IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA Petitioner, vs. GEORGE WILLIAM THAYER Respondent.	)	CASE NO. 68,842

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the pretrial proceedings held in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida.

Respondent, GEORGE WILLIAM THAYER, was the defendant in the pretrial proceedings held in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida.

Petitioner and respondent were designated as such in petitioner's proceeding for common law certiorari before the Fourth District Court of Appeal.

In this brief, GEORGE WILLIAM THAYER and the State of Florida will be referred to as respondent and petitioner, respectively.

The following symbols will be used:

"PA" Petitioner's Appendix, filed with petitioner's initial brief on the merits.

"PA-A; PA-B; PA-C; etc." Successive exhibits in petitioner's initial appendix.

"RA" Respondent's Appendix

STATEMENT OF THE CASE

Petitioner's statement of the case is adopted with the following additions. On June 24, 1985, petitioner filed his Notice of Intent to Offer Evidence of Other Criminal Offenses pursuant to Sec. 90.404(2)(a)(b), also known as the "Williams" rule. (RA-A)

On July 30, 1985, respondent filed his Notice of Intent to Rely Upon the Defense of Insanity and Statement of Particulars. (RA-B) In that Statement of Particulars, respondent alleged that he was not able to distinguish the difference between right and wrong at the time of the alleged offenses, as a result of respondent's experiences as a combat soldier in Southeast Asia, and his consequent affliction with "Vietnam post traumatic stress disorder or some atypical anxiety disorder associated with stress occurring or accumulating with the defendant as a result of his experiences in Southeast Asia". (RA-B) Subsequent to respondent filing the above-described notice, the trial court proceeded to appoint four mental health professionals to examine respondent in order to determine his mental state at the time of the alleged offenses. (RA-C,D,E)

At least two of the four mental health professionals appointed to examine the respondent subsequently concluded that respondent did suffer from post traumatic stress disorder to the extent that he did not or could not differentiate between right and wrong at the time of the alleged offenses. (RA-F,G)

STATEMENT OF FACTS

This appeal arises as a result of petitioner seeking review by certiorari of a trial court order granting respondent's motion to submit a written questionnaire to prospective venireman. Petitioner was denied certiorari review by the Fourth District Court of Appeal in State v. Thayer, 11 FLW 1083 (Fla. App. 4th Dist. May 7, 1986).

Respondent filed his motion for jury list and to submit questionnaire before the trial court on November 7, 1985. (PA-A) In that motion, respondent alleged "that it is in the best interest(s) of the state and defense to submit questionnaires...[and that] because of the complexity and length of this trial it would be in the interest of fairness and judicial economy to allow all parties to submit questionnaires to the prospective jurors" (PA-A).

On November 8, 1985, a plenary hearing was held on respondent's motion to submit jury questionaire before the Right Honorable Rupert Jasen Smith, Circuit Judge. (PA-B) At that hearing, respondent asserted that because of the complexity of issues involved in the case, including the defense of insanity, that submission of a jury questionnaire would help expedite the jury selection process which respondent contended would be "lengthy" in any event. (PA-B,4) Respondent also asserted that the trial court had discretion to permit sending a questionnaire to prospective jurors. (PA-B,4-5)

Petitioner responded by alternately contending that sending such a questionnaire was not within the trial court's authority, was an unconstitutional invasion of juror's privacy, and that sending such a questionnaire would not result in any saving of time. (PA-B,5,10)

The trial court ruled that sending a questionnaire was within his authority, but that each of the questions should be individually evaluated and screened by the Court in order to establish the propriety of each question. (PA-B,12) Before the trial judge could begin evaluating each of the questions contained in the questionnaire, petitioner advised the court, "I'm going up to the Fourth on this..." (PA-B,13)

The trial court then proceeded to carefully review each and every question proposed by respondent. (PA-B,13,14, 15,16) Of the fifty-two questions originally tendered by respondent, the court accepted nineteen questions as proffered, permitted thirteen more after modification, and completely rejected twenty questions. (PA-B,13,14,15,16) The trial court in effect modified or deleted sixty-three percent of the questions originally proffered by the respondent.

After the trial court had substantially revised the proffered questionnaire, respondent offered petitioner the opportunity to review the revised document. Petitioner responded, "I don't have to review it, I object to every line

of it". (PA-B,20) The trial court responded,

> ... your position is made known to the court, Mr. Walsh, but that's why we have judges. The judge has to make the decision between the two adversaries. ...we're still a common law state and sometimes I feel that if a court or a judge is so weak-kneed as not to announce what the common law of Florida is, he probably shouldn't be sitting on the bench. And I believe firmly in the common law of Florida and if we don't have a direct instruction to this court not to do something innovative, I'll declare it to be the common law of Florida.

