IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL LEVANDOSKI, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: SC17-962

PETITIONER'S BRIEF ON JURISDICTION

On Review from the Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

This case involves the issue of whether a trial court's oral pronouncement of "sex offender probation" satisfies due process and notice requirements where the defendant is not convicted of a crime requiring sex offender probation.

A. Background facts, as presented by the Fourth District Court of Appeal

Petitioner pleaded guilty to lewd computer solicitation of a child and traveling to meet a minor for sexual activity. *Levandoski v. State*, 42 Fla. L. Weekly D910 (Fla. 4th DCA April 19, 2017). The trial court sentenced him to 48 months in prison followed by a year of probation on Count I and 15 years "of sex offender probation" on Count II. *Id*. at D910. It later stated that sex offender probation was "available, but …not mandatory" and that probation "will be subject to the conditions of sex offender probation." *Id*. As a precaution, in case the law changed by the time Petitioner was released from prison, the trial court pronounced that it was "making it a special condition of probation" that he was (1) prohibited from accessing the internet, (2) possessing a device that can access the internet, and (3) having an email address or other similar type of address that would allow him to participate in conversation over the internet. *Id*.

Sixteen months after release from prison, Petitioner filed a motion to strike the sex offender conditions of his probation. *Id*. He argued that the conditions of sex offender probation were special conditions of probation and those not orally

pronounced by the trial court at sentencing were illegal. *Id.* The trial court concluded, based on *Sturges v. State*, 980 So. 2d 1108 (Fla. 4th DCA 2008), that it had been without authority to sentence Petitioner to sex offender probation. *Id*. However, it did have the authority to impose the conditions of sex offender probation that were relevant to his charges. *Id*. It denied the motion.

B. The Fourth District Court of Appeal's analysis and holding

The Fourth District recognized that a trial court must orally pronounce special conditions of probation in order to satisfy due process and provide adequate notice to the defendant. *Id*. at D911. It categorized "sex offender probation" as "a term of art describing certain conditions of probation" that the court must impose pursuant to statute in certain circumstances. *Id*. The court may also impose "sex offender probation" for a non-enumerated offense if it states "at sentencing that it is imposing sex offender probation." *Id*. It held that a court can impose sex offender probation as a special condition of probation without stating the various components that term encompasses:

> Due process is satisfied, and the defendant is put on notice, when the court states at sentencing that it is imposing sex offender probation. When a court clearly imposes sex offender probation as a special condition of probation, it need not individually specify each item contained within the umbrella of sex offender probation conditions.

Id.

The *Levandoski* court found Petitioner was on notice that he was sentenced to "sex offender probation" because: (1) prior to entering his plea, he acknowledged a prior State offer to impose sex offender probation; (2) after sentencing, he filed two motions stating that he was sentenced to sex offender probation; and (3) his appellate attorney filed an *Anders* brief acknowledging his sentence of sex offender probation. *Id*.

Thus, finding no conflict between the court's oral pronouncement and written sentence, the Fourth District affirmed Petitioner's sentence on April 19, 2017. *Id.* It also certified that its decision is in conflict with the First District's opinion in *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So. 3d 1091 (Fla. 1st DCA 2016). *Id.* He filed a notice to invoke discretionary jurisdiction of this Court on May 18, 2017. This jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal held that a trial court may impose standard conditions of sex offender probation as special conditions of probation by stating that it is imposing "sex offender probation" without orally pronouncing any of the specific special conditions. This decision conflicts with the First District Court of Appeal's decision in *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So. 3d 1091 (Fla. 1st DCA 2016), where the court held that a trial court may impose selected sex offender probation conditions as special conditions of probation but must orally pronounce each special condition at sentencing. The Fourth District's opinion also conflicts with this Court's holding in *State v. Williams*, 712 So. 2d 762 (Fla. 1998), that, in order to satisfy due process and provide notice, a trial court is required to orally pronounce any special condition of probation it imposes.

ARGUMENT

This Court has jurisdiction under article V, section 3(b)(3) of the Florida Constitution, because the Fourth District's decision conflicts with a decision of this Court and decisions from other District Court of Appeals.

The Fourth District held that a trial court satisfies notice and due process requirements when it pronounces "sex offender probation" as a special condition of probation without specifying indentifying which conditions of sex offender probation apply. This decision conflicts with: (1) the First District's determination that a judge may impose sex offender probation conditions as special conditions of probation, but that it must orally pronounce each special condition at sentencing; and (2) this Court's holding that a judge must orally pronounce any special condition of probation at sentencing.

A. The Fourth District's decision conflicts with *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015), *clarified on remand*, 193 So. 3d 1091 (Fla. 1st DCA 2016).

