IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67,482

PALM BEACH NEWSPAPERS, INC.,
SCRIPPS-HOWARD BROADCASTING COMPANY,
THE MIAMI HERALD PUBLISHING COMPANY,
and THE NEWS & SUN SENTINEL COMPANY

Petitioners,

vs.

STATE OF FLORIDA,

Respondent

On Petition for Discretionary Review of
a Decision of the District Court
of Appeal of Florida, Fourth District

Reply Brief of
Palm Beach Newspapers, Inc.,
Scripps-Howard Broadcasting Company, and
The News & Sun Sentinel Company

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INTRODUCTION

This brief is filed on behalf of Palm Beach Newspapers, Inc., Scripps-Howard Broadcasting Co., and the News & Sun-Sentinel Co. It replies to the state's answer brief.

SUMMARY OF ARGUMENT

Point I. The state offers no explanation for its view that the Court should disregard the framework of First Amendment analysis which the United States Supreme Court has established.

Point II. Certiorari should not have been granted because the state has not demonstrated any departure from the essential requirements of law or any harm which resulted from the order below. In addition, district courts of appeal have no jurisdiction to grant the state a writ of common law certiorari in a criminal case.

ARGUMENT

I.

The State Offers No Reason that this Court Should Disregard First Amendment Analysis

The state argues that the United States Supreme Court decisions relied upon by the petitioners, Waller v. Georgia, ___ U.S. ___, 104 S.Ct. 2210 (1984); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe-Newspaper Co. v. Superior Court, 457 U.S. (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), are inapplicable here because they did not involve the issue of deposition access. All the cases examined access to criminal trials or to pretrial hearings.

This point of distinction provides no basis to disregard the principles established in the decisions. These cases develop a carefully crafted framework through which all media access problems may be resolved. Whenever state action is invoked to bar press or public access to information, a number of issues must be address. First, whether the information is important to members of a self-governing society. If this first issue is resolved affirmatively, then access to that information is protected by the First Amendment. The next issue then is whether there are compelling interests which warrant a restriction on access to that information. If this second issue is resolved negatively, then the restriction on access is unconstitutional.

Only by ignoring this framework entirely, does the state reach its conclusion that the Fourth District's decision below is constitutional.

II.

The Fourth District Erred in Granting a Writ of Certiorari

Apart from First Amendment considerations, petitioners offer two replies to the state's contention that certiorari was the correct remedy under the circumstances. First, the state's answer brief fails to make the requisite showing to warrant the relief granted. Second, a number of recent decisions from this Court make it clear that the Fourth District lacked jurisdiction to review an order allowing the press to attend depositions in a criminal case. Each point is discussed separately below.

A. The State Provides the Court With No Explanation of the Prejudice it Would Suffer

Even assuming that the state is entitled to seek certiorari review under some extraordinary circumstances, that type of review should not have been granted here because, as is evident from the state's own brief, the state failed to show either that the order was a departure from the essential requirements of law or that it was hurt by the trial court's order.

1. No Showing of Departure from the Essential Requirements of Law

In Jones v. State, 477 So.2d 566, 569 (Fla. 1985), Chief Justice Boyd filed a special concurrence which discussed at length the precise showing which a party is required to make to entitle it to certiorari review.[1] "On a petition for common-law writ of certiorari," Chief Justice Boyd wrote, "the legal correctness of the judgment of which review is sought is immaterial. The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross

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1. 477 So.2d at 569 (Boyd, J., concurring). See also State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982)(holding that the state is entitled to certiorari review of an interlocutory order in a criminal case only if it shows the order "has the effect of substantially impairing the ability of the state to prosecute its case.").

miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error."[2]

No such "essential illegality" occurred in this case. The Third District Court of Appeal recently reviewed a deposition access problem in Estrada v. Snyder, ___ So.2d ___, Third District Case No. 86-767 (April 11, 1986), pet. for rev. pending, Sup. Ct. Case No. 68,625. There the Court denied a petition for writ of certiorari by a criminal defendant[3] seeking review of a trial court order which refused to exclude a journalist from depositions in a criminal prosecution of police officers for murder, trafficking in cocaine, and other felonies. The Estrada case also certified to the Florida Supreme Court this issue: "May either or both parties in a criminal case exclude members of the public, including the press, from attendance at pre-trial depositions?"

