IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-1395

JASON SHENFELD,

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 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.

STATEMENT OF THE CASE AND FACTS

The facts appear in the opinion of the Fourth District. Shenfeld v. State, 34 Fla. L. Weekly D999 (Fla. 4th DCA May 20, 2009). The Petitioner appealed the order of the trial court imposing a 15-year prison sentence after the Petitioner violated the terms of administrative probation. He raised two issues for appeal. The one upon which he is seeking to invoke the jurisdiction of this Court was: "whether the retroactive application of section 948.06(1)(d) Florida Statutes (2007) violates the prohibition against ex post facto laws." Id. The Fourth District held that it did not. Id. The Fourth District added: "To the extent that our decision conflicts with the First District's decisions in *Frye v. State*, 885 So. 2d 419 (Fla. 1st DCA 2004) and *Harris v. State,* 893 So. 2d 669 (Fla. 1st DCA 2005), we certify a conflict." Id. at D1000. In a footnote, the Fourth

District stated that *Frye* addressed the 2001 amendment to section 948.06, Florida Statutes. Id. at D1000 FN 1.

The Fourth District agreed with the petitioner's contention that the trial court erroneously sentenced him to 15 years because that sentence exceeded the original split sentence that he had received. Id. at D999. Since this holding is not a basis for discretionary review, the Respondent will not address it further in the instant brief. In the event that this Court accepts jurisdiction, the Respondent will address it at that time and will argue that this part of the Fourth District's opinion was incorrectly decided. See generally, Caufield v. Cantele, 837 So. 2d 371, 377 FN5 (Fla. 2002)("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").

The facts of this opinion are as follows:

> In July 2002, Shenfeld entered an open plea of guilty to a robbery charge. The trial court adjudicated him guilty of robbery and sentenced him to five years in prison, but suspended the entire sentence and ordered him to serve five years of drug offender probation. In 2004, Shenfeld filed a motion to terminate his probation, stating that he had complied with and completed all of its terms. Instead of terminating his probation, the trial court modified his probation to administrative probation.
>
> On July 23, 2007, an affidavit of violation of probation was filed alleging that Shenfeld had committed several new law violations.

> Shenfeld had been arrested without a warrant on the new law violations several days earlier. An amended affidavit was filed on October 1, 2007 changing the dates of the alleged offenses. Shenfeld moved to dismiss the affidavit of violation of probation based on lack of jurisdiction. The trial court denied the motion and Shenfeld was arraigned on the amended affidavit. After an evidentiary hearing, the trial court found that Shenfeld had violated his probation and revoked that probation. Over Shenfeld's objection that he could be sentenced to no more than the five-year suspended sentence that had previously been imposed, the trial court sentenced him to fifteen years in prison . . .

Shenfeld, 34 Fla. L. Weekly at D999.

The Petitioner argued that the trial court erred by retroactively applying section 948.06(1), Florida Statutes (2007). His argument was 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 reviewed the version of section 948.06(1) at the time the Petitioner was placed on probation; this section provided that: "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 . . ." Id. (emphasis in opinion). "Thus, 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 D1000. If these requirements were not met, and the probationary period had expired, then a court would lose jurisdiction to hear an alleged violation of probation. Id.

The Fourth District next discussed the 2007 amendment to section 948.06(1) which allows for tolling of a 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* . . ." Id., quoting, section 948.06(1)(d), Florida Statutes (2007)(emphasis in opinion).

Therefore, as the Fourth District reasoned, since it was "undisputed that Shenfeld was arrested without a warrant and no arrest warrant for the new law violations was issued during Shenfeld's probationary period", and "an affidavit of violation of probation was filed during Shenfeld's probationary term", the question became: "whether retroactive application of the 2007 amendment to section 948.06(1)(d), Florida Statutes (2007) constitutes an expost facto violation." Id.

The Fourth District recognized "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 increase

the penalty by which the crime is punishable", and concluded "the 2007 amendment to section 948.06(1), Florida Statutes to be 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." Id.

Finally, the Fourth District certified conflict with Harris and Frye to the extent that the instant decision conflicts with those decisions. Id.

SUMMARY OF THE ARGUMENT

This Court should decline jurisdiction. Although the Fourth District certified conflict with Frye and Harris to the extent that the instant decision conflicts with those decisions, there is no actual conflict between the instant decision and the decisions of the First District Court of Appeal. Frye/Harris address the 2001 amendment to section 948.06(1), while the instant decision addresses the 2007 amendment to that section.

