IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-1395

JASON SHENFELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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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 Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal ("Fourth District"). In this brief, the parties shall be referred to as they appear before this Honorable Court. The Respondent may also be referred to as the "State".

Citations to the record will be designated by "V" (for volume) followed by the volume number, and either "R" (for record) followed by the page number(s) of the record, or "T" (for transcript) followed by the page number(s) of the transcript. Volumes 4-7 of the record consist of transcripts.

STATEMENT OF THE CASE AND FACTS

The Respondent presents the following statement of the case and facts for the convenience of the Court:

On July 15, 2002, the Petitioner entered a plea of guilty to the charge of robbery directly to the trial court; at the time, the trial court advised the Petitioner that he could be sentenced to up to 15 years in the Department of Corrections; a factual basis for the plea was placed in the record and the case was reset to a later date for sentencing (V 1, R 27-29; V 4, T 1-10).

On September 27, 2002, the Petitioner was sentenced to 5 years in the Department of Corrections; however, the trial court suspended the sentence and placed the Petitioner on 5 years drug offender probation with special conditions (the sentencing order was dated September 30, 2002)(V 1, R 39-50; V 4, T 44-47).

Thereafter, on December 15, 2004, the Petitioner moved to terminate probation; his motion was denied, but he was placed on administrative probation (V 1, R 53-54, 73-74; V 4, T 55).

On July 23, 2007, an affidavit and violation report for violation of probation was signed alleging that the Petitioner violated probation by committing the Crimes of First Degree Murder, Sexual Battery, and False Imprisonment on July 21, 2007 (V 1, R 94-100). An amended affidavit and report were signed on October 1, 2007 (V 1, R 138-140).

The Petitioner then filed a "Motion to Dismiss Violation of

Probation” arguing that the original affidavit of violation of probation (filed in July, 2007) was a “legal nullity”, and that the amended affidavit (filed in October, 2007) was “untimely” (V 1, R 156-157). In essence, he argued that the original affidavit did not extend the Petitioner’s term of probation since no warrant was issued by the court (V 1, R 156-157).

The State filed a response to the Petitioner’s motion to dismiss (V 1, R 174-178). In its response, the State noted that the only difference between the original and amended affidavits of violation of probation was that the amended affidavit corrected the date of the offense (V 1, R 174). Furthermore, “the defendant was actually arrested and charged with a violation of probation before his period of probation ended.” (V 1, R 175). The state also noted that section 948.06(1)(a), Florida Statutes “specifically allows an arrest by an officer, whenever within the period of probation, there are reasonable grounds to believe that a probationer violated probation in a material respect”, and that a warrant is not required for an officer to arrest a probationer for the violation (V 1, R 175). The State further argued: “Since the defendant was arrested on July 23, 2007 and the affidavit was filed on July 24, 2007, which is clearly before his probation period ended, the Court has jurisdiction over the violation of probation and the subsequent amended violation of probation.” (V 1, R 176). Therefore: “Since the amended affidavit does not add any new allegations and only

corrects a date of offense previously alleged in the original affidavit filed within the period of probation, the amended affidavit is timely." (V 1, R 178)

At the hearing on violation of probation, the trial court denied the Petitioner's motion to dismiss:

> THE COURT: . . . Within the probationary period, an affidavit was filed; the defendant was in custody, he was notified of that with- - he was then brought before the court for a preliminary hearing, and there was jurisdiction at that time. After the probationary period expired, a minor amendment was made to the violation of probation affidavit in that the date was changed. And, for those reasons and that I'm relying on [cited case law] which all stand for the proposition that with respect to the timeliness of allegations and a successive affidavit of violation filed in a case, allegations are timely if the affidavit is filed before the expiration of the probation at issue or if the allegation does not allege new charges. So, it goes to due process and notice, and the cases say that after - - if an amended information is filed and then alleges new grounds for the violation, that you would - - your motion on timeliness would be well taken, but under these circumstances it does not - - and as such, the motion to dismiss is denied.

(V 5, T 81-82).

