IN THE SUPREME COURT OF THE STATE OF FLORIDA

GERALD R. SHURMAN, SUPREME COURT CASE NO: SC 96,918
Appellant, FIFTH DCA CASE NO: 5D99-556
CIRCUIT COURT CASE NO: 98-720-CA

Vs.

ATLANTIC MORTGAGE &
INVESTMENT CORP. ETC..
Appellee.

PETITIONERS BRIEF ON MERITS

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT STATE OF FLORIDS

Appellant:

Gerald R. Shurman
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Appellee:

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FLORIDA SUPREME COURT Case No 96918

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14 Point Times New Roman; with no more than ten characters per inch and complies with the Eleventh Circuit Court of Appeals Fed. R. App. P. 28-2 (d) & 32-4 (West)

FLORIDA SUPREME COURT Case No. 96918

TABLE OF CONTENTS

FLORIDA SUPREME COURT Case No 06918
TABLE OF CITATIONS

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner Gerald R. Shurman was incarcerated by the Florida Dept. of corrections May 2, 1997. Default proceedings against the Shurman Home started during the month of March 1998. During the entire proceedings between March 1998 and final foreclosure sale June 25, 1998 the Petitioner was never notified, legally served or advised that his adobe was being sold because foreclosure was granted by the Fifth circuit court, eight division.

January 11, 1999, Defendant filed a motion with the Fifth Judicial Circuit of Florida and for Lake County to set aside Final Judgment for Default, under case number 98-720 CA.

January 28, 1999, Honorable Don F. Briggs, ordered a Evidentiary hearing for February 12, 1999. Between February 12, 1999, and March 15, 1999, Defendant was denied appointment of counsel, denied motion for extention of time, denied motion to set aside Judgment, denied motion to strike, and denied motion to Distribute funds held in the registry of the court.

March 2, 1999, Defendant filed a direct appeal with the Fifth District court of Appeal under case number 99-556.

August 20,1999, Florida Fifth District court of Appeal invoked final Judgment against Appellant in the above reference case.

The Appellant/Petitioner served notice to invoke discretionary jurisdiction
FLORIDA SUPREME COURT Case No 96918

PRELIMINARY STATEMENT

October 25, 1999, under Article V. Section 3 (b) (3) (4) and Chapter 350.128, 366.10, and 364.381, Florida Statutes, from the decision rendered Oct. 6, 1999.

The Petitioner received a order December 21, 1999, from the Florida Supreme Court, with case Number 96-918, to file a brief in the above styled cause by January 5, 2000.

July 13, 2000, this honorable court ordered Petitioner to file his reply Brief based on the merits of this case. August 1, 2000, the Petitioner requested a extension of time to file his reply brief, August 8, 2000, this Honorable court Granted an extension of time to September 25, 2000, to file this reply brief.

FLORIDA SUPREME COURT Case No. 96918

STATEMENT OF CASE AND FACTS

March 26, 1998, service of process was serviced on Emily D. Shurman at Appellants residence while Appellant was in prison. A Default was entered Against the Shurmans on May 13, 1998. Atlantic Mortgage moved for and was granted a final summary judgment of foreclosure, and the property was sold at a foreclosure sale June 25, 1998.

During the Default proceedings the Shurmans were separated, leaving the Appellant isolated from all legal proceedings leading up to the Default Judgment and final sale for his home (abode).

The Appellant/Petitioner was aware of the proceedings July 4, 1998 During a visit from Emily Shurman . At this Point and time the Shurmans Had no active knowledge that the home in question had been the subject of a sale.

Petitioner advised Mrs. Shurman to file for Bankruptcy in order to stop any Proceedings. During the Bankruptcy proceedings it was disclosed that the Shurman's property was sold at the sheriff sale June 25, 1998.

Bankruptcy proceedings provided no relief for Mrs. Shurman, which led Petitioner to seek his only recourse to the default sale of his home; to file a motion to set aside the Default Judgment.

After an evidentiary hearing, the Fifth Circuit ruled against Petitioner; which was affirmed by the Fifth DCA August 20, 1999 (App. "**")

A rehearing was denied October 6, 1999. Notice to invoke Discretionary Jurisdiction was filed December 3, 1999.