(PA-B,20)

When the court requested petitioner to draft an order reflecting the trial court's ruling, petitioner replied "your Honor, with all due respect, this is their motion. I don't intend to prepare an order, I'm going to be spending time making a motion before the Fourth District Court".

Respondent subsequently drafted the order in question, and it was signed by the trial court on November 8, 1985. (PA-C)

SUMMARY OF ARGUMENT

The authority of the District Courts of Appeal to review interlocutory orders is delineated in Article V, Sec. 4(b)(1) of the Florida Constitution. There are two requirements for such review: 1) The order under consideration must be the kind of order that could be appealed as a matter of right, and, 2) the appeal will only lie to the extent that procedural rules, adopted by the Supreme Court, provide for such review. The order under consideration sub judice meets neither of the two prerequisites enumerated in Article V, Sec. 4(b)(1) of the Florida Constitution.

Petitioner here attempts to utilize the extraordinary writ of certiorari to procure review of this interlocutory order despite the fact that the constitutionally mandated jurisdictional prerequisites for review have not otherwise been met. When the jurisdictional requirements for District Court review have not been met, certiorari may not be utilized to circumvent the requirements necessary to establish such jurisdiction.

Assuming arguendo that the District Court of Appeal has jurisdiction to entertain a petition for writ of certiorari when the requirements of Article V, Sec. 4(b)(1) have not been met, petitioner fails to establish that the trial court's order granting respondent's motion to submit jury questionnaire meets the requirements for issuing such a writ. The trial court's order was a sound and proper exercise of judicial discretion.

ARGUMENT

I. THE STATE MAY NOT SEEK CERTIORARI REVIEW OF INTERLOCUTORY ORDERS IN CRIMINAL CASES WHEN THERE EXISTS NO STATUTORY OR OTHER COGNIZABLE RIGHT TO REVIEW SUCH ORDERS.

A. THE RIGHT TO INTERLOCUTORY REVIEW IS DEPENDANT UPON THE RIGHT TO APPEAL FINAL ORDERS AND UPON AUTHORIZATION CONFERRED BY SURPREME COURT RULE.

Article V, Sec. 4(b)(1) of the Florida Constitution provides:

> District Courts of Appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the Supreme Court or a Circuit Court. **They may review interlocutory orders in such cases to the extent provided by rules adopted by the Supreme Court.** (emphasis added)

Under this provision, there are two prerequisites that must be fulfilled in order for the District Court to entertain an interlocutory appeal. First, the "such cases" requirement mandates that before jurisdiction to hear an interlocutory appeal will vest in the District Court, the order must be in the class of cases enumerated in the preceeding paragraph, i.e., the kind of case in which a final order could be appealed "as a matter of right". Second, the "provided by rules" requirement dictates that any interlocutory appeal must be authorized by Supreme Court Rule. Those two requisites are not mutually exclusive; they operate in tandem. A statute authorizing an appeal as a matter of right in this context will be invalid

unless a Supreme Court Rule "breathes life" into the legislative pronouncement. State v. Smith, 260 So.2d 489 (Fla. 1972).

In the context of interlocutory review, this symbiotic relationship between Supreme Court Rule and legislative enactment is best illustrated by the interaction between Fla. R. App. P. 9.140(c)(1) and Fla. Stat. 924.07. Fla. Stat. 924.07 provides for appellate review as a matter of right from:

> (1) An order dismissing an indictment or information or any count thereof;
> (2) An order granting a new trial;
> (3) An order arresting judgment;
> (4) A ruling on a question of law when the defendant is convicted and appeals from the judgment;
> (5) The sentence, on the ground that it is illegal;
> (6) A judgment discharging a prisoner on habeas corpus;
> (7) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure;
> (8) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case; or
> (9) A sentence imposed outside the range recommended by the guidelines authorized by Section 921.001.

Fla. R. App. P. 9.140(c)(1) permits the State in criminal cases to 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.

A comparative analysis of the above rule and statute reveals substantial correspondence among their respective elements.[1] And unless the statutorily created right of appeal has a corresponding enabling rule promulgated by the Florida Supreme Court, that statute will fail.[2] That rule was further crystallized in R.J.B. v. State, 408 So.2d 1048 (Fla. 1982), where this Court held that the Fifth District Court was without jurisdiction to consider an interlocutory appeal from a Juvenile Court's order waiving juvenile jurisdiction. The "provided by rules" precondition for interlocutory review found in Article V, Sec. 4(b)(1) once again was found dispositive in determining whether jurisdiction vested with the District Court of Appeal. This Court further opined:

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[1]Subsection B of Fla. R. App. P. 9.140 is embodied in and substantially tracked by the provision of Fla. Stat. 924.071.

