IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. 91,851**

DENNIS LYNN HUFF

Respondent.
_____/

CERTIFIED QUESTION FROM
THE FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT

MERITS BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

The Respondent held himself out as a deputy sheriff and took it upon himself to act as such. Upon his conviction, he appealed. In a supplemental brief to the court below, he asked that the condition of his probation requiring him to bear the cost of drug testing be stricken. He called it a special condition without statutory authority. The State answered, showing the existence of statutory authority for the requirement. The district court affirmed, certifying the question to this Court.

SUMMARY OF THE ARGUMENT

The Second District has certified a question of great public importance to this Court. There is statutory authority that as a general condition of probation, a criminal defendant may be required to pay for drug testing without oral announcement.

CERTIFIED QUESTION

> 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 (1965), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?
>
> (As Stated by the Second District)

In State v. Hart, 668 So. 2d 589 (Fla.1996), this Court concluded that rule or statutory-based notice of conditions of probation was sufficient to make such conditions general conditions, conditions that could be imposed without the trial court's having to orally pronounce them.[1] Section 948.09(6) empowers the Department of Corrections to require offenders under any form of supervision to bear the costs of urinalysis

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[1]In the Court's words:

> It has been held that the usual "general conditions" of probation are those contained within the statutes. (Citation omitted). In other words, a condition of probation which is statutorily authorized or mandated...may be imposed and included in a written order of probation even if not orally pronounced at sentencing. (Citation omitted). "The legal underpinning of this rationale is that the statutes provide 'constructive notice of the condition which together with the opportunity to be heard and raise any objections at the sentencing hearing satisfies the conditions of procedural due process.

Hart v. State, 668 So.2d at 592.

seeking to identify drug usage by the offender.[2] The Department of Corrections supervises probationers. See Brown v. State, 697 So. 2d 928(Fla. 2d DCA 1997). Petitioner therefore contends that this is sufficient notice, such that requiring a probationer to bear the cost of urinalysis is a general condition of probation. Hence it need not be orally pronounced at sentencing.[3]

To be sure, the district courts of appeal had been routinely striking conditions of probation requiring offenders to pay for drug testing. E.g. Dean v. State, 669 So.2d 1140, 1141 (Fla. 4th DCA 1996). Occasionally the State has even conceded the point.

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[2]The text of the section 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.

Section 948.09(3), Florida Statutes (1995) designates the extenuating circumstances which exempt a person from payment of urinalysis testing to identify drug usage.

[3]Petitioner also adopts and incorporates the argument presented to this Court in State v. Williams, No. 91,655 (pending).

Davis v. State, 695 So. 2d 921 (Fla. 4th DCA 1997). As mentioned in the decision below, even this Court has stated such to be the case. It was in dicta in Curry v. State, 682 So. 2d 1091 (Fla. 1996) where this Court observed, parenthetically, that the District Court had correctly stricken an unannounced condition of probation valid. More recently, in Brock v. State, 688 So. 2d 909, 912 n.4 (Fla. 1997), this Court stated that "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." It would appear that the Court overlooked the relevant statutory authority in fashioning the exemplar that it did to illustrate its point.

Until such time as the State raised the existence of section 948.09(6), in this case, Smith v. State, No. 96-03383, 1997 WL 716800 (Fla. 2d DCA Nov. 12, 1997) and Williams v. State, 700 So.2d 750 (Fla. 2d DCA 1997)[West Reserved Citation][4], the matter received little attention or analysis. A recent decision by the Fifth District, Porchia v. State, No. 97-348 (Fla. 5th DCA Dec. 5, 1997), is typical of the type of reasoning found in

[4]Both Smith and Williams are pending on review in this Court. Smith is case number 91,852. Williams is case number 91,655.

these opinions. There the District Court concluded that requiring a probationer to pay for drug testing was a special condition of probation and that it could not be imposed unless orally pronounced The District Court cites Justice v. State, 674 So. 2d 123 (Fla. 1996) as its primary authority for this proposition. This Court was not, however, concerned with deciding which conditions of probation are or are not special conditions of probation. In fact, the condition at issue here was not one of the conditions at issue.[5] The Court used the Justice case to address the propriety of allowing the reimposition of special conditions of probation the trial court had failed to orally pronounce on remand from the order striking them. The Court concluded that it was not proper to do so. As secondary authority, the Porchia court cites its own decision in Jackson v. State, 685 So .2d 1386 (Fla. 5th DCA 1997). Jackson, however, did not engage in any analysis of the question. It simply cited this Court's decision in Justice. It most assuredly did not address the existence of the statutory

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[5]The conditions at issue were" (2) ordering the defendant to pay for and successfully complete the Mentally Disordered Sex Offender program; (3) prohibiting the defendant's participation in any job or activity where he would wear a police-type uniform or use police-type equipment; and (4) restricting the defendant's contact with his immediate family until the entire family entered a program for family members of mentally-disordered sex offenders and all therapists approved contact with the family." Justice, 674 So. 2d at 126 n.2.

authority Petitioner called to the attention of the District Court in this case.