The State's first witness at the hearing on violation of probation was a drug offender probation officer who supervised the Petitioner for part of his probation. On several occasions, the Petitioner was instructed on the terms and conditions of his probation, including the condition that he must not violate the law

(this was a standard condition of probation, including administrative probation). (V 5, T 88-101)

Another probation officer testified that when the Petitioner was placed on administrative probation he was instructed that he "could not have any new law violations, which is also a standard condition of administrative probation." On July 23, 2007, this officer received notice that the Petitioner had been arrested. She completed a probable cause affidavit and took the paperwork to the booking desk at the county jail once it was approved by her supervisor. She filed a warrantless arrest at the county jail on July 23, 2007. The affidavit of violation was filed with the clerk of court on the next day, July 24, 2007. (V 5, T 106-121)

Thereafter, she filed an amended affidavit of violation of probation. This amended affidavit contained no new allegations. The date of the occurrence was corrected. (V 5, T 121-122)

The State then called several law enforcement witnesses, a forensic scientist, an associate medical examiner, and another witness. This testimony primarily concerned the investigation of the strangulation death of the victim, Amanda Buckley, whose body was found in the closet of the Petitioner's bedroom. (V 6, T 262-316, 329-334, 349-376, 387-396, 398-425; V 7, T 434-440)

At the conclusion of the hearing, the trial court concluded that the State had proven the violation of probation: "To say that the conscience of the court is convinced beyond - - is convinced by

a preponderance of the evidence or by the greater weight of the evidence would be a gross underestimation of the strength of the evidence that has been presented here that ties Mr. Shenfeld to the murder, to the sexual battery, and to the false imprisonment of Amanda Buckley." (V 7, T 487-488)

The trial court then revoked the Petitioner's probation and sentenced him to a statutory maximum 15 years in the Department of Corrections for the original offense of robbery (V 7, T 488-492).

The trial court also entered a detailed written sentencing order with an corrected scoresheet attached, finding as follows: "Although the original sentencing judge was not given an accurate scoresheet in this case, this court may use the corrected version provided prior to the violation of probation hearing (attached)" (V 2, R 239-248, 245) The corrected scoresheet upon which the trial court relied appears at V 2, R 237-238, and bears the signature of the trial court. (Slightly different scoresheets appear at V 2, R 250-253.)

On appeal, the Petitioner argued that the trial court erred by retroactively applying section 948.06(1)(d), Florida Statutes (2007), the statute that governs tolling of time for violations of probation. <u>Shenfeld v. State</u>, 14 So. 3d 1021, 1023 (Fla. 4th DCA 2009). "He reasoned that, had the trial court applied the probation violation tolling statute that was in effect when he was originally placed on probation, the trial court would have lost

jurisdiction to consider his violation of probation because no warrant had been issued prior to the expiration of his probationary period." Id.

The Fourth District then compared the version of section 948.06(1) which was in effect when the Petitioner was originally placed on probation in 2002 and the section as amended in 2007. Previously, "there were two requirements to tolling the probationary period: (1) filing of an affidavit of violation of probation, and (2) the issuance of an arrest warrant." Id. at 1024. However, "[i]n 2007, prior to the expiration of Shenfeld's term of probation, the Florida legislature amended section 948.06(1), Florida Statutes to allow for tolling of the probationary period '[u]pon the filing of an affidavit alleging a violation of probation or community control and following issuance of a warrant under s. 901.02, *a warrantless arrest under this section, or a notice to appear under this section* . . .' [section] 948.06(1)(d), Fla. Stat. (2007)(emphasis added)." Id.

Finding that the Petitioner "was arrested without a warrant and no arrest warrant for the new law violations was issued during Shenfeld's probationary period", but that "an affidavit of violation of probation was filed during Shenfeld's probationary period", the Fourth District set forth the dispositive issue as "whether retroactive application of the 2007 amendment to section 948.06(1)(d), Florida Statutes (2007) constitutes an ex post facto

violation." Id. Recognizing "the well-established legal principle that retroactive application of a new law is not an ex post facto violation if the statutory change is merely procedural and does not alter the definition of criminal conduct or increases the penalty by which the crime is punishable", and finding that the 2007 amendment was "procedural in nature because the purpose and effect of the amendment was to toll the probationary period in order to allow the violation of probation to be heard", the Fourth District concluded that the retroactive application of the 2007 amendment to section 948.06(1)(d) does not constitute an ex post facto violation and, therefore, "the trial court had jurisdiction to revoke Shenfeld's probation and sentence him." Id.