FLORIDA SUPREME COURT Case No. 96918

SUMMARY OF THE ARGUMENT

due processwas not enjoyed by Appellant where service of process was not Proper as he was not served by plaintiffs at a place where plaintiffs knew he was Not residing at the time of service. Appellant was aware of the proceedings Against him until after default and his home and property were sold by plaintiffs.

There must come a time when a fixed residence, or usual place of abode Establishes itself, incarcerated or not, so that due process is fully enjoyed.

Moreover, specific statute exist for service of process on state prisoners.

When one has not been informed that a lawsuit has been instituted against him, service of process cannot be held proper and a court lacks jurisdiction over defendant.

This Honorable Court should reverse the lower Court'(s) decisions and grant any and all relief just and proper in this cause.

FLORIDA SUPREME COURT Case No. 96918

ARGUMENT

The decision reached in the Fifth DCA in appellants case is in direct conflict With Courts opinion in State ex. Rel. Merritt v. Hefferman, 195 So. 145 (Fla. 1945).

The Fifth DCA has also escalated conflicting opinions; its own District compare: Houarth v. Aetna Life Insurance Co. 634 So. 2d 240 (Fla. 5th DCA 1998); Floyd v. Federal National Mortg. Ass'n, 704 So. 2d 1110 (Fla. 5th DCA 1998) then see Wagner v. Island Corp., 443 So. 2d 469 (Fla. 5th DCA 1984) and Page v. Hallingsworth, 117 Fla. 288 (Fla. 1935).

And is in conflict with the Fourth DCA's holdings in Berhtold v. Griffin, So. 2d 377 (Fla. 4th DCA 1992); Kennedy v. Richard, 512 So. 2d 1129 (Fla. 4th DCA 1987).

These conflicts must be resolved to have conformity throughout the State In the Appellant levels as well as Trial Court Levels. Moreover, not to bring conformity to the courts of Florida, as in the case of of Appellant Shurman due process and equal protection under the law would in fact be voided for Appellant's such as Shurman. Appellant Shurman, due to the lower tribunals rulings, was in

fact denied due process of the law.

FLORIDA SUPREME COURT Case No. 96918

ARGUMENT

This Court has jurisdiction to decide the issues raised herein. It should be duly noted from the onset that the length of Appellant Shurmans Prison sentence is in fact in the record, and was brought to the trial courts attention at a evidentiary hearing. The conflicts this court is faced to decide. Is not just a conflict of opinions of the Courts In question, this Court is also called upon to answer a question, it formerly had ruled upon Appellant Shurmans favor, and the lower courts have held inapplicable. The answer relayed must encompass a two fold analysis and a two fold conclusion as the holdings of conflict when entwined with Appellants case are actually natures Of entirely different beasts when juxtaposed as to the interrelated factors and the Components necessary to properly evaluate them, and the circumstances of each as they relate to the true issue of the meaning of usual place of abode when in the realm of "The Process Serving Statutes World".

An issue not visited by this Court in almost 50 years.

1.) What is usual place of abode within the meaning of section 48.031(1) (a) Fla. St. 1998? when does usual place of abode become such when the person to be

served is Incarcerated for purposes of section 48. 031(1)(a) Fla. St. 1998? Which

ARGUMENT

encompasses; "when is long enough for a longer term of imprisonment to become ones abode, or proper place for service of process?" In accepting Jurisdiction of this cause, these are the two "essentials" which Must be defined as it relates to this cause as **It is interesting to note that in the 5th DCA's opinion that the Court states** "the length of Shurmans's sentence is not in the record and was not considered by the Trial Court" in fact it was and more so on certificate of service granted an Evidentiary Hearing it clearly shows Shurman was incarcerated.

Appellant Shurman relied on this court opinion in State ex rel Merritt v. Hefferman, 195 So. 2d 149 (Fla. 1945) which held: "usual place of abode" is the place where the defendant is actually living at the time of service. The word abode means one's fixed place of residence **for the time being when the service is made.**

The key is "for the time being." The Court did not place emphasis or state that it is incumbent of its opinion that pregnancy or having a family home also,

denotes the abode. The Court simply stated: The word abode means ones fixed place of residence **for the time being** when the service is made. "One

whose right to affirmative relief depends upon establishing his or another person domicile in a given place has the burden as to proof of the issue."

