IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,789

THE STATE OF FLORIDA,

Petitioner/Cross-Respondent,

-vs-

JACKIE FORCHIN,

Respondent/Cross-Petitioner.

BRIEF OF RESPONDENT/CROSS-PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

This is a petition and cross-petition for discretionary review on the grounds of express and direct conflict of decisions. In this brief of respondent/cross-petitioner on jurisdiction, all references are to the appendix attached to this brief, paginated separately and identified as "A", followed by the page numbers. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts contained in petitioner/cross-respondent's brief on jurisdiction as a substantially accurate account of the proceedings below, as reflected in the opinion of the Third District Court of Appeal, with the following additions:

The affidavit of violation of probation filed in this case alleged that Jackie Forchin had violated the conditions of his probation by committing the criminal offense of tampering with physical evidence, and by failing to report to his probation officer on November 8, 1994 (A. 2). As to Forchin's failure to present himself to his probation officer on November 8, the district court of appeal found the following evidence sufficient to establish a willful and substantial violation of probation:

> The probation officer had given Forchin the opportunity to appear on any date from November 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th. Although Forchin testified below that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected this contention when it noted that the weather had not precluded the probation officer from being present in the office on that date.

(A. 3-4).

On October 26, 1995, the State filed its notice to invoke the discretionary jurisdiction of this Court. On November 8, 1995, Mr. Forchin filed a cross-notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

Opinions of this Court do not apply to pending proceedings in other cases until the date that rehearing is denied by this Court. Accordingly, this Court's opinion in *State v. Jennings*, 20 Fla. L. Weekly D540 (Fla. October 19, 1995) cannot provide a basis for conflict jurisdiction, as this Court has not ruled on the motion for rehearing filed in that case.

The conflict between the decision of the district court of appeal in this case and the decision of the First District Court of Appeal in *Washington v. State*, 20 Fla. L. Weekly D1994 (Fla. 1st DCA August 31, 1995) is clear --- one case holds that a single missed appointment demonstrates a willful and substantial violation of probation sufficient to support a revocation of probation, and the other case holds exactly the opposite. Accordingly, on this basis this Court should exercise its discretionary jurisdiction to review the decision in the instant case.

ARGUMENT

I.

THE OPINION ISSUED BY THIS COURT IN *STATE v. JENNINGS*, 20 Fla. L. Weekly S540 (Fla. October 19, 1995), DOES NOT PROVIDE A BASIS FOR CONFLICT JURISDICTION, AS THAT OPINION IS NOT YET FINAL.

Opinions of this Court do not apply to pending proceedings in other cases until the date that rehearing is denied by this Court. *Allen v. State*, 20 Fla. L. Weekly S397 (Fla. July 20, 1995). A motion for rehearing was timely filed in *State v. Jennings*, 20 Fla. L. Weekly D540 (Fla. October 19, 1995), and as of the date of the filing of this brief, there has been no ruling on that motion for rehearing. Accordingly, this Court's opinion in *Jennings* cannot provide a basis for conflict jurisdiction.

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *WASHINGTON v. STATE*, 20 Fla. L. Weekly D1994 (Fla. 1st DCA August 31, 1995).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. *Neilsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960). In the present case, the Third District Court of Appeal applied a rule of law to produce a different result in a case which involves substantially the same facts as the decision of the First District Court of Appeal in *Washington v. State*, 20 Fla. L. Weekly D1994 (Fla. 1st DCA August 31, 1995).

Any probation violation sufficient to trigger revocation must be substantial, and the willful and substantial nature of the violation must be supported by the greater weight of the evidence. *Thorpe v. State*, 642 So. 2d 629 (Fla. 1st DCA 1994); *Green v. State*, 620 So. 2d 1126 (Fla. 1st DCA 1993); *Stevens v. State*, 599 So. 2d 254 (Fla. 3d DCA 1992). In the present case, the district court of appeal held that Jackie Forchin's single missed appointment with his probation officer on November 8, 1994 demonstrated the willful and substantial noncompliance with a condition of probation required to support a revocation of probation:

> As to Forchin's failure to present himself to his probation officer on November 8, we do find that the greater weight of the evidence supported the trial court's determination that Forchin's conduct was willful and substantial in nature to support the revocation. *Green v. State*, 620 So.2d 1126, 1129 (Fla. 1st DCA 1993); *Steiner v. State*, 604 So.2d 1265, 1267 (Fla. 4th DCA 1992). The probation officer had given Forchin the opportunity to appear on any date from November

> 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th. Although Forchin testified below that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected this contention when it noted that the weather had not precluded the probation officer from being present in the office on that date.

(A. 3-4).