The Fourth District certified conflict with the decisions of the First District Court of Appeal ("First District") in Frye v. State, 885 So. 2d 419 (Fla. 1st DCA 2004), and Harris v. State, 893 So. 2d 669 (Fla. 1st DCA 2005). Shenfeld, 14 So. 3d at 1024.

Additionally, the Fourth District held that the trial court erroneously sentenced the Petitioner to 15 years in prison since the Petitioner received a "true split sentence" of 5 years, and upon revocation of probation, a trial court "may not order new incarceration that exceeds any remaining balance of the suspended incarceration portion of the original sentence, less credit for time served." Id. at 1024-1025, quoting, Snell v. State, 902 So. 2d 957, 959 (Fla. 4th DCA 2005). The Fourth District rejected the

State’s argument that the Petitioner’s sentence was an illegal downward departure and that he was improperly placed on drug offender probation - - finding that these arguments were waived because the state did not object to these sentences or file an appeal at the time they were imposed. Id. at 1025.

Accordingly, the Fourth District remanded to the trial court with directions that the Petitioner be resentenced to 5 years prison for his violation of probation. Id.

SUMMARY OF THE ARGUMENT

Point I. The Fourth District properly concluded that the trial court had jurisdiction to revoke the Petitioner's probation. The Petitioner's probation was tolled upon his warrantless arrest for violation of probation and the filing of an affidavit of violation of probation. Ex post facto analysis is not required since the Petitioner's violation occurred after the 2007 amendment to section 948.06(1)(d). In any event, retroactive application of this section does not constitute an ex post facto violation since the section is procedural in nature and does not affect the sentence for violation of probation. Conflict between the instant decision and Frye/Harris should be resolved in favor of the instant case because Frye/Harris applied an incorrect ex post facto analysis.

Point II. The Fourth District incorrectly concluded that the trial court could not sentence the Petitioner to 15 years in prison for the violation of probation. Since multiple sentencing errors occurred when the Petitioner was originally placed on probation and subsequently placed on administrative probation, the trial court was authorized to correct those errors and impose a sentence that could have been imposed before the Petitioner was placed on probation.

ARGUMENT

Point I

THE FOURTH DISTRICT CORRECTLY CONCLUDED THAT THE TRIAL COURT HAD JURISDICTION TO REVOKE THE PETITIONER'S PROBATION; ANY CONFLICT WITH THE DECISIONS OF THE FIRST DISTRICT (FRYE/HARRIS) SHOULD BE RESOLVED IN FAVOR OF THE INSTANT DECISION (RESTATED)

The Fourth District correctly concluded that the trial court had jurisdiction to revoke the Petitioner's probation. Accordingly, that portion of the instant decision should be affirmed. The Petitioner's central argument is that the trial court did not have jurisdiction to revoke his probation because his warrantless arrest for violation of probation did not toll his probationary period, and that the 2007 amendment to section 948.06(1)(d) - - which provides for tolling of probation upon a warrantless arrest - - should not have been applied retroactively. Although the Fourth District correctly concluded that the 2007 amendment could be applied retroactively, it is the Respondent's position that the retroactive application of this amendment need not be considered in the instant case in order to affirm the order of the trial court.

As the Fourth District correctly observed, prior to the 2007 amendment, section 948.06(1) provided for tolling of a defendant's probationary period upon: 1. the filing of an affidavit of violation of probation; and 2. the issuance of an arrest warrant. Shenfeld, 14 So. 3d at 1023-1024. After the 2007 amendment,

probation could also be tolled upon a warrantless arrest, or the issuance of a notice to appear. Id. at 1024.