FLORIDA SUPREME COURT Case No. 96918

ARGUMENT

Bowmall v. Bowmall (1937) 127 Fla. 747, 174 So. 14. "It is said that no compass of language can ever fully comprehend the variety of acts which shall in any given case tend to prove establishment of domicile,
for these acts will be as various as are occupations of men or the emotions of mind" Smith v. Croom, 7 Fla. 81.

However, the single most important factor overlooked by the lower tribunals rulings and interpretation of usual place of abode and the statutes relating to service of process, is that Due Process was not enjoyed by Appellant Shurman.

There are several necessary analysis to be made in this case; due process, the foremost, as we are discussing a $175,000 to $200,000 piece of real property rather than an "immaterial matter" "under fire" purely for the sake of principal.

It has long been held: "The objects to be accomplished by process are to advise the defendant that an action or proceeding has been commenced against

him by plaintiff and warn him that he must appear within a time, and that in Default of his doing so, judgment against him will be applied for or taken in a

ARGUMENT

designated sum, or for relief specified." Arcadia Citrus Growers Ass'n v. Hollingsworth, (1939) 135 Fla. 322, 185 So. 431.

"The purpose of summons and respondendum is to give proper notice to defendant that he is answerable to the claim of plaintiff and, therefor, to vest jurisdiction in the Court entertaining the controversy. ." State ex rel. Merritt Heferman, (1940) 142 Fla., 195 So. 145, 127 A.L.R. 1263 Klosensk v. Flaherty, 116 So. 2d 767 (Fla. 1959) rehearing denied. It is not disputed that Appellant did not receive service of process, let alone notice that proceedings against him were initiated until well after Final Judgment for Default was entered against him in the trial court.

Moreover, the trial court in its denial to set aside judgment specifically stated: "Whether Mr. Shurman was properly served or not depends on where his usual place of abode was at the time service was attempted." (Trial Courts order denying motion to set aside judgment) pp2.

The lower Courts decided that appellees were correct in their argument that

Araujo v. Ramirez-Limon, 490 So. 2d 1049 (Fla. 3rd DCA 1986) was controlling. That case relied on Bull v. Kistner, 135 N.W. 2d 545 (Iowa 1965)

FLORIDA SUPREME COURT Case No. 96918

ARGUMENT

A degree of permanence and stability cannot be ascribed to a location to which term imprisonment). Prison is where one resides as a means of punishment, segregation from general society and away from ones home and ;family. It should not in cases of a prisoner having a family home be considered the persons dwelling or usual place of abode, which, as indicated above , connotes a concept of prenancy mandtes v. Seda. 599 N.Y.S. 2d 61, (N. Y. App. 1994).

It is ironic that while **Bull v. Kistner** explicitly resigns that prison is where one resides (as a means of punishment) that it cannot be considered (per Bull) ones place of abode. But that Appellant in this case is faced with losing (per erroneous interpretation by the Court) this same usual place of abode, because service of process was delivered to his home on the street, and not "**where ones fixed place of residence for the time being (emphasis added) when service was made. "Hefferman, Id.**

"An inhabitant has been defined as one who, being a citizen, dwells or has

his home in some particular town where he has municipal rights and duties and is subject to particular burdens; and this habitancy may exists or continue not withstanding an actual residence in another town or another country provided

ARGUMENT

that absence is not so long or such a nature as to interrupt pr destroy the municipal relations previously formed." Dennis v. State, (1879) 17 Fla. 789.

Kistner court determined that one's residence is not changed by Imprisonment **However,** McDougald v. Jenson, 596 F. Supp. 680, 687 (N.D. Fla. 1984). Held: "When the statutory use of residence is to be the equivalent of domicile, then two elements are necessary: (1) bodily presence in a place, and (2) the intention of remaining in the place; neither alone is sufficient to create a legal residence." Id 687.

Neither of these elements were met under McDougald when process was allegedly served on Appellant.