Although the Estrada opinion has not yet been issued, the result in the case makes clear that a trial judge has the discretion under the rules of procedure to determine whether

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2. He interpreted the majority's decision in Jones as not wholly precluding certiorari review even where there is no right to appeal. The Jones decision, he argued, should be read as holding only that "certiorari is not properly issued as an alternative means of granting appellate review when an appeal is not provided by general law." 477 So.2d at 567 (Boyd, C.J., concurring). As noted in point II.B. infra, however, Chief Justice Boyd apparently has abandoned his hope of restricting the holding of Jones and the other decisions dealing with this issue and he now has joined in the holding that the state can never seek a writ of common law certiorari in a criminal case.

3. Because the petitioner in Estrada was the defendant rather than the state, the jurisdictional problems discussed in point II.B., infra, were not present in that case.

media access to depositions is appropriate under the particular facts and circumstances of the case.[4]

The trial court in this case conducted hearings to evaluate the arguments and consider the evidentiary showings which all parties wished to make concerning the appropriateness of media access. He considered all of the facts and circumstances and decided that media access was appropriate. Thus, even if his decision to allow access to the depositions in this case were considered wrong, as a matter of law, certiorari should not have been granted because the state cannot show the order amounted to an act of judicial tyranny. Rather, it was an order which weighed all competing considerations and reached a result which attempted to accommodate all as best as possible.

2. No Showing of Injury.

The Fourth District's opinion below allowed the power of the judiciary to be invoked by a litigant merely because of

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4. Petitioners' maintain the argument advanced in their initial brief that the trial court's exercise of this discretion is bounded by First Amendment considerations. It may not constitutionally exclude the media absent compelling interests which justify exclusion and may order exclusion only through an order which is narrowly tailored to serve those interests. A compelling interest is present only where media presence will cause a serious and imminent threat to the administration of justice, there are no less restrictive alternatives to exclusion, and exclusion will be effective to avoid the harm. The Court need not in this case decide the precise standard which a party in a criminal case must meet to justify exclusion because, as discussed in the argument, the state must show "essential illegality" rather than mere legal error. Thus, even if the trial judge weighed the competing interests under an incorrect standard, it cannot be said on this record that the Court's order was "an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice."

its concern that in future cases it would be unable to exclude the press from depositions. No attempt was made to show prejudice in the instant case and therefore the Court should not have granted the writ of certiorari. The state represents in its answer brief that the "judicially authorized interference of the media with the discovery process in the prosecution of State of Florida v. John Freund and John Trent meets any legal test for appellate review." But the state strangely neglects to say why or how. No reference is made in the state's brief to the record below nor is there even any suggestion that media access to the depositions caused any problems for the prosecution whatsoever. The state has not contested that voir dire proceeded without incident and that no juror was excused because of prejudice from pretrial publicity.

Judges trying cases which perhaps can be categorized as the most publicized of our times have concluded that pretrial publicity is rarely so pervasive that it makes selection of a jury who is not familiar with it difficult. For example, the D.C. Circuit observed in United States v. Mitchell, 551 F.2d 1252, 1262 at n.46 (D.C. Cir. 1976), rev'd on other grounds sub nom Nixon v. Warner Communications, 435 U.S. 589 (1978), that "without undue effort, it would be possible to empanel a jury whose members had never even heard the [Watergate] tapes." Of the twelve jurors selected in United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976)(en banc), only ten "claimed to have followed Watergate casually, if at all." The Haldeman court concluded: "This may come as a surprise to lawyers and judges,

but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." See also CBS Inc. v. United States District Court, 729 F.2d 1174 (9th Cir. 1984)(finding pretrial gag order unconstitutional despite extensive pretrial publicity); People v. Manson, 61 Cal. App. 3d 102, 189 (1976 Los Angeles), cert. denied, 430 U.S. 986 (1977)(observing that a metropolitan setting tends to blunt the effect of publicity).