This holding by the district court of appeal expressly and directly conflicts with the holding of the First District Court of Appeal in *Washington v. State*, *supra*. In that case, an affidavit of violation of probation was filed alleging that the defendant had violated his probation because he had been terminated from a counseling program for poor attendance, he had failed to pay the program's required fees, and he had engaged in disruptive behavior. On appeal from the order revoking the defendant's probation based on these violations, the appellate court found that the only violation established at the revocation hearing was the defendant's failure to attend a single counseling session. The court then held such a violation could not by itself support the revocation order:

> The trial court could find a violation of probation only for infractions which occurred during the period of probation. *A single missed counselling session does not demonstrate willful and substantial noncompliance with a condition of probation.*

20 Fla. L. Weekly at D1994.

The conflict between the decision of the district court of appeal in this case and the decision of the First District Court of Appeal in *Washington* is clear --- one case holds that a single missed appointment demonstrates a willful and substantial violation of probation sufficient to support a revocation of probation, and the other case holds exactly the opposite. Accordingly, this Court should exercise its discretionary jurisdiction to review the decision in the instant case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent/cross-petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 17th day of November, 1995.

HOWARD K. BLUMBERG
Assistant Public Defender

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1995

JACKIE FORCHIN,	**	
Appellant,	**	
vs.	**	CASE NO. 95-480
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed September 6, 1995.

An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and LEVY and GREEN, JJ.

PER CURIAM.

Jackie Forchin appeals an order revoking his probation based upon his alleged commission of tampering with physical evidence

while on probation and failure to report to his probation officer as directed. Based upon this court's decision of State v. Jennings, 647 So. 2d 294 (Fla. 3d DCA 1994), rev. granted, No. 84, 909 (Fla. May 23, 1995), we find that the tampering charge could not legally serve as a basis for the revocation but Forchin's willful failure to report as directed could. Accordingly, we affirm.

Forchin was placed on probation in 1993 following a conviction for possession of a controlled substance.[1] As a special condition of probation, the court ordered that he receive drug treatment on an outpatient basis. While Forchin was still on probation, the State filed an affidavit alleging that Forchin had committed the criminal offense of tampering with physical evidence on or about November 10, 1994 and that Forchin failed to report to his probation officer two days earlier on November 8, 1994 for a referral to an outpatient drug program.

The State's evidence in support of the tampering charge was essentially that several police officers observed Forchin exchange money for a small plastic bag containing a white substance while Forchin stood in an enclosed bus bench. As Forchin walked away from the bus bench toward a grassy median in the street, two officers got out of unmarked cars and identified themselves as police to Forchin. Forchin then swallowed the plastic bag

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[1] Forchin was also sentenced to serve 364 days in jail.

containing the white substance. After a brief struggle wherein the officers were unsuccessful in their attempts to get Forchin to expel the plastic bag, Forchin was arrested for tampering with physical evidence and resisting arrest without violence.[2]

Under virtually indistinguishable facts, this court in State v. Jennings, held that a criminal defendant had not tampered with evidence when he swallowed cocaine rocks after an officer shouted "police" where the defendant was neither under arrest at the time nor did he know that a law enforcement officer was about to instigate an investigation. As in Jennings, Forchin was neither under arrest nor did he know that the officers were investigating him when he swallowed the plastic bag containing the white substance. Thus, as a matter of law, we find that the tampering charge could not serve as a basis for the revocation of Forchin's probation.

As to Forchin's failure to present himself to his probation officer on November 8, we do find that the greater weight of the evidence supported the trial court's determination that Forchin's conduct was willful and substantial in nature to support the revocation. Green v. State, 620 So. 2d 1126, 1129 (Fla. 1st DCA 1993); Steiner v. State, 604 So. 2d 1265, 1267 (Fla. 4th DCA 1992).

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[2] Prior to the probation violation hearing, Forchin was tried by a jury both on the tampering charge and on a charge of resisting an officer without violence. The jury failed to reached a verdict on the tampering charge but acquitted Forchin on the resisting charge.

The probation officer had given Forchin the opportunity to appear on any date from November 1st through November 8th. Forchin telephoned his probation officer on November 1st with an excuse for his non-appearance on that date. There was no evidence that Forchin thereafter ever attempted to appear before his probation officer from November 1st through the 8th. Although Forchin testified below that a heavy rainstorm precluded his appearance on the 8th, the trial court rejected this contention when it noted that the weather had not precluded the probation officer from being present in the office on that date. Since there is ample evidence in the record to support these findings, the trial court's resolution of the evidence will not be disturbed on appeal. See Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982); State v. Guerra, 455 So. 2d 1046, 1048 (Fla. 3d DCA 1984), rev. denied, 461 So. 2d 114 (Fla. 1985); State v. Garcia, 431 So. 2d 651 (Fla. 3d DCA 1983).

Affirmed.