> Upon filing of an affidavit alleging a violation of probation or community control and following issuance of a warrant under section 901.02, a warrantless arrest under this section, or a notice to appear under this section, the probationary period is tolled until the court enters a ruling on the violation . . .

Section 948.06(1)(d), Florida Statutes (2007). The Petitioner correctly recognizes that this amendment became effective on June 20, 2007. (Petitioner's Initial Brief, page 9) See, Ch. 2007-210, Laws of Florida, section 5. This date was over a month before an affidavit of violation was filed by the Petitioner's probation officer on July 24, 2007 (V 1, R 94-100, V 5, T 106-121) and the Petitioner's warrantless arrest on the prior day (V 5, T 106-121). Since these events occurred **after** the effective date of this section and prior to the expiration of the Petitioner's probation -- which would have occurred in September of 2007 - - the Petitioner's probation was clearly tolled under section 948.06(1)(d), Florida Statutes (2007), and an ex post facto analysis of the retroactive application of this section is not necessary. Such analysis would only be necessary if the violation and subsequent warrantless arrest occurred **prior to** the effective date of this section.

In any event, if such analysis is required, it is the Respondent's position that the Fourth District correctly concluded

that the 2007 amendment could be applied retroactively without constituting an ex post facto violation. Citing this Court's decision in Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996), the Fourth District has correctly held that even if a statute has retrospective effect, it does not constitute an ex post facto violation if it does not alter the elements of the defendant's criminal conduct or increase the penalty for a defendant's crime. See, Morrow v. State, 914 So. 2d 1085 (Fla. 4th DCA 2005). The Fourth District has also recognized "the well-established legal principle that retroactive application of new law is not an ex post facto violation if the statutory change is merely procedural and does not alter the definition of criminal conduct or increase the penalty by which a crime is punishable." Shenfeld, 14 So. 3d at 1024.

Under these principles, the application of the 2007 amendment to cases in which a probationer was placed on probation prior to the effective date of the amendment, clearly does not constitute an ex post facto violation. The plain language of section 948.06(1)(d), Florida Statutes (2007) demonstrates that this is a procedural statute addressing the tolling of time when there has been an allegation of violation of probation. Furthermore, the statute does not address penalties for a violation of probation nor does it have any effect on those penalties.

"A statutory change operates retrospectively when it applies

to convicted offenders whose crimes were committed prior to the statute's effective date." Griffin v. State, 980 So. 2d 1035, 1037 (Fla. 2008). The Petitioner posits that the legislature did not indicate that this amendment was to be applied retrospectively, and he observes that "this amended statute became effective after the defendant committed the crime for which he was placed on probation, but before the expiration of his probationary term." (Initial Brief, pages 13, 14). However, the Respondent respectfully submits that the "crime" in this case, as it pertains to this section, is not the date of the original offense, but rather, the date of the alleged violation. Again, the violation in the instant case occurred **after** the effective date of the statute; the date that the Petitioner was actually placed on probation is immaterial in this case.

The Petitioner relies substantially on the decisions of the First District in Frye and Harris, the decisions with which the Fourth District has certified conflict. It remains the Respondent's position that these decisions are distinguishable from the instant case; however, to the extent they are in conflict with the instant decision, the Respondent requests that this Court disapprove Frye/Harris.

Frye/Harris found that retroactive application of the 2001 amendment to section 948.06(1) constituted a ex post facto violation. However, this reasoning does not necessary suggest that

even under those decisions the retroactive application of the 2007 amendment would also constitute an ex post facto violation since the decisions address different amendments. The Respondent will not reargue this matter which was made in its brief on jurisdiction except to restate its position that the decisions are distinguishable and therefore not in conflict.

The Frye Court found that retroactive application of the 2001 amendment to section 948.06(1), which established a statutory tolling provision for violations of probation, constituted an ex post facto violation because the amendment "disadvantaged" the defendant. Id. at 420-421. This was because the affidavit in question would have been deemed untimely under the prior version of that section. Id. at 421. Harris followed Frye. The Respondent respectfully submits that the ex post facto analysis applied by the Frye/Harris Courts is simply wrong, and is inconsistent with the analysis applied by this Court. The question is not whether a defendant has been "disadvantaged" by the law in question. For the purposes of ex post facto analysis, the question is "whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Gwong, 683 So. 2d at 112. See also, Griffin, 980 So. 2d at 1036.

