

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2001

LOWER COURT CASE NO. 3D08-2187

CARLOS DEL VALLE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, Carlos Del Valle, seeks discretionary review of a decision that is in express and direct conflict with decisions from this Court and other district court of appeal on the burden of proof when the State seeks to revoke a probationer's status on the basis of a failure to pay restitution or the cost of supervision. In this brief, the designation "A." refers to the attached appendix, which contains a conformed copy of the decision of the lower court.

STATEMENT OF THE CASE AND FACTS

In its entirety, the decision below reads as follows:

Affirmed. See Gonzales v. State, 909 So. 2d 960, 960 (Fla. 3d DCA 2005) ("If the probationer's defense is inability to pay, 'it is incumbent upon the probationer or offender to prove by clear and convincing evidence that he or she does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so.' § 948.06(5), Fla. Stat. (2004)").

(A. 2).

A notice to invoke this Court's discretionary jurisdiction was timely filed on October 24, 2008.

SUMMARY OF ARGUMENT

Express and direct conflict jurisdiction exists pursuant to Article V, Section 3(b)(3) of the Florida Constitution as the Third District addressed the legal

principles it applied in reaching its decision and those legal principles conflict with decisions from this Court and other district courts of appeal.

ARGUMENT

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH *STEPHENS v. STATE*, 630 So. 2d 1090 (Fla. 1994); *BLACKWELDER v. STATE*, 902 So. 2d 905 (Fla. 2d DCA 2005); *OSTA v. STATE*, 880 So. 2d 804 (Fla. 5th DCA 2004); and *SHEPARD v. STATE*, 939 So. 2d 311 (Fla. 4th DCA 2006)

Conflict jurisdiction exists under Article V, Section 3(b)(3) of the Florida Constitution when the decision of a district court of appeal expressly and directly conflicts with a decision from this Court or another district court of appeal “on the same question of law.” The facts do not have to be identical for there to be conflict jurisdiction.

This Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is, the opinion must contain a statement **or citation effectively establishing a point of law upon which the decision rests.**

The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988) (emphasis added). The term “expressly” simply requires “some written representation or expression of the legal grounds supporting the decision under review.” Philip J. Padovano, *Florida Appellate Practice*, § 3.10, at 68-69 (2007 ed.). Thus, a “discussion of the legal

principles which the [district] court applied supplies a sufficient basis for a petition for conflict review.” *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).

The decision below is not a “citation PCA” as the court, through its squib from *Gonzales*, which includes a citation to § 948.06(5), expressed the legal principle it applied when reaching its decision. In the Third District, when probation is sought to be revoked due to failure to pay restitution or the cost of supervision and the probationer’s defense is inability to pay, it is incumbent on the probationer to prove he does not have the resources to make payments.

The legal principle announced below – that the burden is on the probationer to demonstrate an inability to pay – expressly and directly conflicts with this Court’s decision in *Stephens* and with decisions from other district courts of appeal that have followed *Stephens*.

In *Stephens*, this Court held that “before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so.” 630 So. 2d at 1091. Imprisonment without such a finding “would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 673 (1983)).

Following *Stephens*, the Second District has held that “the State is required to present evidence of the probationer's ability to pay to demonstrate the

willfulness of the violation.” *Blackwelder v. State*, 902 So. 2d 905, 907 (Fla. 2d DCA 2005). The Second District specifically held that “section 948.06(5), despite its plain language, cannot relieve the State of its burden to prove that the violation was willful by proving the probationer’s ability to pay”. *Id.* at 907 n.1.

The Fifth District reached a similar conclusion in *Osta v. State*, 880 So. 2d 804 (Fla. 5th DCA 2004), noting that “a plain reading of the statute appears to place the burden of proving ability to pay restitution on the probationer” but following *Stephens* and holding that “in order to revoke probation for failure to pay restitution the burden is on the State to prove the ‘willfulness’ of the violation, and in order to prove ‘willfulness’ the State must provide evidence that the probationer has the ability to pay restitution but willfully refuses to do so.” *Id.* at 807.

The Fourth District has likewise considered the effect of section 948.06(5) in probation revocation hearings and held that “[d]espite the language of the statute, where the violation alleged is a failure to pay costs or restitution, there must be evidence and a finding that the probationer had the ability to pay.” *Shepard v. State*, 939 So. 2d 311, 314 (Fla. 4th DCA 2006).

One of the tests for conflict jurisdiction is whether the holdings are irreconcilable. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006). The decision below, which relies on section 948.06(5) to place the burden on a probationer to demonstrate **inability** to pay when probation is sought to be

revoked for failure to pay restitution or the cost of supervision, can not be reconciled with *Stephens*, which requires a determination of an **ability to pay**. The decision below is also in irreconcilable conflict with *Blackwelder*, *Osta* and *Shepard*, all of which expressly considered section 948.06(5) but nevertheless held that the burden was on the State to demonstrate a probationer's ability to pay. This Court should accept jurisdiction to resolve the conflict.

CONCLUSION

Jurisdiction should be accepted based on an express and direct conflict between the cases discussed above on the same question of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on Jurisdiction was delivered by hand to Heidi Milan Caballero, Assistant Attorney General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, FL 33131 on October 24, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point font, and so is in compliance with Rule 9.210(a)(2).

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