[2]Sec. 924.07(8), providing for review of "all other pretrial orders", is the only subsection that has no parallel provision in Fla. R. App. P. 9.140(c)(1). Because there is no such enabling provision, this Court declared subsection 8 void "until and unless the Supreme Court of Florida adopts such statute as its own". State v. Smith, supra., at 491; see: R.J.B. v. State, 408 So.2d 1048 (Fla. 1982)

> Even if the legislature had intended to create a right of interlocutory appeal from waiver orders, such enactment would have been void because the Florida Constitution does not authorize the legislature to provide for interlocutory review...this Court is vested by the Constitution with the sole authority of deciding when appeals may be taken from interlocutory orders. Article V, Sec. 4(b)(1) expressly provides that District Courts of Appeal "may review interlocutory orders in such cases to the extent provided by rules adopted by the Supreme Court". This Court has not adopted any appellate rule which permits the type of interlocutory appeal sought by petitioners.

R.J.B. v. State, supra., at 1050.

And so it is with petitioner's claim here. Petitioner is unable to meet either of the requirements set forth in Article V, Sec. 4(b)(1). There is no statutory basis for appealing as a matter of right the trial court's pretrial order granting respondent's Motion to Submit Jury Questionaire. And even if there **was** such statutory authority, it would clearly fail absent a Supreme Court Rule "breathing life" into it.

B. THE STATE MAY NOT UTILIZE THE EXTRAORDINARY WRIT OF CERTIORARI TO PROCURE REVIEW OF INTERLOCUTORY ORDERS WHEN THE JURISDICTIONAL PREREQUISITES FOR REVIEW HAVE NOT OTHERWISE BEEN MET.

When a Court is subject to jurisdictional limitations to the consideration of an appeal from a final judgment, certiorari may not be utilized to circumvent that limitation. State v. G.P., 429 So.2d 786 (Fla. App. 3rd Dist. 1983); State v. Brown, 330 So.2d 535 (Fla. App. 1st Dist. 1976). Although

the Third District Court of Appeal did not confront the issue of interlocutory appeals in State v. G.P., supra., this Court in affirming the District Court's opinion announced that the State's direct appeal and certiorari rights to review are co-extensive; if there is no statutory appeal as a matter of right, there is "no greater right by certiorari". State v. G.P., 476 So.2d 1272, 1273 (Fla. 1985).

In State v. C.C., 476 So.2d 144 (Fla. 1985), this Court reviewed the Third District Court's order refusing to hear state appeals from three trial court orders dismissing charges against juveniles and one order granting a juvenile defendant's Motion to Suppress. Approving the District Court's decision, this Court agreed with the lower tribunal that:

> Article V, Sec. 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.

State v. C.C., 476 So.2d 144, 146 (Fla. 1985).

In Jones v. State, 477 So.2d 566 (Fla. 1985), this Court directed the Fourth District Court of Appeal to dismiss a state petition for certiorari resulting from the trial Court's dismissal of probation violation charges. In applying to adult criminal proceedings the rules promulgated in State v. G.P., supra., and State v. C.C., supra., this Court reiterated the now oft repeated maxims that:

> (1) The State Constitution permits interlocutory review only in cases in which an appeal may be taken as a matter of right... and...

(2) No right of review by certiorari exists when no right of appeal exists.

Jones v. State, supra., at 566; see: R.L.B. v. State, 11 FLW 174 (Sup. Ct. April 17, 1986).

The state invited this Court to recede from its precise and unequivocal rulings in the above-cited cases in State v. Jones, 11 FLW 215 (Sup. Ct. May 15, 1986). Affirming the First District's dismissal of the state's attempted appeal, this Court refused to characterize a dismissal of a probation violation charge as equivalent to dismissing an information or indictment pursuant to Fla. Stat. 924.07(1) and Fla. R. App. P. 9.140(c)(1)(A). State v. Jones, supra., at 216. Because the state has no statutory or other cognizable right to appeal the dismissal of a probation violation charge, and because no certiorari lies in cases where there exists no vested right to appeal, the state's attempted appeal failed. State v. Jones, supra.

In State v. Palmore, 11 FLW 194 (Sup. Ct. May 2, 1986), this Court recapitulated the evolution of recent Florida Supreme Court Doctrine concerning the state's right to appeal interlocutory orders in criminal cases.

