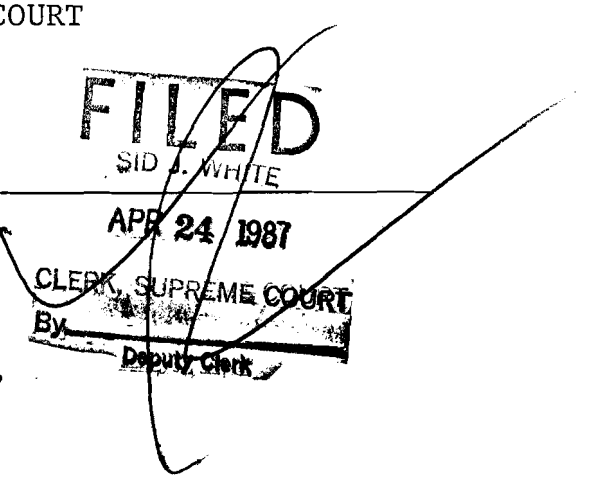
IN THE FLORIDA SUPREME COURT

CASE NO. 70,327



PAUL L. MADSEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DIANE E. LEEDS
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

PRELIMINARY STATEMENT

In this brief, the Petitioner, PAUL L. MADSEN, will be referred to as "Petitioner", and the Respondent, STATE OF FLORIDA, will be referred to as "State".

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

Review of the decision of the Fourth District Court of Appeal is not within the discretionary jurisdiction of this Court since that decision does not expressly conflict with the decisions of this Court or others district courts of appeal or construe provisions of the Florida and Federal Constitution:

a) Issue 1 - Sarmiento - The Sarmiento opinion is easily distinguishable from the instant opinion. Sarmiento predated the 1982 amendment to Article 1, Section 12 of the Florida Constitution whereas the instant opinion relied on said amendment. Further, there is no "express construction" of the State or Federal Constitution in the opinion.

Issues 2, 3, 4, 5 -- As these issues were not mentioned in the opinion whatsoever -- the Court merely stated "We find no merit in appellant's other points on appeal" -- no discretionary jurisdiction is conferred.

ARGUMENT

I.

REVIEW OF THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS NOT WITHIN THE DISCRETIONARY JURISDICTION OF THIS COURT SINCE THAT DECISION DOES NOT EXPRESSLY CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL OR CONSTRUE PROVISIONS OF THE FLORIDA AND FEDERAL CONSTITUTION.

Issue 1 - Sarmiento

Fla.R.App.P. 9.030(2)(iv)requires express and direct conflict prior to jurisdiction being conferred on this Court. Where opinions are distinguishable, discretionary review must not be granted, In Re Interest of M.P., 472, So.2d 732 (Fla. 1985); Dept. of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

In the instant case the Fourth District Court of Appeal, in its opinion, recognized Petitioner's "reliance on Sarmiento[1] and found it misplaced. The court reasoned that Sarmiento predated the 1982 amendment to Article 1, Section 12 of the Florida Constitution.

As such Sarmiento was based upon 'old law' not currently in existence. The instant decision was based upon 'new law' in existence subsequent to Sarmiento and the voters' acceptance of the 1982 amendment to Article 1, Section 12, Florida Constitution. Said amendment has substantially changed the law as the U.S. Supreme Court's construction of the U.S.

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[1] State v. Sarmiento, 397 So.2d 643 (Fla. 1981)

Constitution became Florida's construction of its counterpart:

> The difficulty with appellant's reliance on Sarmiento is that it predates the 1982 amendment to Article 1, Section 12 of the Florida Constitution, whereby the citizens of Florida expressed their desire to have the protections contained in this section of our constitution construed in accordance with the U.S. Supreme Court's construction of the United States Constitution.
>
> (Opinion, p.4)

The Court concluded that "Sarmiento was no longer viable" (Opinion, p.4).

Based upon this reasoning it is clear that no express conflict exists but merely two opinions that are clearly distinguishable. The instant case is on all fours with In Re Interest of M.P., 472 So.2d 732 (Fla. 1985). In M.P. conflict jurisdiction was argued where, as in the case at bar, an earlier decision was in apparent facial conflict. However, said decision was rendered prior to the effective date of the Statute M.P. had been decided under and made only a "passing reference to it.[2] This Court which had earlier "accepted jurisdiction" based upon conflict, reversed its position and found "the issue in this case [M.P.] clearly distinguishable from the issues decided in In Re the Interest of D.B. [the earlier case]". Review was denied. In one case, the later one, actions were taken pursuant to Statute and in the other, the earlier one, actions predated the

[2]In the instant case no reference was made by the district court to the constitutional amendment as the Sarmiento court could not have known of its future passage.

Statute. As such, apparently conflicting decisions were held distinguishable and not in conflict at all. Such is the case at bar.

