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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No.: SC14-1400

L.T. Case No.: 4D14-1745

CARMEN C. GUIDO,

Petitioner,

v.

BRANCH BANKING AND TRUST COMPANY,

Respondent.

RESPONDENT'S ANSWER BRIEF IN OPPOSITION TO JURISDICTION

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POINT ON APPEAL

THIS COURT LACKS JURISDICTION TO REVIEW THE FOURTH DISTRICT'S ORDER DISMISSING PETITIONER'S APPEAL OF A NON-FINAL NON-APPEALABLE ORDER VACATING A DEFAULT.

SUMMARY OF THE ARGUMENT

Petitioner undoubtedly disagrees with the Fourth District's Order entered on July 2, 2014 granting Respondent's Motion to Dismiss Appeal and dismissing the appeal in Case No. 4D14-1745 (the "Order").¹ He fails, however, to identify any basis for this Court's jurisdiction to review the Order. His only jurisdictional analysis parrots the standards for certiorari, a jurisdiction that this Court does not have. He mentions, but does not argue, other inapplicable writs. While it is tempting to end this discussion here, Respondent will demonstrate that this Court should exercise none of its jurisdictions.

¹ The Order has been included as A.1 in Petitioner's Appendix filed with this Court on September 24, 2014.

STATEMENT OF THE CASE

Petitioner's Statement of the Facts is improper because there simply are no facts contained in the Order. (A.1). The Order stated in its entirety:

ORDERED that appellee's motion filed June 11, 2014 to dismiss appeal is granted, and the above-styled appeal is hereby dismissed. An order vacating a clerk's default is not appealable. *Broward Employment & Training Admin. V. Cmty. P'ship Program, Inc.*, 422 So. 2d 1101, 1101 (Fla. 4th DCA 1982). Irreparable harm for extraordinary writ jurisdiction, such as certiorari, is lacking. *Liebman v. Sportatorium, Inc.*, 374 So. 2d 1124 (Fla. 4th DCA 1979); further,

ORDERED that the appellee's motion for attorney fees filed June 13, 2014, is granted conditioned on the trial court determining that appellee is the prevailing party and, if so, to set the amount of the attorney's fees to be awarded for this appellate case. If a motion for rehearing is filed in this court, then services rendered in connection therewith, including but not limited to preparation of a responsive pleading, shall be taken into account in computing the amount of the fee; further,

ORDERED that appellant's motion filed June 5, 2014, for attorney fees is hereby denied.

(A.1).

ARGUMENT ON JURISDICTION

The Florida Constitution defines this Court's jurisdiction. *See* Art. V, § 3(b), Fla. Const. Rule 9.030(a), Fla. R. App. P., breaks this down to mandatory Appeal Jurisdiction, Discretionary Jurisdiction and Original Jurisdiction. The Court has only the limited jurisdiction authorized under the Florida Constitution, and cannot exercise any other forms of jurisdiction. *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976).

The subject Order clearly does not fall within any of the Court's categories of mandatory appeal jurisdiction articulated in Rule 9.030(a)(1), Fla. R. App. P. (final orders of courts imposing sentences of death; decision of district courts of appeal declaring invalid a state statute or a provision of the state constitution; final orders entered in proceedings for the validation of bonds or certificates of indebtedness; or action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service).

Rule 9.030(a)(2), Fla. R. App. P., lists the Court's categories of discretionary jurisdiction. Clearly the subject Order does not fall within any of the Court's discretionary categories set forth in subsection 9.030(a)(2)(A)(i), (ii), (iii), (v) or (vi) (expressly declare valid a state statute; expressly construe a provision of the state or federal constitution; expressly affect a class of constitutional or state officers; pass upon a question certified to be of great public importance; or certified to be in direct conflict with decisions of other district courts of appeal).

Moreover, the Order does not fall under Rule 9.030(a)(2)(B) , Fla. R. App. P. because it is not an order or judgment of a trial court certified by the district court of appeal in which the appeal is pending to require immediate resolution by the Supreme Court; and to be of great public importance, or to have a great effect on the proper administration of justice.

Additionally, the Order is not certified by the Supreme Court of the United

States or a United States Court of Appeals. *See*, Rule 9.030(a)(2)(C), Fla. R. App. P.

It appears that Petitioner is attempting to invoke some form of original jurisdiction under § 9.030(a)(3). The Petitioner recites the familiar test for issuance of a writ of certiorari. Petition, p.6-7. However, the 1980 amendments to Article V of the Florida Constitution eliminated this Court's certiorari jurisdiction, and removed its discretionary jurisdiction to review non-final orders. *See Haines City Cmty Dev. v. Heggs*, 658 So. 2d 523, 525 fn.2 (Fla. 1995); *see*, England, CONSTITUTIONAL JURISDICTION OF THE SUPREME COURT OF FLORIDA: 1980 REFORM, 32 Fla. L. Rev. 147, 161-197 (1980).

