwise, as Petitioner does, improperly enlarges the clear meaning and legislative intent of Section 948.09(6) of the Florida Statutes (1995). "Urinalysis testing" is not the same as "random drug testing."

Petitioner fails to recognize that Section 948.09(6), Florida Statutes (1995) is not a general condition of probation. See §

948.03-.034, Fla. Stat. (1995); see also Hart v. State, 668 So. 2d DCA 589, 592 (Fla. 1996). Petitioner argues that Section 948.09(6), Florida Statutes (1995) provided statutory authority for condition (8) so that the trial court did not have to orally announce the payment requirement contained therein as related to "random drug testing." Section 948.09(6), Florida Statutes (1995) provides:

> (6) In addition to any other required contributions, the department, at its discretion, may require offenders under any form of supervision to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program. Any failure to make such payment, or participate, may be considered a ground for revocation by the court, the Parole Commission, or the Control Release Authority, or for removal from the pretrial intervention program by the state attorney. The department may exempt a person from such payment if it determines that any of the factors specified in subsection (3) exist.

§ 948.09(6), Fla. Stat. (1995). Thus, Petitioner submits that the payment requirement contained in condition (8) is statutorily authorized by § 948.09(6), Fla. Stat. (1995). See Petitioner's Brief on the Merits at 4-7, State v. Huff, (No. 91,851).

In making this quantum leap of logic, Petitioner relies on Hart v. State, 668 So. 2d 589, 592 (Fla. 1996), to support the proposition that general conditions of probation are those contained within the statutes, presumably including section 948.09(6), Florida Statutes (1995). In doing so, Petitioner chooses to omit material citations. See Petitioner's Brief on the Merits at 3, Huff, (No. 91,851). See Hart v. State, wherein this Court observed:

It has been held that the usual "general conditions" of

> probation are those contained within the statutes. Hart, 651 So. 2d at 113. In other words, a condition of probation which is statutorily authorized or mandated, see, e.g., sections 948.03-.034, Florida Statutes (1993), may be imposed and included in a written order of probation even if not orally pronounced at sentencing. Nank v. State, 646 So. 2d 762, 763 (Fla. 2d DCA 1994). "The legal underpinning of this rationale is that the statute provides 'constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process.' " Id. (quoting Tillman v. State, 592 So. 2d 767, 768 (Fla. 2d DCA 1992)).
>
> "With regard to a special condition not statutorily authorized, however, the law requires that it be pronounced orally at sentencing before it can be included in the written probation order." Id. Consequently, when a trial court sufficiently apprises the defendant of the "substance of each special condition" so that the defendant has the opportunity to object "to any condition which the defendant believes is inappropriate" the minimum requirements of due process are satisfied. Olvey, 609 So. 2d at 643. [FN4]
>
> > FN4. We agree with the Second District's statement on the substance of an "open court pronouncement":
> >
> > When special conditions of probation are imposed for the first time, these conditions can be orally explained using language which is different from the language in the order of probation. So long as the oral pronouncement is sufficient to place the defendant on notice of the general substance of each special condition and gives the defendant the opportunity to object, the minimum requirements of due process are satisfied.
> >
> > Olvey, 609 So. 2d at 643. We further believe the above rule applies equally to general conditions that are pronounced in open court.

Hart v. State, 668 So. 2d at 592. The passage from Hart quoted by Petitioner, with citations not omitted, stands for the proposition that "a condition of probation that is statutorily authorized or mandated, see, e.g., sections 948.03-.034, Florida Statutes (1993),

may be imposed and included in a written order of probation even if not orally pronounced at sentencing" since "the statute provides 'constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process.'" Hart v. State, 668 So. 2d at 592. Moreover, even if section 948.09(6), Florida Statutes (1995) were to be considered to provide constructive notice, that section of the probation statutes would only provide constructive notice of as the Department of Corrections having discretion to require offenders to submit to and pay for urinalysis testing not any and all "random drug testing." See § 948.09(6), Fla. Stat. (1995).