Florida Case Law reflects, with some statutory provisions also attached, that there is a time frame synonymous with a permanence or stability that would govern a residence or place of abode for legal purposes. Appellant incarceration period of time, at the time he personally was aware of the action(s) instituted

and levied against him, far exceed these limitations,

"The word residence as used in statute for constructive service is not synonymous with the word domicile in all cases, but may be construed as

ARGUMENT

meaning actual present residence as distinguished from legal domicile. It should be construed in such a sense as to carry out the intent of statute, that Is, to reach the defendant and impart notice to him of the pendency of the proceedings as far as it is reasonably possible to do." Minick v. Minick, (1933) 111 Fla. 469, 149 So. 483; Housey v. Rutter, (1936) 123 Fla. 156,166 So. 558, holding that a person who had gone to another state to seek employment and intended to live there if he found employment had established his "residence" there for purposes of statute.)"Individual who resides in same abode as defendant for approximately one year prior to time he was served with a copy of complaint and summons by plaintiff, was a person of the family for purposes of process and , hence, was proper who to effect substituted service." Speer v. Wooddell, 340 So. 2d 524 (Fla. 3rd DCA 1976).

In Flower v. Flower, 22 So. 2d. 817 (Fla. 1945 this court held: "the complainant must reside 90 days … this section contemplates the establishment

of a residence in the State of Florida as differentiated from a visit or temporary residence for a period of 90 days."

In determining residence or place of abode, can be proven in declarations

ARGUMENT

contained in such writings as … pleadings in Court proceedings. "Warren v. Warren,(1917) 73 Fla. 764 75 Sc. 35 … " and other legal instruments." Smith v. Crom (1857) 7 Fla. 81.

And **Hefferman:** usual place of abode is the place where the defendant is actually living at the time of service. The word abode means one's fixed place of residence **for the time being when the service is made.**

But also see Florida statute 48.051 (1998). "Process on State prisoner shall be served on the prisoner."

> **"Purpose of statute is to insure that prisoner shall have opportunity to defend himself by having commissioner as his official State guardian advised of nature and contents of process. "State ex. Rel. Page v. Hollingsworth, 117 Fla. 288, 157 So. 887 (1935). (3)**

But see Florida statutes section 370.01(18) (1998) "Resident …making Application … following period of time to wit for 1 year in the State and 6 months in the county.

(3) And it appears that not only trial Court was aware that F.S. 48.051 was

applicable but Appellant Court knew as well, however, the Courts still held that service was proper on Appellant wife, when in fact the statute mandates otherwise. Therefore the trial Court **was not** vested with jurisdiction to entertain

the initial Complaint nor rule on any subsequent motions, thus, appellant Court certainly was without jurisdiction.

Jurisdiction is a fundamental error which can be ruled on at anytime, and since Appellant raised the issue that service was not proper in the first place, it goes to the merits of the case as well as foundation. Distefino Const. v. Fidelldity & Deposit, 597 So. 2d 248 (Fla. 19); Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970).

Statutes governing service of process are to be strictly construed to insure that defendant is given notice of proceedings. Henzel v. Noel, 598 So. 2d 220 (Fla. 5th DCA 1992).

Absent strict compliance with statutes governing service on Appellants wife proper. (See Courts opinion pp.1 Florida statutes 48.031 (2) (a) states in part: Substitute service may be made on the spouse of the person to be served … and if the spouse and the person to be served are residing together. 4

word **shall** will be strictly construed where property right, rather than immaterial

matter, or matter of substance, rather of convenience is involved. **Concerned Citizens of Putnam County for Responsive Gout., Inc. v. St. Johns River Water Management Dist., 622 So. 2d 520 (Fla. 5th DCA 1993)**

FLORIDA SUPREME COURT Case No. 96918
ARGUMENT

(4) Appellant cannot be said to have been residing in the same dwelling. "Statutes which govern substitute service of process are to be strictly construed and also they must be strictly complied with." Areo Costa Rica, Inc. v. Dispatch Services, Inc., 710 So. 2d 219 (Fla. 3rd DCA 1998).

Also, (in Appellees brief pp3 and the lower Courts further agree that pursuant to 48.031 Fla. St. that service was proper. This also must fail to pass muster as the elements of that statute were **Neither met.** Fla. Statutes 48.031 (1)(a) in part states: service of original process … who is 15 years or older and informing the person of such.

Speer v. Wooddell, 340 So. 2d 524 (Fla. 3rd DCA 1976): "The record shows that at the time of service of process … he was twenty-seven years of age at the time of service. upon receipt of the papers he left them for Wooddell on desk in their home
and informed him thereof."

