IN THE SUPREME COURT OF THE STATE OF FLORIDA

ANDRE FROST,

Petitioner,

vs. CASE NO. SC11-405

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Okeechobee County, Florida, and the appellant before the Fourth District Court of Appeal. Respondent, the State of Florida, was the prosecution and the appellee, respectively. In this brief the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Following a traffic stop, Petitioner's vehicle was subject to a search by a police dog, which alerted to the presence of drugs in his car. Petitioner moved to suppress the evidence seized from his vehicle as a result. At the hearing, Petitioner challenged the training and reliability of the dog and argued that the dog's alert, by itself, did not provide probable cause for the search. The trial court denied his motion.

On direct appeal, Petitioner argued that the case should be governed by Matheson v. State, 870 So.2d 8 (Fla. 2d DCA 2003), *review dismissed* 896 So.2d 748 (Fla. 2005), *cert. denied* 546 U.S. 998 (2005), which held that a dog's alert did not, standing alone, provide probable cause for a search. In its decision dated January 26, 2011, the Fourth District Court of Appeal reiterated its support for its prior decision in State v. Laveroni, 910 So.2d 333, 335 (Fla. 4th DCA 2005), which determined that Matheson was "out of the mainstream." The appellate court noted that the issue was pending before this Court in Harris v. State, No. SC08-1871, reviewing Harris v. State, 989 So.2d 1214 (Fla. 1st DCA 2008), which followed Laveroni, in conflict with Matheson, on the same issue. In the absence of any contrary opinion from this Court, the Fourth District Court of Appeal accordingly affirmed the trial court's denial of Petitioner's's motion to suppress.

Petitioner filed his notice seeking this Court's discretionary review on February 23, 2011.

SUMMARY OF THE ARGUMENT

The instant decision of the Fourth District Court of Appeal directly and expressly conflicts with the decision of another district court of appeal on an issue which is presently pending before this Court for review. This Court accordingly has jurisdiction to review the instant case.

ARGUMENT

POINT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON AN ISSUE WHICH IS PRESENTLY PENDING BEFORE THIS COURT FOR REVIEW.

On his direct appeal of his conviction, Petitioner challenged the trial court's denial of his motion to suppress evidence, on the grounds that a dog alert is not, standing alone, sufficient to provide probable cause for a vehicle search. In its decision, the Fourth District Court of Appeal acknowledged that the Second District Court of Appeal had held, in Matheson v. State, 870 So.2d 8 (Fla. 2d DCA), *review dismissed* 896 So.2d 748 (Fla. 2005), *cert. denied* 546 U.S. 998 (2005), that a dog's alert to the presence of drugs may provide probable cause, but not by itself; proof that a narcotics dog has been trained and certified is insufficient in and of itself to establish probable cause for a search. In Matheson, the appellate court held that the State must demonstrate that the dog's alert is sufficiently reliable to furnish probable cause, considering the dog's training, the standards or criteria which had to be met to complete training, and the dog's performance history. *Id.* at 14-15.

The Fourth District Court of Appeal below, however, noted that it had

previously determined, in State v. Laveroni, 910 So.2d 333, 335 (Fla. 4th DCA 2005), that Matheson was "out of the mainstream." In Laveroni, the Fourth District Court determined that the State

> can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony. Whether probable cause has been established will then be resolved by the trial court.

Id. at 336. The appellate court found that the dicta in Laveroni expressing its disagreement with Matheson was "judicial dictum" which had precedential value, so that the trial court was required to follow Laveroni. The Fourth District Court of Appeal further decided that "we continue to abide by Laveroni, subject to a different ruling by the Florida Supreme Court." The Court then relied on Laveroni to govern its analysis on appeal of the facts on which Petitioner's motion to suppress was based.

The Fourth District recognized that this Court had presently pending before it Harris v. State, No. SC08-1871, reviewing Harris v. State, 989 So.2d 1214 (Fla. 1st DCA 2008), which followed Laveroni, in conflict with Matheson, on the same issue. Although oral argument was heard by this Court in Harris on June 4, 2009, no decision has as yet been issued in that case.

The decision of the Fourth District Court of Appeal below therefore by its own terms directly and expressly conflicts with the decision of the Second District Court of Appeal in Matheson. Further, in Jollie v. State, 405 So.2d 418, 420 (Fla. 1981), this Court held that it had jurisdiction to review decisions of the district courts of appeal which cite as controlling authority a decision that is pending review before it. Since then, this Court has consistently accepted jurisdiction to review decisions which cite cases pending before it. *E.g.*, Collins v. State, 26 So.3d 1287 (Fla. 2009); Steadman v. State, 14 So.3d 218 (Fla. 2009); Madeiros v. State, 14 So.3d 219 (Fla. 2009); State v. Luciano, 12 So.3d 183 (Fla. 2009); State v. Cote, 913 So.2d 544 (Fla. 2005); Roberts v. State, 644 So.2d 84 (Fla. 1994).

Consequently, this Court has jurisdiction to review the instant decision of the Fourth District Court of Appeal. Moreover, this Court should exercise that discretion in order to resolve the conflict between the district courts of appeal and to insure that the same legal principles are uniformly applied in similar fact situations. This Court should therefore accept jurisdiction of the instant case for review.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner requests that this Court accept discretionary jurisdiction of this instant cause based on its direct and express conflict with the decision of another district court of appeal on the same issue which is presently pending before this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, ninth floor, West Palm Beach, Florida 33401 by United States mail this ___ day of MARCH, 2011.

_____
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