IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1848

L.T. Case No. 3D17-1421

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., d/b/a HERSSEIN LAW GROUP, a Florida corporation and REUVEN HERSSEIN,

Petitioners,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,

Respondent,

On Review from the District Court of Appeal, Third District, State of Florida

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. STATEMENT OF THE CASE AND FACTS

Petitioner, Law Offices of Herssein and Herssein, P.A. d/b/a Herssein Law Group ("HLG") sued its former client Respondent, United Services Automobile Association's ("USAA") for breach of contract and fraud. App. A002. In the course of the litigation, Petitioner Reuven Herssein, Esq. ("Mr. Herssein") accused one of USAA's managers—a non-party—of witness tampering. *Id.* USAA engaged former circuit judge Israel Reyes ("Mr. Reyes") to serve as separate counsel for the manager, and Petitioners later indicated that they may name the manager as a co-defendant in the litigation. *Id.*

HLG moved to disqualify the trial judge *inter alia* on the basis that Mr. Reyes is listed as a "friend" on the judge's personal Facebook page. *Id.* In support of their motion, Iris Herssein and Mr. Herssein, president and vice-president of HLG, executed affidavits attesting that they had a well-grounded fear of not receiving a fair trial because the trial judge was Facebook friends with Reyes. *Id.*

The trial court denied the motion, and Petitioners filed a Petition for Writ of Prohibition. *Id*. The Third District Court of Appeal denied the petition, holding as follows:

> Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook friend with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend."

Id. at A010. The Third DCA "respectfully acknowledge[d] [its decision is] in conflict" with the Fourth District's opinion in *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012). *Id.*[1]

SUMMARY OF THE ARGUMENT

The case Petitioners point to as the basis for express and direct conflict—*Domville*—differs factually from this case and is not irreconcilable with the Third District's decision. This case is a civil suit where the trial judge is Facebook friends with a non-party's attorney (who is a retired judge from the same circuit). *Domville* was a criminal case where the trial judge was Facebook friends with the prosecutor—the attorney for the State of Florida, an actual party in the litigation. Petitioners have not established that an "express and direct conflict" exists between the decision in *Domville* and the decision in the instant case.

Petitioners' second argument—that the Court has jurisdiction because the decision affects a class of constitutional or state officers—fails because it takes too broad a view of this category of discretionary jurisdiction. Even if the decision is

[1] Petitioners' Statement of the Case and Facts includes numerous factual statements regarding the underlying proceedings that do not appear within the four corners of the decision on review. Such extraneous facts are improper in a jurisdictional brief, and the Court should therefore disregard them. *See, e.g.*, *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record . . . . Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below . . . .").

deemed to expressly affect a class of constitutional officers, this Court has discretion to not exercise jurisdiction and should decline to do so here.

III. ARGUMENT

A. Express and Direct Conflict

This Court has discretionary jurisdiction to review a DCA decision that expressly and directly conflicts with a decision of another DCA or of this Court on the same question of law. Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court has made clear that conflict jurisdiction exists where decisions are "irreconcilable." *Aravena v. Miami-Dade Cnty*., 928 So. 2d 1163, 1166-67 (Fla. 2006).

Petitioners have not shown, and cannot show, that this case is irreconcilable with *Domville*. There, the Fourth District considered "a criminal defendant's effort to disqualify a judge whom the defendant alleges is a Facebook friend **of the prosecutor assigned to his case**." 103 So. 3d at 185 (emph. added). The court quashed the order denying disqualification "[b]ecause [the criminal defendant] has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Id.* at 186.

The facts of *Domville* are readily distinguishable from those at issue here. Petitioners are not like the non-lawyer, criminal defendant in *Domville* and Mr. Reyes is not a prosecutor—he does not even represent a party. Further, Petitioners

are sophisticated litigators who have practiced in Miami-Dade County for many years. It is highly questionable whether any reasonably prudent person in Petitioners' situation would have a well-founded fear of not receiving a fair and impartial trial simply because the trial judge and Reyes are Facebook "friends." Given these factual distinctions, any conflict is "not panoptic." *N. Miami Med. Ctr. Ltd. v. Miller*, 896 So. 2d 886, 889 (Fla. 3d DCA 2005).