The Petitioner cites this Court's decision in State v. Williams, 397 So. 2d 663 (Fla. 1981), which does indeed ask, as a part of the ex post facto test, "does the law affect the prisoners

who committed those crimes in a disadvantageous fashion?" Id. at 665. However, the Petitioner's reliance on this decision is misplaced; in Williams, by "disadvantageous", this Court was referring to the fact that the statute in question had a disadvantageous effect because it enhanced the prisoners' sentences. Id. See also, Duncan v. Moore, 754 So. 2d 708, 711 (Fla. 2000)(ex post facto clause triggered when a later-enacted law increases the punishment beyond what was prescribed when the crime was committed). As the Respondent has argued above, the 2007 amendment in question has absolutely no effect upon the sentence of a defendant who has violated probation.

Likewise, in Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), upon which the Petitioner also relies in part, the Court addressed ex post facto in terms of "disadvantage" to the defendant; however, the Court explained that: "We have also held that no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'". 450 U.S. at 29 FN12, quoting, Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 210, 28 L. Ed. 262 (1884). Therefore, under Weaver, the retroactive application of the 2007 amendment to section 948.06(1)(d) would not constitute a violation of the ex post facto clause.

Accordingly, to the extent that there is conflict between

Frye/Harris and the instant decision, this Court should approve the instant decision and disapprove Frye/Harris since the ex post facto analysis applied by the Frye/Harris Courts was erroneous and inconsistent with the test applied by this Court and the United States Supreme Court.

Point II

THE FOURTH DISTRICT ERRONEOUSLY CONCLUDED THAT THE TRIAL COURT COULD NOT SENTENCE THE PETITIONER TO 15 YEARS PRISON UPON REVOCATION OF PROBATION

It is the Respondent's position that the Fourth District erroneously concluded that the trial court could not sentence the Petitioner to 15 years in prison upon revocation of his probation. The Fourth District reached this holding because it found that the Petitioner had originally received a "true split sentence" of 5 years according to Poore v. State, 531 So. 2d 161 (Fla. 1988), and that pursuant to the Fourth District's decision in Snell, upon revocation of probation of such a sentence, a judge may not sentence a defendant to incarceration that exceeds the remaining balance of the suspended incarceration portion of the sentence. Shenfeld, 14 So. 3d at 1025. However, in the instant case, the trial court properly relied upon this Court's decision in Roberts v. State, 644 So. 2d 81 (Fla. 1994) in sentencing the Petitioner to 15 years prison and, accordingly, that sentence should have been affirmed on appeal.

Although this issue was not the basis for certified conflict, "once this Court has accepted jurisdiction in order to resolve conflict, [it] may consider other issues decided by the court below which are properly raised and argued before this Court." Caufield v. Cantele, 837 So. 2d 371, 377 FN5 (Fla. 2002). See also, Schreiber v. Rowe, 814 So. 2d 396, 398 (Fla. 2002)("Given our

jurisdiction on the certified conflict, we have jurisdiction over all of the issues presented in this case”). Consequently, this Court may review this portion of the instant decision.

In the instant case, the trial court entered a detailed, well-reasoned order explaining why she could impose a statutory maximum sentence of 15 years prison upon the Petitioner’s violation of probation (V 2, R 239-248). As the trial court explained, since the Petitioner was convicted of robbery, rather than an enumerated drug offense, he was improperly placed on drug offender probation (V 2, R 241-243). See generally, Jones v. State, 813 So. 2d 22 (Fla. 2002). See also, Epperson v. State, 955 So. 2d 642, 643 (Fla. 4th DCA 2007)(“A court may not impose drug offender probation other than for the violation of a drug related offense listed in the offender probation statute . . .”). Placing the Petitioner on administrative probation, the trial court reasoned, was illegal because he had served less than half of his probation at the time (V 2, T 243-245).