> In State v. C.C., 476 So.2d 144 (Fla. 1985), we resolved the question of whether the state could appeal from adverse judgments or orders of juvenile courts when the state has no statutory right to such appeal. We held that absent a statutory right to appeal, the state was unable to appeal such orders. In State v. G.P., 476 So.2d 1272 (Fla. 1985), we concluded that when the state had no statutory right of appeal from a suppression order in a juvenile case, it could not win review of such order

> by a petition for a writ of certiorari. In Jones v. State, 477 So.2d 566 (Fla. 1985), we extended the rationale of C.C. and G.P. to adult criminal proceedings, crystallizing the general rule 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.

State v. Palmore, supra., at 195.

In the case at bar, petitioner implores this Court to recede from its opinions in Jones v. State, supra., State v. G.P., supra., State v. C.C., supra., State v. Jones, supra., and R.L.B. v. State, supra. (Pet. Brief, pgs. 12 and 18). Before abandoning the articulate, rational doctrine these cases represent, however, an analysis of the policy justifications underlying its development may prove helpful.

Historically, the common-law provided that in a criminal case a writ of error would lie with the defendant, but not with the sovereign. And it is now generally held that unless expressly provided for by statute, "in criminal cases the state is not entitled to appeal adverse judgments and orders". State v. Creighton, 469 So.2d 739, 740 (Fla. 1985); see: U.S. v. Sanges, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1892). In the context of interlocutory appeals of pretrial orders, the exceptions to the general proscription against state appeals are carefully crafted and limited. Article V, Sec. 4(b)(1) restricts the District Court's authority to review such orders to those cases 1) that are appealable as a matter of right and 2) to the extent provided by rules adopted by the Supreme Court.

As to the first limitation, the legislature has issued its policy directive concerning the state's right to appellate review in Sections 924.07 and 924.071. Those Sections are:

> 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 constitutional principles.

State v. Creighton, supra., at 740.

The bi-partite requirements of Article V, Sec. 4(b)(1) however, permit this Court to further delimit the scope of state interlocutory appeal of pretrial orders through adoption of rules. And this Court has exercised its option to promulgate such rules in Fla. R. App. P. 9.140(c). As previously discussed, the legislative and judicial policy directives in this area are nearly identical. But not quite. In State v. Smith, supra., this Court specifically rejected the legislature's policy directive of permitting the appeals enumerated in Section 924.07 (8).[3] The ruling in Smith was plain and unequivocal.

> The Constitution does not authorize the legislature to provide for interlocutory review. Any statute purporting to grant interlocutory appeals is clearly a declaration of legislative policy and no more. Until and unless the Supreme Court of Florida adopts such statue as its own (as it did with regard to Section 924.071), the purported enactment is void.

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[3]Section 924.07(8), Fla. Stat., provides that the state may appeal from "all other pretrial orders, except that it may not take more than one appeal under this subsection in any case".

State v. Smith, supra., at 491.

Fourteen years have passed since this Court ruled in Smith, supra., and the Rules of Appellate Procedure have undergone one major revision and countless minor modifications. Fla. R. App. P. 9.140(c) has never been amended to include the kinds of appeals envisioned in Section 924.07(8), Fla. Stat. And for good reason.

The limited appeals permitted the state under Fla. R. App. P. 9.140(c)(1) have been carved out to avoid those rare situations when the state could be **substantially prejudiced** by a trial court's order. "Substantial prejudice" in the context of criminal proceedings simply means any ruling, the effect of which is to completely bar the state from prosecuting its case. A close perusal of the provisions of Fla. R. App. P. 9.140(c) clearly reveals that nearly all the substantive categories preclude just such a result.[4]

District Courts occasionally have granted writs of certiorari without reference to specific statutory and procedural authority, in order to avoid imposing upon the state what they perceived to be "substantial prejudice". A careful examination of many of those cases, however, reveals that proper jurisdiction existed for granting the writs within existing

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[4]Subsection H permits the state to appeal questions of law when a convicted defendant appeals her judgment of conviction. Subsections I and J permit appeals of sentences that are illegal or outside the sentencing guidelines.

statutory and procedural authority. See, e.g., State v. Steinbrecher, 409 So.2d 510 (Fla. App. 3rd Dist. 1982) [Pretrial order precluding introduction at trial of defendant's admissions would be reviewable as a "suppression order under Fla. R. App. P. 9.140(c)(1)(B) and Sec. 924.071]; Jantzen v. State, 422 So.2d 1091 (Fla. App. 3rd Dist. 1982) [Circuit Court order entered in its appellate capacity cognizable for certiorari review under Fla. R. App. P. 9.030(b)(2)(B) and Sec. 924.07(4)]; State ex. rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. App. 3rd Dist. 1981) [Trial court's order finding defendant not guilty by reason of insanity appealable pursuant to Fla. R. App. P. 9.140(c)(1)(G) and Sec. 924.07(7)].