Clearly, all through the record, from Appellants original motion, to the

evidentiary, to Appeal that Shurman was never informed of the proceedings against him until after Final Default was entered against him.

The records support this claim and again these are fundamental errors which

ARGUMENT

require all prior rulings reversible errors and again shows the lower courts were without jurisdiction. "Strict compliance with constructive service statutes is required. "Floyd Federal Nat. Mortg. Ass'n 704 So. 2d 1110 (Fla. 5th DCA 1998). "Failure to strictly comply renders a subsequent judgement violable. "Tindall" Damars, 625 So. 2d at 1221, "If service of process is so defective that it amounts to no notice of the Proceedings, the Judgment is void."

In terms of due process and its guarantees, this Court cannot sustain that because one is prevented from occupying a voluntary place of abode by an act of sovereign, such as a long term imprisonment (8 years in Appellant case) or even one as little as a year and a day sentence, that he should not be served process at the place of residence for the time being, or that it is proper to serve him where he is incapable of being, and his no control over over the actions of others there, Article I, ss 9 of the Florida Constitution ensures:

> **"NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW."**

It is the service of process which that puts one on notice that such action will be taken against a person and that some type of regress or loss of property will take place if he fails to respond in a timely manner.

ARGUMENT

In considering the issues raised herein, it cannot be of any relevance that usual place of abode is the home where appellant intends to return to. After all, **what home is there to return to now?**

This is not what the legislative intent was when drafting these statutes. It was simply to ensure that a man or women was put on notice of pending action, where he is living, and allow him to be answerable to the plaintiff, or not, and default. It was designed to ensure due process.

To conclude service of process was proper in this case where Appellant received no notice because of usual place of abode, is where Appellant was living at the time is to lesson any qualities and healing meaning the drafters Florida Constitution and the Legislative intents had in mind.

Appellees and their attorneys will be establishing precedent case law not on the level of due process or that due process was actually served, but on a level of a child who didn't lie, but didn't tell the truth either, when question by a concerned parent, where some action or inaction due to the untruth, someone was severely

injured or placed in great harm.

Nor can Appellant be held responsible for his estranged wife's failure to inform him that a complaint was filed against him.

FLORIDA SUPREME COURT Case No. 96918

ARGUMENT

Appellants usual place of abode was where he was incarcerated at the time of service, he had been incarcerated over a year, a requirement for residency and was under a long term of imprisonment, 8 years is substantial time enough to interrupt any municipal relations previously formed.

"Residence indicates place of abode, whether permanent or temporary, and a resident is one who lives at a place with no present intention of removing therefrom." There must come a time when a fixed residence or usual place of abode establishes itself, incarcerated or not, for proper service of process so that due process is fully enjoyed. Contrary to Bull v. Kisntner, a degree a permanence and stability can be ascribed to a location to which the sovereign involuntarily places a person. How can one say, when one has not done or been there?

Moreover, many times over, the State of Florida Health and Rehabilitative Services in re child custody and paternity suits, always file where state prisoners are incarcerated.

Appellant Shurman received not one iota of due process in this cause before his real property had been defaulted against and sold, he was not informed by anyone that the suit had been instigated against him. This Court should quash the lower Courts decisions in this cause in favor of Appellant.

FLORIDA SUPREME COURT Case No. 96918

CONCLUSION

For the reasons expressed herein, Appellant respectfully request this Honorable Court reverse the lower Courts rulings and hold that service was not proper in this cause and the trial court was without jurisdiction to enter judgment against Appellant.

This Court is also asked to give legal meaning to the term "usual place of abode," **And.** When is "long enough" to be incarcerated, for proper service of process on an inmate, even though per Statute, "Process on state Prisoner shall be served on the Prisoner."

And any and all relief this Court deems just and proper.

Respectfully Submitted,

GERALD RODNEY SHURMAN

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FLORIDA SUPREME COURT Case No. 96918

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished via U.S. Mail to: Ms. Jennifer Ebanks and Mrs. Mason c/o MASON & ASSOCIATES, Attorneys at Law, Mangrove Bay 17757 U.S. Hwy. 19 North Suite 500, Clearwater, Florida 33764-6559 this 9th day of September, 2000, and revised This 20 day of September 2000.

GERALD RODNEY SHURMAN

FROM GERALD SHURMAN
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