IN THE SUPREME COURT OF THE STATE OF FLORIDA

JASON SHENFELD, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. SC09-1395

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

AUTHORITIES CITED ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE PROBATION VIOLATION WHERE NO WARRANT WAS ISSUED PRIOR TO THE EXPIRATION OF APPELLANT'S TERM OF PROBATION.....6

CONCLUSION.....17

CERTIFICATE OF SERVICE 18

CERTIFICATE OF FONT SIZE.....18

AUTHORITIES CITED

CASES PAGE

Andrews v. State, 392 So. 2d 270
(Fla. 2d DCA 1980) 13

Bridges v. United States, 346 U.S. 209
73 S.Ct. 1055, 97 L.Ed.1557
(1953). 12

Crain v. State, 914 So.2d 1015
(Fla. 5th DCA 2005) 8
Clark v. State, 402 So. 2d 43
(Fla. 4th DCA 1981) 8

Ford v. State, 994 So.2d 1244
(Fla. 4th DCA 2008) 8

Francois v. State, 695 So.2d 695
(Fla.1997) 7

Frye v. State, 885 So. 2d 419
(Fla. 1st DCA 2004) 4, 13-15

Furman v. Georgia, 408 U.S. 238
92 S.Ct. 2726, 33 L.Ed.2d 346
(1972) 11

Harris v. State, 893 So. 2d 669
(Fla. 1st DCA 2005) 4, 15

Jones v. State, 954 So.2d 675
(Fla. 4th DCA 2007) 7

Jones v. State, 964 So.2d 167
(Fla. 5th DCA 2007) 8, 9

Mead v. State, 101 So.2d 373
(Fla. 1958) 12

Miller v. Florida, 482 U.S. 423
107 S.Ct. 2446, 96 L.Ed.2d 351
(1987). 9-10

Reino v. State, 352 So. 2d 853
(Fla. 1977)
receded from on other grounds Perez v. State, 545 So. 2d 1357
(Fla. 1989). 13

Sepulveda v. State, 909 So. 2d 568
(Fla. 2d DCA 2005) 8, 9, 15

Stambaugh v. State, 891 So. 2d 1136
(Fla. 4th DCA 2005) 8, 15

Stapler v. State, 939 So.2d 1092
(Fla. 5th DCA 2006) 7

State ex rel. Manucy v. Wadsorth, 293 So. 2d 345
(Fla. 1974) 11, 13

State v. Calderon, 951 So. 2d 1031
(Fla. 3d DCA 2007) 12

State v. Hall, 641 So.2d 403
(Fla.1994) 7

State v. Williams, 397 So. 2d 663
(Fla. 1981) 10, 13

Toussie v. United States, 397 U.S. 112
90 S.Ct. 858, 25 L.Ed.2d 156
(1970) 12

United States v. Richardson, 512 F.2d 105
(3d Cir. 1975). 12

Vidaurre v. State, 8 So.3d 1206
(Fla. 2d DCA 2009) 7

Waggy v. State, 935 So.2d 571
(Fla. 1st DCA 2006) 7

Weaver v. Graham, 450 U.S. 24
101 S.Ct. 960, 67 L.Ed.2d 17
(1981) 10, 14

Young v. State, 439 So.2d 306
(Fla. 5th DCA 1983)
receded from on other grounds Fike v. State, 455 So.2d 628
(Fla. 5th DCA 1984) 7

UNITED STATES CONSTITUTIONS

Ex Post Facto Clause 5, 9, 10, 12-15

FLORIDA STATUTES

Section 947.16 (1978 Supp.) 10

Section 948.04(2) (2001) 6

Section 948.06(1) (2001) 7, 9, 14, 15
Section 948.06(1)(d) (2007) 9, 13

OTHER AUTHORITY

Laws of Florida ch. 2007-210 9

PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court for the Fifteenth Judicial Circuit. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appeared in the trial court (i.e., the Defendant and the State).

