IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner as the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

In July, 2002, Petitioner, Jason Shenfeld, pled guilty to robbery. The trial court adjudged him guilty of the offense and sentenced him to five years in prison. The entire sentence was suspended and Petitioner was ordered to serve five years of drug offender probation.

On July 23, 2007, an affidavit of probation violation was filed, but no warrant was issued. Appellant 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. The trial court denied the motion, Appellant was found to have violated his probation, and he appealed from the orders revoking his probation and sentencing him to fifteen years in prison.

On appeal, the Fourth District Court of Appeal rejected Appellant's claim that Section 948.06(1), Fla. Stat. (2007), which became effective well after Appellant 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).

Respondent's motion for rehearing was denied on June 25, 2009. Petitioner filed his notice invoking the discretionary jurisdiction of this Court on July 20, 2009.

This jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

As certified by the Fourth District Court of Appeal, its decision in the instant case directly and expressly conflicts with decisions of the First District Court of Appeal which held that Section 948.06(1), Fla. Stat. (2007) could not be applied retroactively.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

In Frye v. State, 885 So. 2d 419 (Fla. 1st DCA 2004), two amended affidavits of probation violation were filed after the expiration of the defendant's term of probation. The defendant moved to dismiss the affidavits on the grounds that the trial court lacked jurisdiction to consider them. In response, the State invoked an amendment to Section 948.06(1), Fla. Stat. (2001), which 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 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. . . .

The First District Court of Appeal rejected the State's argument that this 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, 67 L.Ed.2d 17 (1981), 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.

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 Appellant violated his probation, but no warrant was ever issued. Appellant'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 Appellant 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). Absent the issuance of an arrest warrant, the filing of an affidavit alone did not toll the probationary period, *id.*, and the trial court would not have jurisdiction after the

expiration of the term to hear the charges of probation violation. Clark v. State, 402 So. 2d 43, 44 (Fla. 4th DCA 1981).

As in Fry v. State, 885 So. 2d 419, the legislature had amended Section 948.076(1), Fla. Stat. (2001) after Appellant was placed on probation. The new statute provided that the probationary term would be tolled "[u]pon the filing of an affidavit alleging a violation of probation or community control and following the 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). In the same statute, the legislature further provided that any law enforcement officer could make a warrantless arrest if he had reasonable grounds to believe that a probationer had violated his probation. Section 948.06(1), Fla. Stat. (2007). Under this amendment, then, the trial court would have retained jurisdiction to hear Appellant's probation violation; absent the amendment, the trial court would have had no jurisdiction to hear the violation.

Although the parallel to Fry is exact, the Fourth District Court of Appeal took a diametrically opposite tack in determining the same *ex post facto* issue in the instant case. That is, despite the contrary holding in Fry, the Court in the instant case held that the retroactive application of the 2007 amendment to Appellant's case did not violate the *ex post facto* clause. In so holding, the Court

correctly agreed that its decision was in direct and express conflict with Fry and Harris. Consequently, this Court has jurisdiction to review the decision of the appellate court below.

Because the decision of the Fourth District Court of Appeal in the instant case is in direct and express conflict with the decisions of another district court of appeal on a matter affecting a significant legal issue, namely, the scope of the *ex post facto* clause, this Court should therefore exercise its discretion and accept jurisdiction to review the decision below. Moreover, the decision of the Fourth District Court of Appeal in the instant case which treated a statute affecting the *jurisdiction* of the trial court as one of merely procedural import, in distinction to the contrary decisions of the First District Court of Appeal, further compel a conclusion that this Court should accept jurisdiction of this appeal so that consistency in the law of this State may be maintained between all its districts in a matter implicating the interpretation of a fundamental Constitutional right.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court exercise its discretion and accept jurisdiction of the instant cause for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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 JULY, 2009.

_____
Of Counsel

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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Assistant Public Defender