IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

FRANK J. BRADY; PHILIP M. ECKARD: RONALD B. ELLIOT: DAVID A. LIST: HERMOGENES MANUEL,

Respondents.

STATE OF FLORIDA,

Petitioner,

v.

HERMOGENES MANUEL and DAVID LIST,

Respondents.

CASE NO. 59,054

PETITIONER'S REPLY BRIEF ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

ROBERT L. BOGEN
Assistant Attorney General
Elisha Newton Dimick Building
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner will rely upon its preliminary statement as initially set forth in the Initial Brief on Jurisdiction.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon its Statement of the Case and Statement of the Facts as initially set forth in its Initial Brief on Jurisdiction.

Petitioner realizes that, at this point of the instant proceedings, the substantive merits of Petitioner's position in the Fourth District Court of Appeal are irrelevant, as not bearing upon the issue of jurisdiction in this Court. As such, in its initial brief on jurisdiction, Petitioner limited its statement of the facts to matters reflecting upon the issue of jurisdiction in this Honorable Court. Inasmuch as Respondents Elliot and Eckard, in their statement of the facts, attempt to argue the substitive merits of their position on appeal (rather than the issue of jurisdiction), this Honorable Court should disregard and strike their statement of the facts.

Suffice it to say that Petitioner certainly denies Respondents Elliot's and Eckard's allegation that Petitioner is deliberately attempting to mislead this Court. It is noteworthy that none of the other Respondents were of that view. Clearly, jurisdiction is the only issue before this Court at this time, and substantive matters concerning positions to be taken once this Court accepts jurisdiction are irrelevant.

POINTS INVOLVED

POINT I

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE EXPRESSLY CONFLICTS WITH AYLIN v. STATE, 362 SO.2D 435 (FLA. 1DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL?

POINT II

WHETHER THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL ON THE CASE SUB JUDICE CONFLICTS WITH VARIOUS OPINIONS RENDERED BY OTHER DISTRICT COURTS OF APPEAL INASMUCH AS THE FOURTH DISTRICT COURT OF APPEAL APPLIED A RULE OF LAW WHICH CONFLICTS WITH THAT ANNOUNCED BY THE OTHER OPINIONS?

ARGUMENT

POINT I

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE EXPRESSLY CONFLICTS WITH AYLIN V. STATE, 362 SO.2D 435 (FLA. 1DCA 1978), AND VARIOUS OTHER OPINIONS OUT OF THE SECOND DISTRICT COURT OF APPEAL.

Clearly, Petitioner is not attempting to utilize the instant proceeding for the purpose of obtaining a second appeal. Such, of course, is not the measure of this Court's jurisdiction. Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963). The measure of this Court's jurisdiction (as far as it relates to this issue) is express and direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law. Fla.R.App.P., 9.030(a)(2)(A)(IV). See also Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); Mancini v. State, 312 So.2d 732 (Fla. 1975).

There can be no doubt but that the Fourth District Court of Appeal's opinion in the instant cause expressly and directly conflicts with Aylin v. State, 362 So. 2d 435 (Fla. 1DCA 1978). The opinion sub judice clearly states as much. It matters not that the Fourth District Court of Appeal ruled in favor of Petitioner on this point, for the Fourth District Court of Appeal pit itself against the First District Court of Appeal on this point of law. For the benefit of the lower courts, this Court must review and decide the issue, thus removing the conflict.

Respondents' concerns that Petitioner is not an aggrieved party regarding this issue is irrelevant, for Petitioner is not merely seeking a second appeal. As a party to the instant cause, in which the opinion sub judice expressly and directly conflicts with Aylin, supra, Petitioner has standing to ask this Court to properly exercise its jurisdiction in resolving the conflict that exists. Otherwise, the lower courts of this State will be faced with conflicting opinions out of various district courts of appeal, and no pronouncement on the matter by the Florida Supreme Court.

ARGUMENT

POINT II

THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL ON THE CASE SUB JUDICE CONFLICTS WITH VARIOUS OPINIONS RENDERED BY OTHER DISTRICT COURTS OF APPEAL INASMUCH AS THE FOURTH DISTRICT COURT OF APPEAL APPLIED A RULE OF LAW WHICH CONFLICTS WITH THAT ANNOUNCED BY THE OTHER OPINIONS.

Petitioner will rely upon the argument presented to this Court in its Initial Brief on Jurisdiction. However, once again, Petitioner must point out that Respondents Elliot and Eckard are merely arguing the substantive merits of their position in the Fourth District Court of Appeal. Such an argument has nothing to do with the issue of jurisdiction in this Honorable Court. Suffice it to say that the inferences(regarding the ultimate merits of the case) which are attempted to be drawn by Respondents Elliot and Eckard, will be rebutted by Petitioner in its Initial Brief on the Merits once this Court accepts jurisdiction.

The fact that so many cases have come out of the district courts of appeal of this State, post-Katz [389 U.S. 347(1967)] demonstrates the necessity for this Court to accept jurisdiction and relate these cases to Katz or disapprove these cases. As the law of this State now stands, the cases which Petitioner cited as being in conflict with the instant opinion are good law in the State of Florida. Yet, the Fourth District Court of Appeal failed to even recognize these cases, even though they involve the same principle of law as in the case sub judice.

As illustrative of the fact that the Fourth District Court of Appeal is of the opinion that this Honorable Court should review the instant matter, Petitioner would point out that the Fourth District Court of Appeal granted a motion for stay of mandate in this matter (see appendix). Of course, as pointed out in the Court's Commentary following Fla. R. App. P. 9.120,

> "It should be noted that the automatic stay provided by former Rule 4.5(c)(6) has been abolished because it encouraged the filing of frivolous petitions and was regularly abused . . . the Advisory Committee was of the view that the district courts should permit such stays only where essential. Factors to be considered are the likelihood that jurisdiction will be accepted by the Supreme Court, the likelihood of ultimate success on the merits, the likelihood of harm if no stay is granted and the remediable quality of any such harm."

This Court should accept jurisdiction of the instant cause, and rule on the matter thereby settling the confusion and the conflicting principles of law involved.

CONCLUSION

Wherefore, based upon the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner would respectfully request that this Honorable Court grant certiorari jurisdiction in the instant cause.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida 32301

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed to Steven M. Greenberg, Esq., 744 N.W. 12th Avenue, Miami, Florida 33136; Robert P. Foley, Esq., 406 North Dixie Highway, West Palm Beach, Florida 33401; Alan Karten, Esq., 3550 Biscayne Boulevard, Suite 504, Miami, Florida 33137; Bruce H. Fleisher, Esq., 370 Minorca Avenue, Suite 15, Coral Gables, Florida; and to Joel S. Fass, Esq., 11601 Biscayne Boulevard, Suite 202, North Miami, Florida 33181, this 9th day of May, 1980.

Of Counsel