The following symbols will be used:

"R"	Record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE AND FACTS

The Defendant entered an open plea of guilty (R1/25, 4/3-4) to a charge of robbery (R1/20). On September 30, 2002, the trial court adjudged the Defendant guilty of robbery (R1/39) and sentenced him to five years in prison, but suspended the sentence and ordered him to serve five years drug offender probation, with a condition that he pay $1949.50 restitution (R1/32, 40, 48, 44-45, 4/44-46). The Defendant was advised that if he violated his probation he would receive the suspended five-year prison sentence (R4/45, 5/103).

Having made restitution and successfully complied with the terms of his probation, the Defendant moved to terminate the probation (R1/53-54, 4/52-53). His motion was denied, but the trial court modified his probation on December 20, 2004, at the State's suggestion by converting the drug offender probation to administrative probation (R1/73, 4/55).

On July 23, 2007, an affidavit was filed alleging that the Defendant had violated his probation by committing first degree murder, sexual battery, and kidnapping on July 21, 2007 (R1/94). An amended affidavit filed October 1, 2007, alleged that the offenses were committed July 19-20, 2007 (R1/138). No warrant was ever issued on the affidavits. The Defendant had earlier been arrested on the underlying criminal charges. He moved to dismiss the affidavit of probation

violation on the grounds that the trial court lost jurisdiction of the case when no warrant was filed prior to the expiration of his probationary term (R1/156-157). The trial court denied the motion (R/5/81-82). The Defendant was arraigned on the amended affidavit, over his continued jurisdictional objection (R5/84).

After an evidentiary hearing on the allegations of probation violation, on October 25, 2007, the trial court found that the Defendant had violated his probation as alleged (R7/483), revoked his probation (R2/254), and sentenced him to fifteen years in prison (R2/184, 239-248, 7/489-491), over the Defendant's objection that he could be sentenced to no more than the five-year suspended prison term which had previously been imposed (R7/491).

On appeal, the Fourth District Court of Appeal reversed Appellant's fifteen-year sentence because it exceeded the suspended prison term to which Appellant had been sentenced in the originally imposed true split sentence. The Court, however, rejected the Defendant's claim that Section 948.06(1), Fla. Stat. (2007), which became effective well after the Defendant was placed on probation but before his probationary term expired, could not be applied retroactively to his case. The Fourth District Court of Appeal certified that its decision expressly and directly conflicted with the decisions of the First District Court of Appeal in Frye

v. State, 885 So. 2d 419 (Fla. 1st DCA 2004) and Harris v. State, 893 So. 2d 669 (Fla. 1st DCA 2005).

The State's motion for rehearing was denied on June 25, 2009. The Defendant filed his notice invoking the discretionary jurisdiction of this Court on July 20, 2009. On November 10, 2009, this Court issued its order accepting jurisdiction of this cause.

SUMMARY OF THE ARGUMENT

A trial court loses jurisdiction to consider a probation violation once the term of probation expires. Pursuant to the statute in effect at the time that the Defendant committed the original offense, the expiration of the probationary period may be tolled, but only where the State files an affidavit and a warrant within the term of probation. Application of the intervening amendment of the statute, which authorized tolling of the probationary period on other grounds, to the instant case violated the ex post facto clause of the United States Constitution. In the instant case, no warrant was ever filed. The trial court therefore lost jurisdiction to hear the allegations of probation violation when the Defendant's term of probation expired five years after it was imposed.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE PROBATION VIOLATION WHERE NO WARRANT WAS ISSUED PRIOR TO THE EXPIRATION OF APPELLANT'S TERM OF PROBATION.

The Defendant was placed on drug offender probation for a term of five years on September 24, 2002 (R1/32, 44-45). That probation was modified by converting it to administrative probation on December 15, 2004 (R1/73). The five-year term remained the same. Therefore, the Defendant's probation expired five years after it was imposed, on September 24, 2007. However, the Defendant's probation revocation hearing commenced on October 11, 2007, and concluded on October 17, 2007. Thus, the probation revocation hearing was conducted after the five-year term of the Defendant's probation had expired.