And even when jurors are aware of pretrial publicity, trial problems do not necessarily result. The trial judge in the instant case, examining the deposition access question in an earlier case, wrote: "Jurors are not expected to be utterly ignorant or unfamiliar with news reports of crimes in their community. Florida judges in small towns such as Chattahoochee and Monticello frequently are faced with trials of defendants with whom literally everyone in town is familiar. Through appropriate trial management techniques, judges in these communities are able to guarantee defendants their right to a fair trial. Since fair trials are routinely held under these conditions, there is no reason to conclude that a fair trial cannot be held in a large metropolitan area such as West Palm Beach merely because the newspapers report facts learned about the case in pretrial depositions. Our system of justice works, and works well, in both our large and our many smaller rural communities." State v. Sanchez, 7 Media L. Rep. (BNA) 2338, 2339 (Fla. 15th Cir. 1981)(Mounts, J.).

B. The Fourth District had no Jurisdiction to Review the Trial Court's Order

The Fourth District Court of Appeal should have dismissed this case because the state is never entitled to a writ of certiorari in a criminal case and the state had no authority to appeal the order at issue.[5]

1. The State is Never Entitled to a Writ of Common Law Certiorari in a Criminal Case

Analyzing a string of decisions from this Court dealing with the state's lack of a right to seek a writ of certiorari,[6]

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5. Notwithstanding that this argument -- based on three decisions from this Court rendered subsequent to the filing of the petitioners' initial brief -- is raised for the first time here, the petitioner respectfully asks the Court to consider this point inasmuch as the Fourth District's error was fundamental, going to the jurisdiction of the appellate court to review the trial court's decision at all. The issue of whether a court had jurisdiction to render a particular order may be raised at any time, including on appeal even where it was not raised below. See, e.g., Casey v. Smith, 134 So.2d 846 (Fla. 2d DCA 1961). Because the state has not had an opportunity to address this argument and because it must be considered by the Court, the petitioners would have no objection to the state filing a supplemental brief.

6. Jones v. State, ___ So.2d ___, 11 Fla. L. W. 215 (May 15, 1986)(referred to below as Jones II); State v. Palmore, ___ So.2d ___, 11 Fla. L. W. 194 (May 1, 1986); R.L.B. v. State, ___ So.2d ___, 11 Fla. L. W. 174 (April 17, 1986); Jones v. State, 477 So.2d 566 (1985)(referred to below as Jones I); State v. G.P., 476 So.2d 1272 (Fla. 1985); State v. C.C., 476 So.2d 144 (Fla. 1985). See also, D.A.E. v. State, 478 So.2d 815 (Fla. 1985)(directing dismissal of appeal and not remanding for consideration of whether appeal should be treated as petition for writ of certiorari). In addition, two district court of

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Chief Justice Boyd recently observed: "It appears that this Court in recent decisions has singled out the state as a litigant by holding that certiorari is never available to the state in criminal or delinquency cases even though defendants in those cases and litigants in civil cases may still resort to it in accordance with the common-law principles."[7] The majority in that case decided that the state had no right to seek certiorari review of a final judgment which it had no right to appeal. Just two weeks earlier, a unanimous Court had observed that "the general rule [is] that an appellate court cannot afford review to the state by way of certiorari when the state has no statutory or other cognizable right to appeal the judgment sought to be reviewed."[8]

The rule was first recognized in State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983), an appeal in a delinquency proceeding in which the Third District held "in our view,

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appeal decisions, State v. Thayer, ___ So.2d ___ (Fla. 4th DCA May 7, 1986), and State v. Wilson, 483 So.2d 23 (Fla. 2d DCA 1985), differed regarding the appropriate interpretation of Jones I, G.P., and C.C. and recently certified to this Court the issue of whether the state is precluded from seeking common law certiorari review of nonappealable interlocutory orders in criminal cases. The recent Jones II, Palmore, and R.L.B. decisions, all filed after the petitioners submitted their initial brief, plainly answer the certified question in the affirmative.

