IN THE SUPREME COURT OF FLORIDA

VERNON PINCKNEY,

Petitioner,

Case No. SC12-174

v.

STATE OF FLORIDA,

Respondent.

_____/

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Vernon Pinckney, the petitioner in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name. "PJB" will designate Petitioner's Jurisdictional Brief, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of an order of the First District Court dismissing his petition for writ of mandamus. The order, dated January 5, 2012, states in full:

> Not having received a response to this Court's order of November 30, 2011, requiring appellant to serve a copy of the petition on the Attorney General and Clerk of Court for Duval County and to file a supplemental certificate of service that so demonstrates, the above-styled cause is hereby dismissed.

SUMMARY OF ARGUMENT

Petitioner has not established a constitutional basis for this Court to exercise its discretionary jurisdiction.

ARGUMENT

HAS PETITIONER SHOWN A BASIS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION? (Restated)

Appellate Standard of Review and Jurisdictional Criteria

The applicable standard of review for determining jurisdiction is ***de novo*** subject to the following criteria.

Petitioner appears to contend that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const., providing: The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord, Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla.

1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So.2d 974 (Fla. 2002). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

In the case at bar, the First District Court, by clerk's order, dismissed Petitioner's cause for failure to serve a copy of his petition on the Attorney General and Clerk of Court for Duval County and to file a supplemental certificate of service so demonstrating. Petitioner asserts that the First District Court "was at fault" for not following this Court's decision in

Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993). In Kozel, the issue concerned the dismissal of a case as a sanction in the civil context. Carolann Kozel filed a medical malpractice complaint against Steven Ostendorf on July 25, 1989 in the circuit court of Lee County. Ostendorf filed a motion to dismiss on the grounds that the complaint failed to state a cause of action and that Kozel failed to comply with section 766.205, Florida Statutes (1989). The court granted Ostendorf's motion to dismiss and granted Kozel twenty days to amend her complaint. By agreement of the parties, the time period to amend the complaint was extended another ten days. Kozel's attorney, Kelley A. Finn, did not file the complaint until July 23, 1990, over five months past the due date. On Ostendorf's motion the circuit court then dismissed the complaint with prejudice and the district court affirmed. Id. at 817.

On these facts, this Court held that the district court properly recognized that the trial court has the discretionary power to dismiss a complaint if the plaintiff fails to timely file an amendment. The Court stated:

> Although such broad power is vested in the trial court, it is not necessary or beneficial for that power to be exercised in all situations. We concur with Judge Altenbernd's suggestion that the trial courts need a meaningful set of guidelines to assist them in their task of sanctioning parties and attorneys for acts of malfeasance and disobedience.

> Without such a framework, trial courts have no standard by which to judge the severity of the party's action or the type of sanction that should be imposed. In the instant case, the trial court acted within the boundaries of the law. In our view, though, the court's decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote. The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of litigation. Fla.R.Civ.Pro. 1.010. This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint. Clay. Dismissal "with prejudice" in effect disposes of the case, not for any dereliction on the part of the litigant, but on the part of his counsel. We are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal "with prejudice" would in effect punish the litigant instead of his counsel. Because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

Id. at 817-818 (internal citations and footnote omitted). This Court stated it was vitally concerned with the swift administration of justice at both the trial and appellate levels and that in the interest of an efficient judicial system and in the interest of clients it is essential that attorneys adhere to filing deadlines and other procedural requirement, however, a fine, public reprimand, or contempt order may often be the appropriate sanction to impose on an attorney in those

situations where the attorney, and not the client, is responsible for the error. To assist the trial court in determining whether dismissal with prejudice is warranted, the court adopted the following set of factors set forth in large part by Judge Altenbernd in his dissenting opinion in Kozel: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative. Id. at 818 (internal footnote omitted). The Court quashed the district court's decision, approved the conflicting decision of the Forth District Court in Clay v. City of Margate, 546 So.2d 434 (Fla. 4th DCA 1989), and remanded the case with directions that the trial court be ordered to reconsider in light of the new factors established in the opinion. Id. at 818.

Petitioner herein has pointed to no express or direct conflict between the DCA's order of dismissal in his case and this Court's decision in Kozel. Conflict jurisdiction exists only when decisions which interpret the same principles of law are applied to indistinguishable facts. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983). The decision in Kozel involves neither similar facts nor the same question of law determined by the DCA in the instant case and, thus, cannot be the basis for a finding of express and direct conflict.

CONCLUSION

There is no constitutional basis for discretionary jurisdiction. The petition should be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Vernon Pinckney, DC# 993574, Sumter Correctional Institution, 9544 County Road 476B, Bushnell, Florida, 33513, by MAIL on March 5th, 2012.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Anne C. Conley
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