It is further alleged that this court has improvidently granted review in State v. Hume, 463 So.2d 499 (Fla. 1st DCA 1985), petition for review, Supreme Court Case No. 66,704 (Fla. April 1, 1985). (See Petitioner's Brief, p.6). The reasoning in Hume, on the face of the opinion as to the Sarmiento issue, is indistinguishable from the Fourth District's Opinion in the instant case. As such the Hume opinion is clearly distinguishable from Sarmiento, supra, being based upon the new constitutional amendment and not pre-amendment, Sarmiento, law. When discretionary review has been improvidently granted and the required direct and express conflict subsequently found not to exist, the petition for review is properly dismissed, see State v. Kruse, 12 F.L.W. 138 (Fla. March 19, 1987), where jurisdiction was originally accepted but subsequently found to be improvidently granted and the petition dismissed; Matheson v. State, 500 So.2d 1341 (Fla. 1987). where jurisdiction was originally accepted and subsequently found to be lacking and the petition dismissed; Dept. of HRS v. National Adoption Counseling Service, 498 So.2d 888 (Fla. 1986), where jurisdiction was initially accepted and subsequently found to be improvidently granted and the petition dismissed; Reeves v. State, 485 So.2d 829 (Fla. 1986), where jurisdiction was initially accepted and upon closer examination it was found to have been improvidently granted and the petition dismissed;

Quevedo v. State, 436 So.2d 87 (Fla. 1983), where this Court initially accepted jurisdiction, however, subsequently determined none existed and the petition was dismissed; M.P., supra; Johnston, supra.[3]

Lastly, and briefly as Petitioner himself does not delve into details in his brief, Petitioner argues that a second jurisdictional base exists -- the district court "expressly construed" a provision of the State or Federal Constitutions. However, no such express construction is apparent. The Court merely found the 1982 amendment to Article I, Section 12, Florida Constitution to exist. By virtue of its existence it was found that Sarmiento, supra, was no longer viable, and that Article I, Section 23 did not apply. Websters Third New International Dictionary defines 'construe' to mean "to analyze the arrangement and connection of words". "Express" has been defined as "to represent in words", Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Clearly the Fourth District did not "expressly construe" -- analyze the constitutional amendments -- in its opinion. No analysis was required.

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[3]The 1979 amendment to Section 3 of Article V of the Florida Constitution intentionally limited the jurisdiction of this Court as congestion had become intolerable, Jenkins v. State, 385 So.2d 1356, 1358-9 (Fla. 1980). Hume, supra and the instant case are not the sort of cases deemed worthy of this Court's consideration by the Legislature as no express and direct conflict exists.

Issues 2, 3, 4, 5

Petitioner argues that all of these four issues similarly present express conflict jurisdiction as well as expressly construe provisions of the State and Federal Constitutions (Petitioner's Brief, p.8-9). However, as previously noted, both types of jurisdiction are required to be "express[ed]" within the opinion. Fla.R.App.P. 9.030(2)(ii)(iv). Express conflict or express construction of a Statute or Constitution must be apparent from the "face of the district court's opinion", Quevedo v. State, 436 So.2d 87, 88; Dodi Publishing Co. v. Editorial America, 385 So.2d 1369 (Fla. 1980); Jenkins, supra. It must appear within the "four corners of the majority decision, Reeves, supra at 830; can not be by "implication", National Adoption Counseling Service, supra at 889; and, this Court may not look at the record itself to conclude jurisdiction exists, Reeves, supra.

In the case at bar the Court rendered no opinion as to these four issues. The Court merely stated:

> We find no merit in appellant's other points on appeal.
>
> (Opinion, p.4)

As such no jurisdiction can possibly exist.

Lastly, as this Court will not allow Petitioner to "circumvent the clear language of Section 3(b)(3)", St. Paul Title Insurance Corp. v. Davis, 392 So.2d 1304 (Fla. 1980), it is submitted that should this Court choose to entertain Issue I for any reason, that it decline to review all subsequently raised issues. The State agrees that authority is vested within this Court to

entertain issues ancillary to the issue vesting jurisdiction, however, since the function of the District Court of Appeal is as a court of final jurisdiction, this Court must refrain from using this authority unless the issues affect the outcome of the petition, Lee v. State, 501 So.2d 591, 592 (Fla. 1987) n.1; Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983). The instant issues do not affect the outcome of the petition and are not meritorious as properly noted by the District Court.

CONCLUSION

Based upon the foregoing reasons and citations of authority, it is respectfully requested that this Honorable Court decline to accept jurisdiction of the instant cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Diane Leeds

DIANE E. LEEDS
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been sent, by United States Mail, to JAMES M. RUSS, ESQUIRE, Counsel for Petitioner, Tinker Building, 18 West Pine Street, Orlando, Florida 32801, this 23rd day of April, 1987.

Diane Leeds
Of Counsel