7. Jones II, supra at ___, 11 Fla. L. W. at (May 15, 1986)(Boyd, J., concurring in part and dissenting in part)(emphasis added).

8. State v. Palmore, ___ So.2d. ___, ___, 11 Fla. L. W. 194, 195 (May 1, 1986).

Article V, section 4(b)(1) of the Constitution of the State of Florida permits interlocutory review only in cases in which appeal may be taken as a matter of right."[9] This Court approved of the Third District's C.C. decision, holding that "article V, section 4(b)(1) of the state constitution permits interlocutory review only in cases in which an appeal may be taken as a matter of right."[10] These decisions establish a rule that precludes the state from seeking writs of certiorari to review either final or nonfinal orders in criminal cases, as was done in the instant case.

This restriction on the use of certiorari is consistent with the general proposition that the state is not entitled to seek review of any order unless it is expressly given that power by the sovereign.[11] This common law doctrine prevents the

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9. This statement appears to be a departure from the view expressed by the Third District earlier in State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982), that certiorari may be granted to review a pretrial order excluding evidence which has the effect of substantially impairing the ability of the state to prosecute its case. (Steinbrecher is the case upon which the petitioner rested its argument in its initial brief at page 22 that the state had not made a sufficient showing to entitle it to certiorari relief). G.P. therefore should be treated as overruling Steinbrecher.

10. State v. C.C., 476 So.2d 144, 146.

11. See State v. Smith, 260 So.2d 489 (Fla. 1972); Whidden v. State, 159 Fla. 691, 32 So.2d 577, 578 (1947); State v. Brown, 330 So.2d 535, 536 (Fla. 1st DCA 1976). The general common law rule was that the state was not entitled to a writ of error -- now referred to as a right of appeal -- in criminal cases. See State v. Burns, 18 Fla. 185 (1881). Such a restriction was deemed essential to prohibit the state from invoking its prosecutorial powers merely to harass a citizen.

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state from using its prosecutorial powers to harass a defendant. The state generally is given one opportunity at trial to prevail and is authorized by statute or court rule to take appeals in only certain extraordinary circumstances where public policy mandates such review and the rights of the accused will not be infringed. As discussed below, appellate review of orders which

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Over time the legislature has developed "strictly limited and carefully crafted exceptions designed to provide appellate review to the state in criminal cases where such is needed as a matter of policy and where it does not offend against constitutional principles." State v. Creighton, 469 So.2d 735, 740 (Fla. 1985). This Court, in Florida Rule of Appellate Procedure 9.140(c)(1), has developed a similarly restricted list of orders which may be reviewed on an interlocutory basis notwithstanding the common law ban on the state's right to appeal. The lack of a common law right of appeal is what distinguishes the state from other litigants which at common law had a right of plenary appeal. Hence, while the state must have a specific Supreme Court rule authorizing an interlocutory appeal before it may even seek such relief, other litigants may by certiorari seek review without specific rule authorization.

If this were a civil case, the state would be entitled to seek certiorari review. However, the state's sole interest in the instant prosecution was in obtaining a conviction. The reason which the state sought to exclude the media from the depositions was that it believed that media presence might hinder the prosecution. Furthermore, the defendants opposed exclusion of the media. Therefore, the policy basis for restricting the state's right to appeal -- except where expressly authorized by statute or rule -- is fully applicable here. The state should not have been permitted to burden the defendants by twice attempting to obtain the same relief in a criminal prosecution. If the state is permitted to seek such relief notwithstanding the lack of an authorizing rule, defendants in many future cases can anticipated being faced with such appeals because it has become the rule in Florida and across the nation that all judicial proceedings are open. Under the Fourth District's interpretation of the certiorari rule, the State would be entitled at least to ask an appellate court to examine every trial court order allowing these open proceedings.

merely allow journalists to attend pretrial depositions has never been authorized for the state.

