

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1996
3DCA CASE NO. 04-2366

DAVID EVERETTE,

Petitioner,

-vs-

**THE STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES,**

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON JURISDICTION

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SUMMARY OF ARGUMENT

Petitioner urges this Court to exercise its discretionary jurisdiction over this case on the grounds that it conflicts with other decisions defining necessary parties. The lower court's decision, however, does not address the issue of joinder of necessary parties and so, therefore, does not expressly and directly conflict with those decisions. Since there is no conflict, this Court should not review this case.

ARGUMENT

THE LOWER COURT'S DECISION DOES NOT ADDRESS THE ISSUE OF NECESSARY PARTIES AND, THEREFORE, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION THAT DOES DISCUSS THAT ISSUE. BECAUSE NO EXPRESS AND DIRECT CONFLICT EXISTS, THIS COURT SHOULD REFUSE TO EXERCISE ITS DISCRETIONARY JURISDICTION OVER THIS CASE.

David Everette, Petitioner in this case, has invoked the discretionary jurisdiction of this Court, seeking review of a decision rendered by the Third District Court of Appeal on October 27, 2004 and denied for Rehearing and Rehearing en Banc on September 27, 2005. Petitioner argues that the Court should exercise its discretionary jurisdiction because the underlying decision affects a class of constitutional officers (county sheriffs), thus the county sheriffs were necessary parties, and thus this decision conflicts with precedent from other courts defining "necessary parties." Petitioner has not

articulated a legitimate basis upon which this Court should exercise its discretionary review over this case.¹

Petitioner does not argue that the district court's decision in this case affects county sheriffs such that this Court's jurisdiction should attach solely on that basis.² Rather, Petitioner argues that because the decision affects county sheriffs, the sheriffs were necessary parties and the failure to join them renders this decision inconsistent with other decisions defining necessary parties. Petitioner identifies several opinions in which courts have held that a party whose interests are affected by a judicial decision are "necessary and indispensable" and must be joined.

¹ The Petitioner also urges this Court to review this case "because of the importance of the treatment of mentally retarded persons." However, Petitioner does not (and cannot) suggest that this issue, which was addressed both initially and on motion for rehearing, falls within this Court's discretionary jurisdiction. Article V, s. 3 (b)(3), Fla. Const.; Fla. R. App. Proc. 9.030(a)(2)(A)(iii) and (iv). *See also, State v. Barnum*, 2005 WL 2296638, 2296639 (Fla. 2005) ("It is beyond dispute that this Court is without power to simply assume jurisdiction in a case to correct what we perceive as error, even if the issue appears important . . ."); *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986) ("Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.")

² Although county sheriffs do constitute a class of constitutional officers, the decision of the lower court in this case does not "affect" them so as to warrant invoking the discretionary jurisdiction of this Court. *See Spradley v. State*, 293 S. 2d 697, 701 (Fla. 1974). As in *Spradley*, the decision by the lower court in this case simply imposes upon all sheriffs the duty to henceforth follow the law as interpreted.

Petitioner's argument ignores the plain fact that the issue of joinder of necessary parties was never raised or considered during the pendency of this case. There is no conflict with cases discussing necessary parties because the lower court's decision does not even mention the issue of necessary parties. *See Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980). ("This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law.")

Although the dissenting opinion in this case does mention that the sheriff did not receive notice or an opportunity to be heard, a dissent cannot confer conflicts jurisdiction on this Court. *Id.* ("[T]he language and expressions found in a dissenting or concurring opinion cannot support [conflict] jurisdiction . . . because they are not the decision of the district court of appeal.") *See also, Reaves v. State*, 485 So.2d 829 (Fla. 1986). The majority opinion in this matter did not address the issue of necessary parties at all and, as such, it does not expressly or directly conflict with any decision that does address the matter, and it cannot serve as a basis for this Court's jurisdiction.

In addition, the issue of whether the sheriff was a "necessary party" to this litigation cannot be raised for the first time on appeal to this Court. Rule

1.140 of the Florida Rules of Civil Procedure dictates that the “defense of failure to join an indispensable party may not be raised after an adjudication on the merits and, thus, [can] not be raised for the first time on appeal.” *Gold, Vann & White, P.A. v. Friedenstab, M.D.*, 831 So.2d 692, 696 (Fla. 4th DCA 2002), rev.denied, 874 So.2d 1191 (Fla. 2004). See also, *Engel Mortgage Co. Inc. v. Dowd*, 355 So.2d 1210 (Fla. 1st DCA 1977), cert. denied, 358 So.2d 130 (Fla. 1978). This would seem to be especially true in the case of an appeal to the Supreme Court.

CONCLUSION

This Court should not exercise its discretionary jurisdiction over this case because the case does not present an express and direct conflict with any other district court or Supreme Court opinion. This Court should, therefore, deny review in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Bennett H. Brummer, Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, and to Annette M. Lizardo, Assistant Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida, 33131, this ___ day of December, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is printed in 14 point Times New Roman.

Respectfully submitted,

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