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DEC 29 1997

CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
 :
 Petitioner, :
 :
 vs. :
 :
 TERRY SMITH, :
 :
 Respondent. :
 :
 _____ :

Case No. 91,852

CERTIFIED QUESTION FROM 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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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

This Court should follow its precedent and hold that the probation condition requiring the probationer to pay for drug testing is a special condition which must be orally announced to be a valid condition of probation. Condition (12) of Smith's probation was properly stricken and should not be reimposed.

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 FOR IN SECTION 948.09(6), FLORIDA STATUTES (1995), OR SHOULD IT BE TREATED AS A SPECIAL CONDITION THAT REQUIRES ORAL ANNOUNCEMENT?

This Court has consistently held that the probation condition requiring the defendant to pay for drug testing is a special condition that must be orally announced to give sufficient notice. Brock v. State, 688 So. 2d 909 (Fla. 1997); Curry v. State, 682 So. 2d 1091 (Fla. 1996). Respondent has argued that since there is statutory authority for the condition requiring a defendant to pay for his or her drug testing, it should be treated as a general condition of probation. Respondent relies on this Court's opinion in State v. Hart, 668 So. 2d 589 (Fla. 1996) to define a general condition of probation as one that is statutorily authorized, and a special condition as one that is not.

However, in Hart, this Court defined general conditions as those statutorily authorized by Sections 948.03 through 948.034 of the Florida Statutes which are listed in the first section of the probation order form. Hart, 682 So. 2d at 592. Id. This Court then defined the second set of nine probation conditions as "Special Conditions." Hart, 682 So. 2d at 592. It is the Respondent's interpretation of Hart that any condition not statutorily authorized by Section 948.03 through 948.034 is a

special condition. In Brock, this Court clarified that although some of the conditions that are listed as special conditions on the probation form contain statutory authorization, it was the preferred practice for the trial courts to orally announce all special conditions of probation even if portions of the conditions were statutorily authorized. Brock, 688 So. 2d at 912, fn 4. Therefore, pursuant to the decisions of this Court, the condition requiring payment for drug testing is a special condition requiring oral announcement.

In the instant case, the Second District Court of Appeal was following the above decisions of this Court and its own decisions in striking the condition of probation requiring Smith to pay for drug testing. Huff v. State, 700 So. 2d 787 (Fla. 2d DCA 1997); Williams v. State, 700 So. 2d 750 (Fla. 2d DCA 1997); Johnson v. State, 696 So. 2d 831 (Fla. 2d DCA 1997); Malone v. State, 652 So. 2d 902 (Fla. 2d DCA 1996). Thus, condition (12) was properly stricken from Smith's order of probation and should not be reimposed.

CONCLUSION

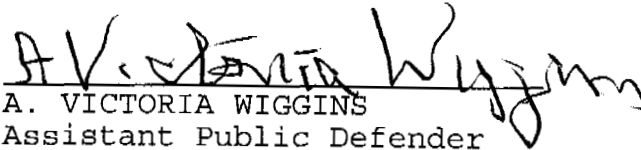
In light of the foregoing reasons, arguments, and authorities, Respondent respectfully asks this Honorable Court to find that the probation condition requiring the payment of drug testing to be a special condition of probation which must be orally announced and affirm the decision of the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss and William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ~~23~~ day of December, 1997.

Respectfully submitted,

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