Normally, the trial court loses jurisdiction to hear an allegation of probation violation once the probationary term has expired. "Upon the termination of the period of probation the probationer shall be released from probation and is not liable to sentence for the offense over which probation was allowed." Section 948.04(2), Fla. Stat. (2001). Once the probationary period expires, "a court is divested of all jurisdiction over the person of the probationer unless in the meantime the processes of the court have been set in motion for revocation or

modification of the probation." Stapler v. State, 939 So.2d 1092, 1093 (Fla. 5th DCA 2006) (quoting State v. Hall, 641 So.2d 403, 404 (Fla.1994)).

Therefore, "A violation of probation must be set in motion prior to the termination of the period of probation." Jones v. State, 954 So.2d 675, 676 (Fla. 4th DCA 2007). Where a violation of probation is not set in motion before the period of probation has ended, the trial court lacks jurisdiction to find the defendant in violation of his probation. Francois v. State, 695 So.2d 695, 697 (Fla.1997); Vidaurre v. State, 8 So.3d 1206 (Fla. 2d DCA 2009). "When a court lacks subject matter jurisdiction, it has no power to decide the case and any judgment entered is absolutely null and void, can be set aside and stricken from the record on motion at any time, and may be collaterally attacked." Waggy v. State, 935 So.2d 571, 573 (Fla. 1st DCA 2006) (quoting Young v. State, 439 So.2d 306, 308 (Fla. 5th DCA 1983) *receded from on other grounds* Fike v. State, 455 So.2d 628 (Fla. 5th DCA 1984)).

However, the legislature has provided that, under certain circumstances, the jurisdictional time for hearing a probation revocation may be tolled. Thus, Section 958.06(1), Fla. Stat. (2001), effective at the time that the original offense was committed and the Defendant was placed on probation, provided:

> Upon the filing of an affidavit alleging a violation of probation or community control and following issuance of a warrant under s. 901.02, the probationary period is

> tolled until the court enters a ruling on the violation. Notwithstanding the tolling of probation as provided in this subsection, the court shall retain jurisdiction over the offender for any violation of the conditions of probation which is alleged to have occurred during the tolling period.

Under this statute, both the filing of an affidavit of violation and the issuance of an arrest warrant are required to toll the probationary period, and the mere filing of the affidavit is insufficient. Sepulveda v. State, 909 So.2d 568, 570 (Fla. 2d DCA 2005). It is the issuance of the warrant prior to the expiration of the probationary period that vests the trial court with jurisdiction, not the filing of the affidavit. Jones v. State, 964 So.2d 167 (Fla. 5th DCA 2007); *see* Crain v. State, 914 So.2d 1015, 1017 (Fla. 5th DCA 2005). Absent the execution of a warrant, the filing of the affidavit alone does not trigger the tolling statute, and the trial court has no jurisdiction to hear the violation of probation once the term of probation has expired. Ford v. State, 994 So.2d 1244 (Fla. 4th DCA 2008); Clark v. State, 402 So. 2d 43, 44 (Fla. 4th DCA 1981).

In the present case, the State filed an affidavit of violation of probation on July 23, 2007 (R1/94).[1] But the State conceded that no warrant was ever issued

[1]Two prior allegations of probation violation had been considered, but the first was never filed (R1/75-76), and the second was withdrawn by the State (R1/92). They therefore had no effect on the term of the Defendant's probation. Stambaugh v. State, 891 So. 2d 1136, 1139 (Fla. 4th DCA 2005).

(R5/118-119). Instead, The defendant was "booked" for his violation of probation at the jail without any warrant (R5/119). Because no arrest warrant was filed, the probationary period was not tolled. Jones; Sepulveda, The defendant therefore moved to dismiss the affidavit of probation violation (R1/156-157).

In denying the Defendant's motion to dismiss (R5/81-82), the trial court relied on an amendment to Section 948.06(1), Fla. Stat. (2001), creating Section 948.06(1)(d), Laws of Florida ch. 2007-210 (effective June 20, 2007), which provides that the probation period is tolled upon the filing of "an affidavit . . . and following issuance of a warrant under s. 901.02, a warrantless arrest under this section, or a notice to appear. . . ." If this amended statute applies to the instant case, then the Defendant's warrantless arrest while in custody would operate to toll the probationary period and permit his prosecution for violating his probation even after the expiration of the five-year probationary term.