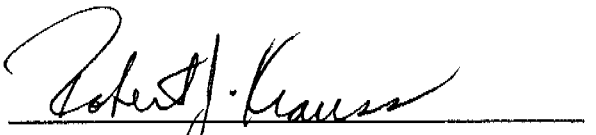
None of the previous precedent on the subject takes into account the effect of section 948.09(6). As the State noted in its supplemental brief in the district court, in all likelihood the State had simply failed to call it to the attention of the Court. This case and its companion cases, Smith and Williams, bring the matter into sharp focus. There is statutory authority for the condition. It has been overlooked until now. This is the time to set the law straight.

CONCLUSION

WHEREFORE Petitioner asks the Court answer the certified question, ruling that a condition of probation requiring a criminal to defendant pay for drug testing is a general condition of probation authorized by section 948.09(6).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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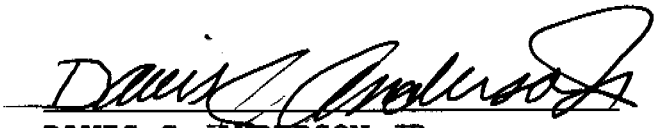

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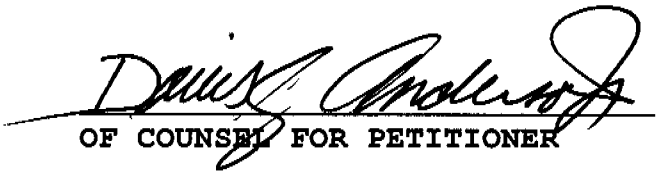
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to, Richard P. Albertine, Assistant Public Defender, Office of the Public Defender-Appeals, Pinellas Criminal Justice Center, 14250 49th Street North, Clearwater, FL 34622 on this 16th day of December, 1997.



OF COUNSEL FOR PETITIONER

AG L96-1-1825

IN THE SUPREME COURT OF FLORIDA

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CERTIFIED QUESTION FROM
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INDEX TO APPENDIX ON

MERITS BRIEF ON CERTIFIED QUESTION

Respondent files this Appendix:

Exhibit 001 **A copy of the opinion rendered by the Second District in Huff v. State,No. 96-02082 (Fla. 2d DCA Oct. 22, 1997)**

DENNIS LYNN HUFF, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-02082. Opinion filed October 22, 1997. Appeal from the Circuit Court for Polk County; Robert L. Doyel, Judge. Counsel: James Marion Moorman, Public Defender, Bartow, and Richard P. Albertine, Jr., Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Davis G. Anderson, Jr., Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) In this appeal, the defendant, Dennis Lynn Huff, raises six issues. We affirm the convictions without discussion, but reverse some portions of the sentencing order.

Huff correctly contends that the trial court failed to orally pronounce the discretionary fine of $44.77, imposed pursuant to

section 775.083, Florida Statutes (1995). See Price v. State, 22 Fla. L. Weekly D1885 (Fla. 2d DCA July 30, 1997); Anderson v. State, 22 Fla. L. Weekly D1796 (Fla. 2d DCA July 18, 1997). Therefore, we strike this discretionary fine.

As to condition eight dealing with drug and alcohol testing and treatment, Huff contends that he was given no notice at sentencing that he would be required to pay for the testing. This court has held that requiring a defendant to pay for either alcohol or drug testing is a special condition of probation which must be announced at sentencing. See, e.g., 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).

The State in this case has pointed out, however, that 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 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. Accordingly, we strike this special condition of probation. As we did in Williams v. State, No. 96-01923 (Fla. 2d DCA Oct. 8, 1997) [22 Fla. L. Weekly D2385], we certify the following question to the Florida Supreme 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?

As to the remaining issues, we find they either lack merit or were not preserved for appellate review. Therefore, we affirm the judgment and sentence in all other respects.

Affirmed in part, reversed in part and certain conditions of probation stricken. (BLUE, A.C.J., and FULMER and WHATLEY, JJ., Concur.)