Additionally, Petitioner appears to recognize that this Court, in Brock, 688 So. 2d 909 (Fla. 1997), stated that requiring a defendant to pay for drug testing was a special condition of probation that lacks statutory authorization and, therefore, must be orally pronounced at sentencing. See Brock v. State, 688 So. 2d 909, 912 (Fla. 1997), in footnote 4, wherein this Court observed:

> FN4. Brock does not contest that the new condition imposing random drug and alcohol testing was a statutorily authorized, i.e., "general" condition, as opposed to a special condition, of community control. See also Hart, 668 So. 2d at 592 (stating that "standard or general conditions" are those contained in sections 948.03-.34, Florida Statutes). In Hart, we held that those general conditions, contained in conditions one to eleven in the untitled section of the Form for Order of Probation, rule 3.986(e), Florida Rules of Criminal Procedure, did not require oral pronouncement at sentencing since they "provide the same type of notice as the probation conditions set forth in the Florida Statutes." Id. at 593. Indeed, those conditions "contain most of the statutory conditions of probation as well as other provisions which apply to most orders of probation." Id.

at 592.

> However, for purposes of clarity, we note that some conditions of probation listed under the "SPECIAL CONDITIONS" portion in rule 3.986(e) contain statutory authorization. Under our reasoning in Hart, any such conditions need not be orally pronounced at sentencing to be held valid. But, if any portion of the special condition lacks statutory authorization, such as the requirement in the second special condition that probationer "pay for the [drug] tests," it must be pronounced orally at sentencing to give the defendant sufficient notice of the substance of the condition and the opportunity to object. Fla. R. Crim. P. 3.986(e). Thus, in that situation, the preferred practice is for the trial court to pronounce in full at sentencing any special conditions of probation and/or community control even if portions thereof contain statutory authorization.

Brock v. State, 688 So. 2d at 912 n.4. Referring to Section 948.09(6), Florida Statutes (1995), Petitioner suggests that this Court "overlooked the relevant statutory authority in fashioning the exemplar that it did to illustrate the point." See Petitioner-'s Brief on the Merits at 5, State v. Huff, (No. 91,851). Accordingly, Petitioner argues that the payment requirement contained in condition (8) has statutory authority therefor and, thus, need not be orally announced in open court at sentencing.

Petitioner's argument simply is without merit in several respects. Most important, however, Petitioner answers the certified question affirmatively; that is, Section 948.09(6), Florida Statutes (1995) provides constructive notice that a defendant be required to pay for drug testing, presumably all drug testing, including but not limited to urinalysis, such that oral announcement at sentencing is not required. As noted above, Mr. Huff's answer to that question is an unequivocal no. "Random drug testing" broadly encompasses more testing than just urinalysis

testing, i.e., breathalyzer testing and blood testing, for example, to name the most obvious other types of testing that a defendant on probation may also have imposed. See Williams v. State, 700 So. 2d 750, 751 (Fla. 2d DCA 1997) certifying the same question to this Court based on even broader conditions, i.e., conditions 8, 20 and 24 dealing with drug and alcohol testing and treatment. See Respondent's Answer Brief on the Merits at 5-11, State v. Williams, (No. 91,655) for detailed discussion as to broad nature of question certified. Section 948.09(6), Florida Statutes (1995) plainly does not provide notice, constructive or otherwise, that a defendant must pay for any and all "random drug testing." Section 948.09(6), Florida Statutes (1995) does provide, however, constructive notice that a criminal defendant under supervision may be required at the discretion of the Department of Corrections, not the trial court, to submit to and pay for "urinalysis testing" as set out therein.

Section 948.09(6), Florida Statutes (1995) provides notice that "the department, at its discretion, may require offenders under any form of supervision to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program." See § 948.09(6), Fla. Stat. (1995). Even the standard or general condition that requires a defendant to "[s]ubmit to random testing as directed by the correctional probation officer or the professional staff of the treatment center where he or she is receiving treatment to determine the presence or use of alcohol or controlled substances" is not limited to just urinalysis testing by its terms and, thus, neither Mr. Huff nor any other defendant was,

nor is, on any constructive notice provided by Section 948.09(6), Florida Statutes (1995) that he must pay for the cost of the "random drug testing." See §§ 948.03(1)(k)1, 948.09(6), Fla. Stat. (1995); see also Fla. R. Crim. P. 3.986(e) special conditions.