The First District addressed this identical issue in *Snow v. State*, 157 So. 3d 559 (Fla. 1st DCA 2015). There, the defendant appealed the denial of his motion to correct sentencing error. *Id*. at 560. He argued that his conviction for traveling to meet a minor to do unlawful acts was not an enumerated offense under section 948.03, Florida Statutes, and thus the trial court illegally imposed sex offender probation. *Id*. at 561. The trial court orally pronounced:

> As to Count I, order that you serve eight years in the Florida State Prison with five years probation to follow, sex offender probation. You are to have sex offender therapy within 60 days after your

> release. You're to have curfew of eight hours a day from ten to six. You're not to own any pornographic materials or any computer. You're to keep a driving log. You're not to have any contact with minors … and you will be designated as a sexual offender.

Id.

The *Snow* court acknowledged that a trial court may impose selected sex offender probation conditions that reasonably relate to the defendant's conviction as special conditions of probation. *Id.* (*citing Villanueva v. State*, 118 So. 3d 999, 1002-04 (Fla. 3d DCA 2013)). However, if the court is going to do so, it must orally pronounce each special condition at sentencing before including the condition in the written order. *Snow,* at 561. Because the trial court included every condition of sex offender probation – not just those stated orally – in its written order, the *Snow* court remanded with orders to strike the sex offender conditions the trial court had not pronounced at sentencing. *Id*. at 562.

Here, as in *Snow*, the trial court orally announced it was imposing "sex offender probation," and then orally pronounced three special conditions from the standard sex offender conditions. Yet the Fourth District specifically found that the trial court is not required to orally pronounce each special condition of sex offender probation and the statement that it was imposing "sex offender probation" was sufficient to include every sex offender probation condition as part of the sentence. *Levandoski*, 42 Fla. L. Weekly at D911. Thus the *Levandoski* opinion is in direct conflict with *Snow*.

B. The Fourth District's decision conflicts with this Court's holding in *State v. Williams*, 712 So. 2d 762 (Fla. 1998).

This Court explained that in order to satisfy due process the trial court must pronounce a defendant's sentence in open court in order to provide notice as to the conditions of probation imposed. *State v. Williams*, 712 So. 2d 762, 764 (Fla. 1998). An exception to this rule applies to the standard, or general, conditions of probation. *Id*. Because these are defined by statute, a defendant has constructive notice of the general conditions of probation and the court need not pronounce them orally. *Id*. This Court distinguished general conditions of probation from "special" conditions of probation - those conditions not statutorily authorized or mandated and not found in rule 3.986. *Id*. It found that: "[b]ecause a defendant is not on notice of special conditions of probation, these conditions must be pronounced orally at sentencing in order to be included in the written probation order." *Id*. (*citing State v. Hart*, 668 So. 2d 589, 592 (Fla. 1996)).

The *Levandoski* court acknowledged this rule, citing *Lawson v. State*, 969 So. 2d 222, 227 n. 3 (Fla. 2007). 42 Fla. L. Weekly at D911. However, despite finding that "sex offender probation" is a "term of art" describing mandatory conditions of probation where a defendant is convicted of certain sex offenses, it found that pronouncing "sex offender probation" equally puts a defendant not convicted of one of those sex offenses on notice of every applicable special condition of probation and satisfies due process. *Id*.

Section 948.30, Florida Statutes, mandates a court impose certain conditions of probation for offenders convicted of the sex offenses specified within the statute. Under the rule of *Williams*, the trial court need not orally pronounce each applicable condition as the defendant has constructive notice of these general conditions of sex offender probation. *See also Kalinowski v. State*, 948 So. 2d 962 (Fla. 5th DCA 2007) (holding trial court not required to orally pronounce the mandatory conditions of sex offender probation). But *Williams* requires actual notice of the conditions for which the defendant does not receive constructive notice.

The oral pronouncement of "sex offender probation" does not provide sufficient notice of specific special conditions of probation to satisfy due process. The Fifth District recently addressed this lack of specificity in ordering "sex offender probation" stating:

> The one-size-fits-all probation order at use here impermissibly required Appellant to decipher which of the conditions apply by, among other things, researching particular statutes to determine if they apply to his circumstances. This does not give fair notice of what is expected of Appellant. *See Lawson v. State*, 941 So. 2d 485, 489 (Fla. 5th DCA 2006) (probation order should give fair notice of conduct that might result in violation).

Nero v. State, 42 Fla. L. Weekly D1036 (Fla. 5th DCA May 5, 2017). As the Fourth District held that a trial court need not inform a probationer which non-

mandatory conditions of sex offender probation it is imposing as special conditions of probation, its decision is in conflict with *Williams*.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should accept jurisdiction.

CERTIFICATE OF SERVICE

I certify that I served a copy of this jurisdictional brief to Allen Geesey, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 30th day of May, 2017.

/s/ Joshua LeRoy
Joshua LeRoy

CERTIFICATE OF FONT

I certify I prepared the instant brief with 14 point Times New Roman type, in compliance with a Fla. R. App. P. 9.210(a)(2).

/s/ Joshua LeRoy
Joshua LeRoy