Further, in arguing that the Third District's "specific[ ] acknowledge[ment]" of conflict with *Domville* demonstrates that this Court has jurisdiction (Pet. Br. at 4), Petitioners misapprehend the nature and limitations of conflict jurisdiction. The Third District never stated that its decision "expressly and directly" conflicts with *Domville*, and the Court *denied* Petitioners' post-opinion motion to certify conflict. Thus, although Petitioners lament that the Third District "should have certified the conflict," *id.* at 7, the Court did not do so—and with good reason—since the cases are factually distinguishable.

Petitioners' reliance on *State v. Vickery*, 961 So. 2d 309 (Fla. 2005), is misplaced. Petitioners suggest the Third District should have used the word "certify" rather than "acknowledg[ing]" conflict when the court "actually intend[s] . . . to invoke 'certified conflict jurisdiction" (Pet. Br. at 7), but it is indisputable that the Court did *not* intend to certify conflict. Had it so intended, the Court could and would have granted Petitioners' motion for certification.

B. Decision Affecting Class of State or Constitutional Officers

Petitioners next argue that this Court should exercise jurisdiction on the basis that the Third District's decision affects a class of constitutional officers—that is, Article V circuit judges. To establish jurisdiction under this ground, Petitioners must show that the decision (a) involves a class;[2] (b) of constitutional or state officers; and (c) directly and expressly affects the class of officers. *See* Art. V, § 3(b)(3), Fla. Const.

USAA acknowledges that the first two prongs are met. But whether Petitioners have satisfied the third prong is questionable. Indeed, if the Court were to exercise jurisdiction here, it arguably would encourage litigants to seek Supreme Court review of large numbers of decisions involving judicial disqualification.

In *Spradley v. State*, 293 So. 2d 697 (Fla. 1974), this Court addressed a similarly overbroad interpretation of this category of discretionary jurisdiction. *Spradley* involved a prosecutor's alleged failure to comply with a discovery rule set forth in the Rules of Criminal Procedure. The Court noted that while "the decision below was determinative only of the cause reviewed by the appellate court," "the ultimate effect of it affects all prosecuting attorneys and trial judges in

[2] The term "class" means "two or more constitutional or state officers who separately and independently exercise identical powers of government." *Fla. State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963). Although *Lewis* interpreted a prior version of the constitutional provision, the changes in Article V, section 3(b)(3) do not affect that definition of "class."

the trial of criminal cases." *Id.* at 701. Nevertheless, the Court declined to exercise jurisdiction, explaining:

> A **decision which 'affects a class of constitutional or state officers' must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state**. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. **To vest this Court with certiorari jurisdiction,[3] a decision must Directly and, in some way, Exclusively affect the duties, powers . . . . or regulation of a particular class of constitutional or state officers.** This may be a decision in a case in which the class, or some of its members, is directly involved as a party. It may also be in a case in which no member of the class is a party **if the decision generally affects the entire class in some way unrelated to the specific facts of that case**.
>
> In the instant case, no member of any class of constitutional or state officers was a party, and **any decision as to possible non-compliance with discovery rules by the state attorney did not affect any class of constitutional or state officers in any general way unrelated to the specific facts of this case**. The decision affected only the rights of the parties directly involved and the body of our State law as it applies to each and every citizen alike.

Id. at 701-02 (emph. added).

In so holding, the court receded from *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), where the court concluded that a decision holding that a prosecutor's

[3] *Spradley* was decided in 1974—prior to the 1980 amendment to Article V of the Florida Constitution that abolished the referenced form of certiorari jurisdiction. Nevertheless, *Spradley* is instructive because the pre-1980 version of Article V, like the current version, provided for jurisdiction to review decisions affecting a class of state or constitutional officers.

non-compliance with discovery rules did not support reversal "affect[ed] two classes of constitutional or state officers, viz, prosecuting officers and trial courts in the exercise of their respective powers and duties in the prosecution and trial of criminal cases." *Spradley*, 293 So. 2d at 700-01. The *Spradley* court described the flaw in the *Richardson* court's rationale as follows:

