IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC07-389
(4th DCA Case No. 4D05-4488)

KENNETH ADAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

To decide whether the Court should exercise its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution, the Court only looks within the "four corners" of the appellate opinion sought to be reviewed.

In its December 20, 2006 opinion issued in this case, while the Fourth District Court of Appeal acknowledged and rejected Petitioner's argument that the trial court erred in revoking his probation because of the absence of a specific time period within which he was to complete the program, it is clear that the District Court affirmed the revocation of probation based on the particular and specific **facts and circumstances** that established Petitioner willfully and substantially violated the condition of probation. After spending two pages of its opinion setting out the facts of the case, the District Court **specifically** held:

> There was competent testimony that Adams had the resources to pay for his treatment, was aware he would be accommodated if he could not pay, and simply failed to attend. There was sufficient evidence for the trial court

> to find by a preponderance of the evidence that Adams willfully and substantially violated his probation.

Adams v. State, 946 So. 2d 583, 586 (Fla. 4th DCA 2006). (Appendix).

SUMMARY OF THE ARGUMENT

The opinion of the district court is not in direct and express conflict with the decisions in Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005); *Bingham v. State*, 655 So. 2d 1186 (Fla. 1st DCA 1995); *Dunkin v. State*, 780 So.2d 223 (Fla. 2d DCA 2001); or *Mitchell v. State*, 871 So. 2d 1040 (Fla. 2d DCA 2004). Therefore, Petitioner has failed to show this Court has jurisdiction to review the opinion of the district court, and as such this Court should decline to review this cause on the merits.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT **EXPRESSLY AND DIRECTLY** CONFLICT WITH THE DECISIONS IN *YATES v. STATE*, 909 So. 2d 974 (Fla. 2d DCA 2005); *BINGHAM V. STATE*, 655 So. 2d 1186 (Fla. 1st DCA 1995); *DUNKIN v. STATE*, 780 So.2d 223 (Fla. 2d DCA 2001); OR *MITCHELL v. STATE*, 871 So. 2d 1040 (Fla. 2d DCA 2004). THUS, PETITIONER HAS FAILED TO ESTABLISH THE COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE OPINION OF THE DISTRICT COURT RESOLVING HIS APPEAL.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* (1980) to review a decision of a district court of appeal that **expressly and directly conflicts** with a decision of another district court of appeal or the Supreme Court on the same question of law. See The Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). This Court in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975), made it clear that its "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously announced by this court or another district, 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 case. In this second situation, the facts of the case are of the utmost importance."

[Emphasis added]. See Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

Petitioner argues that because Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005); Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995); Dunkin v. State, 780 So.2d 223 (Fla. 2d DCA 2001); and Mitchell v. State, 871 So. 2d 1040 (Fla. 2d DCA 2004) hold "that probation cannot be revoked for failure to successfully complete a program where the probationer has not been given notice that the program must be completed within a specific time," the opinion under review is in conflict with those cases.

Respondent disagrees, and maintains that because this case is distinguishable factually from all those case, this Court does not have discretionary jurisdiction to review the District Court's opinion at bar. In its opinion, the District Court stated:

> Adams claims the trial court abused its discretion by revoking his probation because the probation or how many chances he had to complete it. We clarify at the outset that the trial court revoked Adams's probation based upon failure to attend and complete sex offender treatment, not failure to pay. . . .

Slip Opinion, p. 3 (Appendix).

The District Court relied in its prior decision in Mills v. State, 840 So. 2d 464 (Fla. 4th DCA 2003) to affirm the trial court's order at bar, and explained:

> Like Adams, Mills argued on appeal before this court that the trial court erred in revoking his probation because of the absence of a specific time period within which he was to complete the program. *Id.* at 467. Although it found the issue unpreserved, this court specifically addressed **and rejected** Mills's argument. Id. (citing *Archer v. State*, 604 So. 2d 561, 563 (Fla. 1st DCA 1992) (rejecting argument that no violation of probation occurred because court had not assigned a specific time period for probationer to complete therapy)).

Slip Opinion, p. 4 (Appendix).

Respondent submits that this Court has upheld the Fourth District's position in Mills and rejected the argument espoused by Petitioner herein. In dismissing review of the Fifth DCA's opinion in Woodson v. State, 864 So. 2d 512 (Fla. 5th DCA 2004), review dismissed, 889 So. 2d 823 (Fla. 2004), Justice Pariente wrote:

> I concur with the decision to dismiss **because of the factual differences in the cases**. I write to point out that, as observed by the Fourth District in *Mills v. State*, 840 So. 2d 464, 467 (Fla. 4th DCA 2003), **the underlying issue in all cases dealing with failure to actively participate**

> **in sexual offender treatment is whether the defendant's conduct in failing to participate and complete the program was willful**.
>
> The parameters of sexual offender probation are statutorily defined as a form of intensive supervision with an individualized treatment plan. See § 948.001(7), Fla. Stat. (2004). The critical component of sexual offender probation is the active participation and completion of a sexual offender treatment program. See § 948.30(1)(c), Fla. Stat. (2004) (previously codified at section 948.03(5)(a)(3), Florida Statutes (2003)). It is only because the defendant agrees to participate in active treatment that the privilege of probation is extended. As Judge Sawaya expressed in the opinion below, "releasing a sex offender, untreated, does not alleviate the concern that he or she will reoffend and affords no protection to society." *Woodson v. State*, 864 So. 2d 512, 516 (Fla. 5th DCA 2004).
>
> **Because each treatment plan is individualized, it is not always realistic for the trial judge to specify time parameters for completion at the time of sentencing**. Nevertheless, the probation officer should clearly communicate to the defendant, both in writing and verbally, the specific details of the individualized treatment plan so that there is no question that the defendant is specifically on notice of exactly what is expected and when.

Woodson v. State, 889 So. 2d at 824 (Pariente, J.C., concurring).

Thus, since the opinion of the District Court in the case at bar does not **expressly and directly** conflict with the

district courts' rulings in Yates v. State, 909 So. 2d 974 (Fla. 2d DCA 2005); Bingham v. State, 655 So. 2d 1186 (Fla. 1st DCA 1995); Dunkin v. State, 780 So.2d 223 (Fla. 2d DCA 2001); and Mitchell v. State, 871 So. 2d 1040 (Fla. 2d DCA 2004), but rather, as asserted by Justice Pariente in Woodson, the opinions can be **factually** distinguished, Petitioner has failed to establish that this Court has jurisdiction to review the District Court's opinion in Adams v. State, 946 So. 2d 583 (Fla. 4th DCA 2006). See Woodson v. State, 889 So. 2d at 824 (Pariente, J.C., concurring); Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court DENY Petitioner's request for discretionary review over the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by U.S. Mail to: JEFFREY L. ANDERSON, ASSISTANT PUBLIC DEFENDER, CRIMINAL JUSTICE BUILDING, 421 THIRD STREET, 6TH FLOOR, WEST PALM BEACH, FL 33401-4203, this 29th day of March, 2007.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
Of Counsel