The plain language of Section 948.09(6), Florida Statutes (1995) provides only that "the department, at its discretion, may require offenders under any form of supervision to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program." § 948.09(6), Fla. Stat. (1995). Also, "[t]he department may exempt a person from such payment if it determines that any of the factors specified in subsection (3) exist." § 948.09(6), Fla. Stat. (1995); see also § 948.09(3), Fla. Stat. (1995) as to a list of seven factors that the Department may consider when determining whether to exempt a person from payment for urinalysis testing. The plain language of the penal statute is by its own terms discretionary, not mandatory, and must be strictly construed as such. Presumably, Section 948.09(6), Florida Statutes (1995) is a penal statute that must be strictly construed. See Hewitt v. State, 613 So. 2d 1305 (Fla. 1993) wherein this Court, considering § 948.06(4), Fla. Stat. (1991), observed that "[u]nder Florida law, penal statutes such as the one at issue here must be strictly construed. Art. I, § 9, Fla. Const.; see Jeffries v. State, 610 So. 2d 440 (Fla. 1992); Perkins v. State, 576 So. 2d 1310 (Fla. 1991)." Hewitt v. State, 613 So. 2d at 1306. Thus, the discretion, statutorily granted to the Department of Corrections regarding the use of and payment for urinalysis testing to identify

drug usage as part of the rehabilitation program, must not be construed to provide notice that a defendant shall be required to pay for costs associated with urinalysis testing under any and all conditions of probation imposed by the trial court. Also, the discretion, statutorily granted to the Department of Corrections by the legislature regarding the use of and payment for urinalysis testing to identify drug usage as part of the rehabilitation program, must not be construed to provide constructive notice that a defendant shall be required to pay for costs associated with all "random drug testing," including but not limited to urinalysis, i.e., breathalyzer tests and bloodtests.

Finally, Petitioner's suggestion that this Court somehow overlooked Section 948.09(6), Florida Statutes (1995) is simply without merit as is Petitioner's argument that Section 948.09(6), Florida Statutes (1995) provided statutory authority that as a general condition probation, a criminal defendant may be required to pay for "random drug testing" without oral announcement, particularly, considering that the section does not authorize "random drug testing" in the broad sense argued by Petitioner or in the even broader sense implied by the certified question as to all drug testing, including but not limited to urinalysis. One of the special conditions of probation included in Rule 3.986(e), Florida Rules of Criminal Procedure, provides that:

> [y]ou will submit to urinalysis, breathalyzer, or bloodtests at any time requested by your officer, or the professional staff of any treatment center where you are receiving treatment, to determine possible use of alcohol, drugs, or controlled substances. You shall be required to pay for the tests unless payment is waived by

your officer.

Fla. R. Crim. P. 3.986(e) under special conditions. Comparing the provision above, as promulgated by this Court, with Section 948.09(6), Florida Statutes (1995) leads to the conclusion that this Court did not overlook the statutory discretion granted to the Department of Corrections to require offenders to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program at the time that the Court decided Brock as well as Curry, Justice, and Hart, for that matter. "In 1992, the order of probation form was added to Florida Rule of Criminal Procedure 3.986. See In re Amendments to the Florida Rules of Criminal Procedure--Rules 3.140 and 3.986, 603 So. 2d 1144 (Fla. 1992)." Hart v. State, 668 So. 2d at 392; see also § 945.30(4), Fla. Stat. (1991) subsequently renumbered § 948.09(6), Fla. Stat. (Supp. 1992) containing similar language authorizing the Department of Corrections discretion to use and require payment for urinalysis testing. Thus, Petitioner's suggestion that this Court overlooked the statutory authorization for urinalysis testing contained in § 948.09(6), Fla. Stat. (1995) and the implication that but for the Court being unaware of that existing statutory authorization for urinalysis testing, Brock and Curry, would have been decided differently, is simply without merit. Just the opposite, the Court recognized that legislatively granted discretion given to the Department of Correction was not the same as the special condition of probation contained in Florida Rule of Criminal Procedure 3.986(e) or the special condition of probation under consideration

in this appeal, condition (8) requiring Mr. Huff to submit to and pay for "random drug testing."