Petitioner names other writs he wishes to invoke, but does not argue their applicability. Petition, p. 7-8. This is because they are inapplicable. *Quo warranto* warrants lies only to test the authority of a person to exercise power granted by the state. *Whiley v. Scott*, 792 So. 3d 702 (Fla. 2011). Mandamus will lie when a petitioner has a clear legal right (already plainly established in the law) to the performance of a purely ministerial duty (one in which no discretion is involved), will suffer harm absent issuance of the writ, and has no other legal method for redressing the wrong or obtaining relief. *See Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992). Discretionary authority cannot be the subject of the writ. *Holland v. Wainwright*, 499 So. 2d 21 (Fla. 1st DCA 1986). While a

writ of mandamus will lie to compel a court to rule, it will not lie to review the correctness of a ruling once it is made.

In *Wells v. State*, 132 So. 3d 1110 (Fla. 2014), this Court recently ruled that it lacked discretionary review jurisdiction over a district court of appeal's unelaborated per curiam dismissal of a petition seeking to invoke the district court of appeal's all writs jurisdiction with respect to an inmate's claim that his prison releasee reoffender sentence was illegal, where the dismissal order merely cited two cases that were not pending review in this Court and had not been quashed or reversed by this Court, and did not contain any discussion of the facts in the case such that it could be said that the district court "expressly address[ed] a question of law within the four corners of the opinion itself." *Id.* at 1113. *See also Wilson v. Griffin*, 2014 WL 4181710 (Fla. August 22, 2014) (unpublished opinion) (having determined that this Court is without jurisdiction, this case is hereby dismissed) citing to *Wells, supra*; *Peterson v. Palm Beach County Health Dep't*, 2014 WL 4180309 (Fla. August 21, 2014) (unpublished opinion) (same); *Gelman v. Caulfield*, 2014 WL 4100141 (Fla. August 19, 2014) (unpublished opinion) (same).

Thus, by process of elimination, the only category that the Order could fit within (but clearly does not) is under Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., (express and direct conflict with a decision of another district court of appeal or of the supreme court on the same question of law).

Jurisdiction does not lie in this Court because there is no “express and direct” conflict. Review is not available here because the Order establishes no point of law contrary to a decision of this Court or other district courts. Florida Const. Art. V, § 3(b)(3); *First Union Nat’l Bank v. Turney*, 832 So. 2d 768 (Fla 1st DCA 2002). Review is not available because a conflict does not appear “within the four corners of a majority decision.” *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

In *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980), this Court held that “express” means “to represent in words” and “to give express to,” and that “expressly” means “in an express manner.” The requirement of “express” conflict means that the district court of appeal must have issued a majority opinion containing analysis of some kind. *Id.* The conflict between decisions must be express, be direct, and appear within the four corners of the majority decision. *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304 (Fla. 1981). The record itself cannot be used to establish jurisdiction. “[T]he only facts relevant to [this Court’s] decision to accept or reject such petitions [based on conflict] are those facts contained within the four corners of the decisions allegedly in conflict.” *Reaves*, *supra* at 830 n.3. An inherent or implied conflict cannot serve as a basis for this Court’s jurisdiction. *Dep’t of Health & Rehab. Servs. v. Nat’l Adoption Counseling Serv., Inc.*, 498 So. 2d 888 (Fla. 1986).

Turning to the instant case, the Order is clearly not in conflict with any other decision of any other court because orders on a motion to set aside a clerk's default are not an appealable, nonfinal order under Rule 9.130(a)(3), Fla. R. App. P. *See, Dawkins, Inc. v. Huff*, 836 So. 2d 1062, 1065 (Fla. 5th DCA 2003), citing to *BMW Fin. Servs., NA, LLC v. Alger*, 834 So. 2d 408 (Fla. 5th DCA 2003); *see, Broward Employment & Training Admin. v. Cmty. P'ship Program, Inc.*, 422 So. 2d 1101, 1101 (Fla. 4th DCA 1982), (cited in the Order). More importantly, Petitioner has not identified any conflict between the Order and any decision of any other court.

The case of *Vanguard Group, Inc. v. Vanguard Security, Inc.*, 409 So. 2d 1219 (Fla. 3^d DCA 1982), cited repeatedly by Petitioner, is inapposite because it does not address the jurisdiction of a district court to review an order vacating a default. Indeed, in *Vanguard*, the trial court denied the motion to vacate.

Here, the Fourth District simply had no jurisdiction to entertain the appeal. The Order merely cited to two cases holding that the Fourth District had no jurisdiction. Those two cited cases are not pending review in this Court and have not been quashed or reversed by this Court. The Order does not contain any discussion of the facts in the lower court case such that it could be said that the Fourth District "expressly addressed a question of law within the four corners of the opinion itself." *Wells, supra*.

CONCLUSION

For the reasons stated above, this Court should decline to exercise its jurisdiction in this case.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service this 30th day of September, 2014 to Gary Barcus, Esq., 1689 SW 158 Avenue, Pembroke Pines, Florida 33027 (barcusgab@aol.com).

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in Times New Roman, 14-point font.

By: /s/ Victor Kline

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