No such application of the amended statute, which became effective well after the date that the Defendant was placed on probation, to the instant case is permissible however, as to do so would violate the ex post facto clause of the United States Constitution. A law falls within the ex post fact prohibition if it is retrospective. That is, it must apply to events occurring before its enactment and must disadvantage the offender affected by it. Miller v. Florida, 482 U.S. 423, 107

S.Ct. 2446, 96 L.Ed.2d 351 (1987). A law is also retrospective if it changes the legal consequences of the acts to be completed before its effective date. 107 S.Ct. at 2451. In order to ex post facto, a law must, of course, be more onerous than the prior law. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

This Court has employed the appropriate analysis of an ex post facto problem in its decision in State v. Williams, 397 So. 2d 663 (Fla. 1981). There, the legislature had enacted a statute authorizing the trial court to retain jurisdiction over one-third of a defendant's sentence. Section 947.16, Fla. Stat. (1978 Supp.). This Court found that Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, prohibited application of that statute to sentences for offenses committed prior to its effective date. Weaver set forth a two-fold test for ex post facto violations: (1) does the law attach legal consequences to crimes committed before the law took effect, and (2) does the law affect prisoners who committed those crimes in a disadvantageous fashion? "If the answer to both questions is yes, then the law constitutes an ex post facto law and is void as applied to those prisoners." 397 So. 2d at 665. This Court found that Section 947.16 did attach the legal consequences of the trial court's parole veto and no gain-time release to those who committed crimes before its effective date. This Court further agreed that these consequences had a negative effect in that prisoner's sentences were thereby enhanced.

Somewhat analogous to the situation raised by the instant case is that where the statute of limitations for an offense is altered after the offense has been committed. In State ex rel. Manucy v. Wadsorth, 293 So. 2d 345 (Fla. 1974), this Court held that because the statute of limitations is a substantive right, the period of the statute begins to run from the time of the alleged criminal conduct. 293 So. 2d at 347. In Manucy, a murder was committed before the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which held that Florida's death penalty statute was unconstitutional. Prior to Furman, death penalty cases could be prosecuted at any time subsequent to the offense, while non-capital crimes had to be prosecuted within a two-year limitation period. The defendant in Manucy was arrested after Furman was decided, when the two-year limitation period was in effect. This Court held that it was the unlimited limitations period in effect at the time of the murder that applied, not the two-year period in effect at the time of the defendant's arrest and prosecution.

> To hold otherwise might be to create a situation which is clearly unconstitutional. This could allow the Legislature to enlarge the statute of limitations until the criminal in question was tried and sentenced; clearly an application which is ex post facto.

293 So. 2d at 347.

While it has been held that the legislature can extend the limitations period without violating the constitutional prohibition against ex post facto laws, this is true only if (a) it does so before prosecution is barred by the old statute, *and* (b) it clearly indicates that the new statute is to apply to cases pending when it became effective. United States v. Richardson, 512 F.2d 105 (3d Cir. 1975); *see* State v. Calderon, 951 So. 2d 1031 (Fla. 3d DCA 2007) (interpreting legislative provision that amended statute of limitations "shall apply to cases the prosecution of which has not been barred prior to this date" as evidencing legislative intent to authorize retrospective application of statute). Statutes of limitation are to be construed liberally in favor of the accused, Bridges v. United States, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed.1557 (1953); Mead v. State, 101 So.2d 373 (Fla. 1958), for the same reason as ex post facto laws generally:

> The purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.

Toussie v. United States, 397 U.S. 112, 114-115, 90 S.Ct. 858, 860 25 L.Ed.2d 156 (1970). And this Court has expressly held that where the legislature did not indicate that the new statutory provisions pertaining to limitations were to apply to cases pending when the statute became effective meant that those provisions could

have prospective application only. Reino v. State, 352 So. 2d 853, 861 (Fla. 1977) *receded from on other grounds* Perez v. State, 545 So. 2d 1357 (Fla. 1989). *See also* Andrews v. State, 392 So. 2d 270 (Fla. 2d DCA 1980).