Thus, Petitioner's contention that Section 948.09(6), Florida Statutes (1995) provides statutory authority that as a general condition of probation, a criminal defendant may be required to pay for any and all "random drug testing" without oral announcement is without merit. Section 948.09(6), Florida Statutes (1995) relating to the Department of Correction having discretion to require offenders under any form of supervision to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program does not provide any constructive notice that a criminal defendant may be required to pay for all "random drug testing," including but not limited to urinalysis, i.e., breathalyzer, or bloodtests. Similarly, without merit is Petitioner's conclusion that condition (8) requiring Mr. Huff to pay for any and all "random drug testing" is a general condition of probation authorized in by Section 948.09(6), Florida Statutes (1995).

Finally, Respondent, Mr. Huff, notes for the Court's consideration, the apparent inconsistency presented by the certified question and Petitioner regarding Section 948.09(6), Florida Statutes (1995) being statutory authority for and, therefore, constructive notice of, the proposition that as a general condition of probation, a criminal defendant may be required to pay for any and all "random drug testing" without oral announcement. The condition complained of herein, (8), as well as

in Williams (91,655), conditions (8), (20), and (24), also pending before this Court, were on preprinted forms with which both the trial courts and State were well acquainted. Yet neither the Second District Court of Appeal nor Petitioner suggest that the probation statutes put the trial courts nor the State on any kind of constructive notice such that the trial court must orally announce those parts of the probation conditions contained in the preprinted forms used that are not contained in the general or standard conditions of probations as set out in the probation statutes, Chapter 948, Florida Statutes (1995) or Florida Rule of Criminal Procedure 3.986(e)1-11. Instead of acknowledging that the trial courts must function under the same constructive notice provided by the probation statutes and rules of criminal procedure as the criminal defendant, Petitioner and Second District Court of Appeal choose to expand the concept of constructive notice to include not only the probation statutes as set out in Chapter 948 of the Florida Statutes (1995) and Florida Rule of Criminal Procedure 3.986(e)1-11 but, also, the conditions contained in the preprinted forms other than that provided in rule 3.986(e), Fla. R. Crim. P., used by each circuit court, in this case, the Tenth Judicial Circuit, which included hybrid conditions of probation that have combined general or standard conditions with special conditions of probation. Mr. Huff had no actual or constructive notice that condition (8) required him to submit to and pay for random drug testing according to the record transcript of the sentencing hearing. (V1, R82-88). Thus, the hybrid condition

should have been orally announced in open court.

Therefore, this Court should answer the certified question presented such that the requirement that a defendant pay for drug testing continues to be treated as special condition of probation that requires oral announcement rather than a general condition of probation for which constructive notice is provided for by Section 948.09(6), Florida Statues (1995). In so doing, albeit, no motion to stay mandate has of yet been filed, the Court should affirm the Second District Court of Appeal's order reversing, in part, the trial court's sentencing order and remanding for proceedings consistent therein, including but not limited to striking the payment requirement in probation condition (8) as a special condition not orally announced. See Huff v. State, No. 96-02082, slp op. at 1 (Fla. 2d DCA Oct. 22, 1997).

CONCLUSION

Based on the foregoing facts, arguments, and citation of authorities, Mr. Huff, respectfully requests that this Honorable Court this Court should answer the certified question presented such that the requirement that a defendant pay for drug testing continues to be treated as special condition of probation that requires oral announcement. In so doing, the Court should affirm the Second District Court of Appeal's order with respect to striking that portion of condition (8) relating to requiring him to pay for costs of random drug testing as contained in the written order of probation entered by the trial court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 9th day of January, 1998.

Respectfully submitted,

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