Furthermore, the trial court also found that the Petitioner was sentenced under an incorrect scoresheet which did reflect the fact that he was on probation for D.U.I. at the time of the offense and did not include victim injury points for the offense (V 2, R 240-241). See e.g., Aponte v. State, 810 So. 2d 1008, 1011 (Fla. 4th DCA 2002)(“There is no doubt that in the instant case, the trial court could have assessed victim injury points at the original

sentencing hearing had the state presented evidence to support victim injury points. Therefore, we see no reason why the plain reading of section 948.06(1) does not permit the same victim injury points to be assessed upon a violation of probation.")

Additionally, as the trial court found, there was no valid reason to impose a downward departure sentence in this case (V 2, R 246). Since there was no valid basis for a downward departure, the original trial court should not have imposed a true split sentence suspending the entire period of incarceration. C.f., State v. Powell, 703 So. 2d 444 (Fla. 1997). See also, State v. White, 842 So. 2d 257, 258 (Fla. 1st DCA 2003)("A sentence consisting of a completely suspended prison term followed by a probationary period falls below the sentencing guidelines . . . Therefore, as a matter of law, such a sentence is treated as a downward departure sentence . . . Valid reasons must exist for a downward departure").

Therefore, since both the original sentence and the subsequently imposed administrative probation were improper, the trial court was authorized to correct the earlier errors and impose the statutory maximum of 15 years in prison upon revocation of the Petitioner's probation. See e.g., State v. Marshall, 869 So. 2d 754 (Fla. 5th DCA 2004). C.f., Lee v. State, 666 So. 2d 209 (Fla. 2d DCA 1995).

As stated above, the 15 year sentence imposed by the trial court in the instant case is supported by this Court's decision in

Roberts. In that case, the defendant was sentenced with an incorrect scoresheet; while he was serving the probation portion of his sentence, he was arrested for a new offense and, after a hearing, his probation was revoked. Id. at 82. At sentencing, over his objection, the defendant was sentenced with a corrected scoresheet and received a greater sentence for the violation than he would have received using the original (incorrect) scoresheet.

> When Roberts originally sentenced, he received the benefit of a mistake in his guidelines scoresheet. Now that he has committed a new crime and violated his probation, we see no reason to perpetuate the error. Justice is not served by awarding a defendant something to which he is not entitled . . .

Id. The Petitioner, like Roberts, received the benefit of the original trial court's error when he was placed on drug offender probation and had his prison sentence suspended under an incorrect scoresheet. Since he violated probation, it was proper for the trial court to correct the earlier errors and sentence the Petitioner to the same sentence that he would have originally received before he was placed on probation. "If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted . . . and impose any sentence which it might have originally imposed before placing the probationer on probation . . ." Section 948.06(2)(b), Florida Statutes (2007).

The Fourth District did not address this argument because the Court found it was "waived" when the State did not object to, or appeal, the prior sentences. Shenfeld, 14 So. 3d 1025. The Respondent respectfully submits that the above argument should not be avoided based upon "waiver". This is not a State appeal of an unpreserved sentencing error. In this case, the legal basis for the trial court's imposition of a 15-year sentence was the fact that the Petitioner's original sentence was improper and that the earlier errors could - - and should - - be corrected upon the Petitioner's violation of probation. It is the Respondent's position that such a correction is allowed under Roberts and that the legal basis for the trial court's sentencing order should have been fully considered by the Fourth District. Accordingly, the Respondent requests reversal of the portion of the instant opinion reversing the Petitioner's 15 year sentence of prison for violation of probation.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Court APPROVE that portion of the instant decision finding that the trial court had jurisdiction to revoke the Petitioner's probation and sentence him, and REVERSE that portion of the instant decision finding that the trial court could only sentence the Petitioner to 5 years in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Respondent's Answer Brief" has been furnished by mail on January 19, 2010, to Tatjana Ostapff, Assistant Public Defender, 421 third Street, Sixth Floor, West Palm Beach, FL 33401.

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DANIEL P. HYNDMAN

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

____
DANIEL P. HYNDMAN