In the instant case, the legislature likewise did not include, in its amendment to Section 948.06(1)(d), any specific indication that the statute was to be retrospectively applied. Because the statute, like a statute of limitations, operates to define the time when the state may prosecute a defendant, its effectiveness must apply from the date that the crime was committed, not the date when the defendant was arrested or some other point during the pendency of the prosecution. Doing otherwise violates the ex post facto prohibition, as it would result in permitting the legislature "to enlarge the statute of limitations until the criminal in question was tried and sentenced." Manucy, 397 So. 2d 347.

In Frye v. State, 885 So. 2d 419 (Fla. 1st DCA 2004), the First District Court of Appeal applied the same analysis as this Court employed in Williams, 397 So. 2d 663, to a case virtually identical to the instant case. There, two amended affidavits of probation violation were filed after the expiration of the defendant's term of probation. The defendant moved to dismiss the amended affidavits on the grounds that the trial court lacked jurisdiction to consider them. In response, the

State invoked the then recently enacted tolling statute, contained in an amendment to Section 948.06(1), Fla. Stat. (2001),[2] which stated:

> Upon the filing of an affidavit alleging a violation of probation or community control and following issuance of a warrant under s. 901.02, the probationary period is tolled until the court enters a ruling on the violation. . . .

As in the instant case, this amended statute became effective after the defendant committed the crime for which he was placed on probation and after he was placed on probation, but before the expiration of his probationary term.

The First District Court of Appeal rejected the State's argument that the amended statute could be applied to toll the probationary term if an affidavit and warrant were filed within the term. Instead, the Court held that retroactive application of the statute would violate the constitutional prohibition against ex post facto laws. 885 So. 2d at 420. Quoting Weaver v. Graham, 450 U.S. 24, 30, 101 S.Ct. 960, the Court observed

> Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

[2]Section 948.06(1) had not previously contained any tolling provision and permitted action by law enforcement officials only "within the period of probation or community control."

885 So. 2d at 421. Because the amended statute "clearly disadvantaged" the defendant, it could not be retroactively applied against him without violating the prohibition against ex post facto laws. *Id.*; *see also* Harris v. State, 893 So. 2d 669 (Fla. 1st DCA 2005).

In the instant case, an affidavit was filed alleging that the Defendant violated his probation, but no warrant was ever issued. The Defendant's revocation of probation hearing was held after the expiration of his probationary term. Well-established existing law under Section 948.06(1), Fla. Stat. (2001) at the time that the original crime was committed and the Defendant was placed on probation provided that the probationary term was tolled only if both an affidavit and a warrant were filed within the probationary period. Sepulveda v. State, 909 So. 2d 568, 571 (Fla. 2d DCA 2005); Stambaugh v. State, 891 So. 2d 1136, 1139 (Fla. 4th DCA 2005).

As in Frye v. State, 885 So. 2d 419, the legislature had amended Section 948.06(1) after the Defendant was placed on probation, which had the effect of enlarging the time during which probation revocation proceedings could be brought even after the expiration of the probationary term; absent the amendment, the trial court would have had no jurisdiction to hear the violation. Consequently, the analysis of this Court in Williams, 397 So. 2d 663, and that of the First District

Court of Appeal in Frye, 885So. 2d 419, and Harris, 893 So. 2d 669, correctly restrict the application of the amended statute to prosecutions for offenses committed after its effective date. The holding of the Fourth District Court of Appeal to the contrary in the instant case must accordingly be vacated and set aside and this cause remanded with appropriate instructions.

CONCLUSION

Based on the foregoing argument and the authorities cited, the Defendant requests that this Court vacate and set aside the decision of the Fourth District Court of Appeal and remand this cause with directions to require that the Defendant's motion to dismiss be granted.

Respectfully submitted,

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I HEREBY CERTIFY that a copy hereof has been furnished to Daniel P. Hyndman, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by mail this _____ day of DECEMBER, 2009.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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