> This **jurisdictional holding of *Richardson*, . . . if literally followed, would mean that this Court had jurisdiction to review nearly all cases, both civil and criminal, because nearly all decisions which review the actions or rulings of trial judges impose upon other trial judges a requirement to follow the law as stated therein in similar situations**. Likewise, any decision concerning the propriety of the actions of a prosecuting attorney imposes upon all prosecuting attorneys the duty to henceforth follow the law as therein decided. We are of the opinion that our jurisdictional holding in *Richardson* was, therefore, much too broad and inconsistent with the often-stated philosophy behind the formation of our District Courts of Appeal-that these courts are to be courts of final appellate jurisdiction except in a limited number of specific situations enumerated in the Constitution. We therefore recede from our jurisdictional holding in *Richardson*.

Id. (emph. added). Here, the decision does no more than simply construe the case law which comprises much of the substantive and procedural law of this state concerning circumstances under which a litigant may properly seek disqualification of a trial judge.

Spradley also addressed an alternative argument that the decision affected a class of constitutional officers (prosecutors) because it affirmed denial of a motion that argued dismissal was required because the indictment was not signed by a

properly appointed prosecutor, as required under the Rules of Criminal Procedure. *Id.* at 702. The prosecutor who signed the indictment in *Spradley* was not "properly appointed" because he had failed to record, as required by statute, his oath of office. In concluding that this decision did not affect all prosecutors, the *Spradley* court stated:

> A decision on that issue affects only the substantive and procedural law regarding the sufficiency of indictments in general, the rights of petitioner, and the authority of one particular assistant state attorney in relation to the specific facts of this case. At most, any decision on this issue could be said to affect only a sub-class of a class of constitutional or state officers, specifically, those assistant state attorneys who have failed to record their oaths of office.

Id.

Here, Petitioners' argument is analogous to those this Court rejected in *Spradley*. In essence, Petitioners contend that a decision sanctioning the trial judge's alleged failure to comply with a JEAC opinion (like the decision condoning the prosecutor's failure to comply with the Rules of Criminal Procedure in *Spradley*) provides a basis for discretionary review. As *Spradley* teaches, this interpretation of "constitutional officer" discretionary jurisdiction is too broad. And, as in *Spradley*, the instant decision only affects a sub-class of constitutional officers—judges who are Facebook friends with attorneys that appear before them. For these reasons, Petitioners' approach is untenable and should be rejected.

Notably, Petitioners cite no cases to support their position that this Court

should exercise discretionary jurisdiction on this basis. Instead, Petitioners rely on case law explaining this Court's responsibility to determine whether the trial judge violated the Code of Judicial Conduct in this case. Pet. Br. at 9-10. But in so arguing, Petitioners conflate this Court's exclusive jurisdiction over judicial qualifications and discipline under Article V, section 12(c) of the Florida Constitution with this Court's discretionary jurisdiction to review decisions affecting constitutional officers under Article V, section 3(b)(3). Of course, these are two completely different bases for jurisdiction, and there is no JQC action pending that would implicate section 12(c) jurisdiction anyway.

Even if Petitioners had established that the decision affects a class of constitutional officers, it does not follow that this Court must exercise jurisdiction. Indeed, "even when discretion is not limited by the law, the Court still can refuse to hear any case falling within a discretionary category" and "[t]ypically this occurs because the Court does not believe the case presents an important enough issue or the result was essentially just." Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151 (1994) (citing Fla. Const. art. V, § 3(b)(3)-(6)).

Here, the exercise of discretion would be precipitous, and USAA respectfully submits that the issue of whether a judge violates Canon 2B of the Code of Judicial Conduct by being Facebook "friends" with an attorney who

appears before him or her is better addressed through JEAC Opinion or by amendment to the commentary to the Code itself.

CONCLUSION

The Third District's decision in this case is not irreconcilable with the Fourth District's decision in *Domville*. Additionally, the decision does not expressly affect a class of state or constitutional officers. Therefore, the Court should decline to exercise jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that undersigned counsel has complied with the font requirement of Florida Rule of Appellate Procedure 9.210 (a)(2) because this brief is set in Times New Roman 14-point font.

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