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IN THE SUPREME COURT OF FLORIDA

JOHN THOR WHITE,

Petitioner,

VS.

PINELLAS COUNTY, a political subdivision of the State of Florida,

Respondent.

_____/

CASE NO. 72,170

DISTRICT COURT OF APPEAL
2ND DISTRICT
NO. 87-1136

PETITIONER'S REPLY BRIEF

PREPARED BY:

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Petitioner

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SUMMARY OF ARGUMENTS

First, Petitioner asserts that he has shown an express and direct conflict between the opinion of the Second District Court of Appeal in the instant case and the opinion of the Florida Supreme Court in Makemson. The said opinions support the threshold conflict requirements because they are substantially factually the same and the subject opinions reached opposite results.

Second, Respondent's multi-faceted arguments against the merits of this appeal must fail in the main because the lower tribunal and the 2nd DCA misapplied Makemson to the undisputed facts of this case which resulted in a confiscation of Petitioner's time, energy and talents when Petitioner was awarded a fee at a rate of approximately one-half the hourly rate mandated by local rules in indigent cases.

ARGUMENT

I. WHETHER OR NOT THERE IS CONFLICT JURISDICTION.

Succinctly stated, the first argument set forth in Respondent's Answer Brief contends that the Court has improvidently agreed to review the decision of the 2nd DCA below and the Court should now, therefore, decline to review that decision.

In support of his contention, Respondent asserts that the district court's decision appealed from is not expressly and directly in conflict with the decision in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986).

The discretionary jurisdiction of the Court to review district court decisions in express and direct conflict with other Florida appellate decisions is vested in the Court by Article V, Sect. 3 (b)(3) of the Florida Constitution. That limiting or qualifiying language of the 1980 amendment to Article V has been interpreted by a number of appellate decisions. For example, we now know that conflict jurisdiction cannot serve as a basis for reviewing a per curiam affirmance rendered without a majority opinion. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Nor can a sufficient conflict arise from a dissenting opinion or from the record itself. Reaves v. State, 485 So.2d 829 (Fla. 1986). Indeed, the alleged conflict cannot be inherent or implied by the decision

appealed from and it must arise from the four corners of the published decision. HRS v. National Adoption Counseling Services, Inc., 498 So.2d 888 (Fla. 1986).

Accordingly, the merits of Respondent's first argument turn upon whether or not the Court abused its discretion when it held that conflict jurisdiction existed in this appeal.

The legal principal justifying the Court's invocation of conflict jurisdiction in this appeal is found upon the fact that the Second District Court's decision appealed from purports to apply the rules of law set forth in Makemson to a substantially similar stipulated statement of facts and yet the 2nd DCA decision below reaches a result opposite the result achieved in Makemson!

The controlling facts set forth in the Makemson decision and set forth within the four corners of the decision now appealed from are substantially the same; in both cases a very substantial number of reasonable and necessary hours of labor were performed by a court-appointed attorney on behalf of an indigent charged with a capital offense. In Makemson the Petitioner was granted "excess" fees, but Petitioner John Thor White was not.

Assuming that an express and direct conflict provenly exists, then it is clear that the Florida Supreme Court has subject matter jurisdiction in this appeal. But, alas, the Court may hear this case on it merits or it may ultimately decline to do so. See Article V, Sect. 3 (b)(3),

Florida Constitution. The Court, however, has the inherent power to determine what constitutes an express and direct conflict and Respondent's first argument does not establish that the Court has abused its discretion. The Florida Star v. BJF, 13 FLW 518 (Sept. 1, 1988).

ARGUMENT

II. WHETHER THE 2ND DCA ERRED IN DENYING CERTIORARI.

The second argument set forth in Respondent's Answer Brief is as multi-faceted as a composite exhibit.

First, Respondent reminds us that the district court does not sit as a trier of fact, i.e. it does not reweigh evidence considered by the lower tribunal. The district court, of course, did not re-evaluate facts of record; the operative facts were stipulated to and were not contested.

Respondent's contention that the trial court was properly found by the district court to have ruled in accordance with the essential requirements of law simply begs the question. Petitioner has, in fact, identified within his Initial Brief specific portions of the fee award order appealed from which misapply the Makemson holding.

Second, Respondent opines that the trial court grappled long and hard and conscientiously with the issue

at hand and only reluctantly did she deny "excess" fees after first finding that Petitioner had not met his burden of showing

"...sufficient and unusual circumstances."

Sufficient and unusual circumstances. Once again that Makemson phraseology has been isolated in an effort to support an order which conflicts with the essence of Makemson which simply sought to prohibit unjust confiscation of an indigent attorney's time, energy and talent.

Lastly, Respondent dwells at some length on the fact that each case of this nature turns upon its own unique set of facts. True. There is no bright line test for resolving fee awards. Petitioner merely prays that his expenditure of time, energy and talent be judged by the proper standard of law as set forth in Makemson..

CONCLUSION

The Court has properly exercised its discretion when granting conflict jurisdiction in this appeal. The Court, therefore, should determine the merits of this appeal and thereupon the Court should remand this cause to the lower tribunal for redetermination of the merits of the Petitioner's fee petition in accordance with the correct standards set forth in Makemson and in Hillsborough County v. Sinardi, 524 So.2d 483 (2DCA, 1988) and Hillsborough

County v. Unterberger, 523 So.2d 779 (2 DCA, 1988).

In the alternative, because the operative facts are not in dispute, Petitioner requests that the Court remand with instructions to enter an order awarding fees to be computed by the simple formula set forth in the authorites above-referenced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John E. Schaefer, Assistant County Attorney and counsel for Appellee, at 315 Court Street, Clearwater, FL 34616, by regular US Mail on this 14th day of September, 1988.

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