2. The State has No Right to Appeal an Order Allowing Journalists to Attend a Pretrial Deposition

Because the state may never obtain a writ of certiorari in a criminal case, it could defend the Fourth District's decision reversing the trial court's order only if it could show that it had a right to appeal that interlocutory order. Of course, the state never asserted in this case -- either here or in the district court of appeal -- that it had any statutory, rule, or other cognizable right to appeal the order which it brought before the Fourth District. No doubt this is true because the state simply lacks any authority to take such an interlocutory appeal.

Article V, section 4(b)(1) of the Florida Constitution, provides in pertinent part that the district courts of appeal "may review interlocutory orders . . . to the extent provided by rules adopted by the supreme court." The language has been interpreted as giving this Court exclusive jurisdiction to determine which interlocutory orders the state may appeal in criminal proceedings.[12]

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12. State v. Smith, 260 So.2d 489 (Fla. 1972)(holding unconstitutional a statute which attempted to grant the state the right to appeal certain interlocutory orders which the Supreme Court had not authorized as appealable by rule). See also State v. C.C., 476 So.2d 144, 147 n.3 (Fla. 1985); In the Interest of R.J.B., 408 So.2d 1048, 1050 (Fla. 1982). The R.J.B. decision

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Florida Rule of Appellate Procedure 9.140(c)(1) lists all appeals which the Court has authorized the state to take in a criminal case.[13] The list plainly does not include an order,

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reaffirmed Smith, holding that "Even if the legislature had intended to create a right of interlocutory appeal from [certain] orders, such enactment would be void because the Florida Constitution does not authorize the legislature to provide for interlocutory review." Id.

13. The rule provides:

> Appeals Permitted. The State may appeal an order:
>
> (A) Dismissing an indictment or information or any count thereof;
>
> (B) Suppressing before trial confessions, admissions or evidence obtained by search and seizure;
>
> (C) Granting a new trial;
>
> (D) Arresting judgment;
>
> (E) Discharging a defendant pursuant to FLA.R.Crim.P. 3.191;
>
> (F) Discharging a prisoner on habeas corpus;
>
> (G) Adjudicating a defendant incompetent or insane;
>
> (H) Ruling on a question of law when a convicted defendant appeals his judgment of conviction; and may appeal
>
> (I) An illegal sentence;
>
> (J) A sentence imposed outside the range recommended by the guidelines authorized by Section 921.001, Florida Statutes (1983) and Florida Rule of Criminal Procedure 3.710.

such as the order at issue, which merely allowed journalists to attend the taking of discovery depositions.[14]

Furthermore, there is no public policy which would justify allowing the state to seek review of a failed attempt to conceal a prosecution from the press or public. To authorize such review would give the state an avenue to protract and increase the expense of virtually every prosecution. If the state fails to persuade the trial judge that these circumstances exist, the issue should be and now is foreclosed from further review, by certiorari or otherwise.

CONCLUSION

The Court should quash the decision of the Fourth District Court of Appeal and direct it to enter an order dismissing the state's petition.

Respectfully submitted,

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14. Florida Rule of Appellate Procedure 9.100(d) allows review of "an order excluding the press or public from access to any proceeding." (Emphasis added). The rule does not allow review of orders which do not exclude the public or press from proceedings.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this reply brief was mailed May 28, 1986, to:

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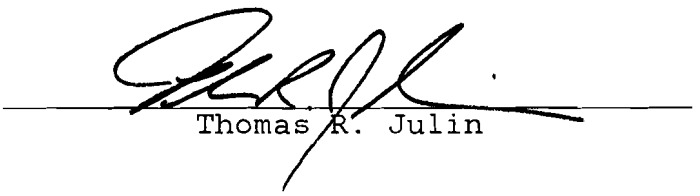

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