ARGUMENT

THIS COURT SHOULD DECLINE JURISDICTION IN THE INSTANT CASE; THE DECISION OF THE FOURTH DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE FIRST DISTRICT (FRYE/HARRIS)ON THE SAME QUESTION OF LAW DESPITE THE FACT THAT CONFLICT WAS CERTIFIED BY THE FOURTH DISTRICT (RESTATED)

The Respondent acknowledges that discretionary jurisdiction

may be sought when a decision of the district court is in express and direct conflict with a decision of another district court, or when a decision is certified to be in direct conflict with a decision of another district court. Rules 9.030(a)(2)(A)(iv) and (vi), Fla. R. App. P. However the instant decision is not in express and direct conflict with the decisions of the First District (Frye/Harris), despite the fact that the Fourth District certified conflict with those decisions "[t]o the extent" that there was conflict between Shenfeld and Frye/Harris. Therefore, this Court should decline to accept discretionary review.

The decisions of the First District are distinguishable from the instant case and, consequently, are not in conflict. The instant decision addresses the retroactive application of the 2007 amendment to section 948.06(1), Florida Statutes. Frye and Harris address the retroactive application of a **different** amendment to the section. Although Frye and Harris found that retroactive application of the 2001 amendment violated *ex post facto*, it does not necessarily follow that under the reasoning of Frye/Harris the retroactive application of the 2007 amendment would also violate *ex post facto*. This is because of the different nature of the amendments.

Frye addressed the 2001 amendment which provided for a tolling of a probationary period once an affidavit alleging a violation of probation was filed and a warrant issued under section 901.02. See,

Frye, 885 So. 2d at 419-420. Prior to this amendment, it does not appear that there was a statutory tolling provision for violation of probation or community control; however, even before this amendment was enacted, a court could retain jurisdiction beyond the expiration of the probationary term if "appropriate steps were taken to revoke or modify probation" after a violation of probation was alleged. See generally, Stambaugh v. State, 891 So. 2d 1136 (Fla. 4th DCA 2005); Clark v. State, 402 So. 2d 43 (Fla. 4th DCA 1981).

The Frye Court seemed to find the existence of an *ex post facto* violation because the 2001 amendment (which established statutory – - as opposed to decisional - - tolling) "clearly disadvantaged" the defendant because the amended affidavits of violation of probation in that case would have been deemed untimely under the pre-2001 version of section 948.06. Id. at 421. The Frye Court's citation to Weaver v. Graham, 450 U.S. 24, 30 (1981), suggests that the Frye Court also found that the defendant had not been provided "fair notice". Frye, 885 So. 2d at 421.

The concerns that the Frye Court had with the 2001 amendment to section 948.06(1) would not necessarily be present with the 2007 amendment to that section. The 2001 amendment **established** a statutory tolling provision; the 2007 amendment merely **modified** that provision. Frye was "disadvantaged" by the 2001 amendment because the amended affidavits in that case (which were not filed

until 2002) would not have been timely before the statutory tolling provision was established. See, Frye, 885 So. 2d at 420-421.

On the other hand, it could hardly be said that a defendant would be "disadvantaged" following the 2007 amendment - - an amendment which merely allowed a warrantless arrest to substitute for the issuance of a warrant as a precondition for a statutory tolling provision which was established in 2001. With the 2007 amendment "the legislature made it clear that the issuance of a warrant is no longer a requirement to toll the probationary period." Shenfeld, 34 Fla. L. Weely at D1000.

The Frye Court's concern about "fair notice" would not apply to the instant case since a defendant, such as the Petitioner, would already be on "notice" at the start of his probationary period in 2002 that there were statutory tolling provisions which could be activated upon a violation of probation.

Furthermore, although Frye could have been "disadvantaged" by the amended affidavits which added new allegations of violation of probation, the amended affidavit in the instant case changed only the dates of the alleged offenses. Shenfeld, 34 Fla. L. Weekly at D999. Frye and the instant decision are distinguishable on this point as well.

A separate discussion of Harris would not appear to be necessary. Harris follows Frye. If there is direct conflict between the instant decision and Frye, then there is also conflict

between the instant decision and Harris. Naturally, if there is no conflict between the instant decision and Frye, as the Respondent submits, then there is no conflict between the instant decision and Harris.

In conclusion, Frye/Harris are substantially distinguishable from the instant decision because those cases address a different amendment to section 948.06 than does the instant decision. The 2001 amendment addressed in Frye/Harris created a statutory tolling provision for a probationary period; the 2007 amendment (addressed in the instant decision) merely modified that provision. The *ex post facto* concerns of the Frye/Harris Courts would therefore not necessary exist in the instant case. Since there is no direct conflict between Frye/Harris and the instant case, this Court should decline discretionary review.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Court decline discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by mail on September 14, 2009, to Tatjana Ostapff, Assistant Public Defender, 421 third Street, Sixth Floor, West Palm Beach, FL 33401.

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