In the case sub judice, the trial court's order granting respondent's Motion for Jury Questionaire does not rise to the level of substantial prejudice contemplated by this Court when it chose to permit state appeals as enumerated in Fla. R. App. P. 9.140(c)(1). Petitioner not only fails to show "substantial prejudice", it describes no prejudice at all. Any defects in the form of questions posed in the questionaire could have been cured at the plenary hearing held on November 8, 1985. Respondent offered petitioner the opportunity to revise the proferred questions, and indeed to submit their **own** questions if desired. (PA-B,4) Rather than review the questionaire after it had been extensively revised by the trial judge, petitioner instead responded, "I don't have to review it, I object to every line of it". (PA-B,20)

In summary, the trial court's ruling here is precisely the kind of order from which this court has refused to grant the state a right to appeal. If the District Courts have jurisdiction to hear interlocutory appeals by certiorari in matters like this, they would also be empowered to entertain appeals on a multitude of other pretrial rulings, e.g., orders to sever defendants or charges, granting change of venue, continuing trial dates, perpetuating testimony, granting additional peremptory challenges, limiting scope of voir dire, etc.

If, as petitioner suggests, this court were to recede from its carefully considered prior decisions construing Article V, Sec. 4(b)(1) of the Florida Constitution, it would be inviting a plethora of potentially frivolous appeals based on nothing more than a petulant prosecutor's shrill cries of "foul". We must also consider the ripple-effects of such an expansion of the District Court's jurisdiction: 1) A state petition for writ of certiorari is accompanied by the ever-present Motion for Stay of Proceedings. 2) The stay is nearly always granted, in order to allow the reviewing court sufficient opportunity to determine whether or not the lower court action constitutes a departure from the essential requirements of law. 3) The end result is a criminal court system, already overburdened, that could become hopelessly enmeshed in an ever expanding web of

interlocutory appeals.[5] Lest this Court posit that these prognostications are merely the forecast of a falling sky,[6] please take note of State v. Mitchell,[7] in which the Fourth District Court of Appeal unanimously denied a state petition for certiorari review of a trial court order granting a defendant's request to appear in a line-up. The primary significance of the decision in Mitchell may well be as a portent. In the words of George Herbert, "The harbingers are come. See, see their mark".[8]

In the instant case, petitioner fails to demonstrate that it meets either of the constitutionally mandated jurisdictional prerequisites for interlocutory review of the trial court's order. Petitioner can cite no statutory or other cognizable right to review that would justify granting its certiorari petition, and as such, that petition ought be denied.

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[6]Halliwell, J.O., Chicken-Licken, a.k.a. Chicken-Little, a.k.a. Henny Penny, Mid-19th century nursery story, in The Oxford Companion to Children's Literature, Humphrey Carpenter & Mari Prichard, Oxford University Press, New York, N.Y., (1984)

[7]11 FLW 1376 (Fla. App. 4th Dist. June 18, 1986)

[8]Herbert, George, The Temple, The Forerunners, St.1 (1633) in Familiar Quotations, John Bartlett, Little, Brown & Company, Boston (1882)

II. THE TRIAL COURT'S ORDER OF NOVEMBER 8, 1986, GRANTING RESPONDENT'S MOTION TO SUBMIT JURY QUESTIONNAIRE, WAS A PROPER AND SOUND EXERCISE OF JUDICIAL DISCRETION.

It is axiomatic that the selection of a jury in a criminal case is a critical stage of any trial. Francis v. State, 413 So.2d 1175 (Fla. 1982); also see; Frank v. Mangum, 237 U.S. 309, 338, 35 S.Ct. 582, 591, 59 L.Ed. 969, 984 (1915); Shaw v. State, 422 So.2d 20 (Fla. App. 2nd Dist. 1982). The responsibilities of the trial judge in the jury selection process are multitudinous. The determination of each prospective juror's impartiality by observing her demeanor is particularly within the judge's purview. Ristano v. Ross, 424 U.S. 589, 594-595, 96 S.Ct. 1017, 1020; 47 L.Ed. 2d 258, 263 (1976). The latitude given the parties in their examination of prospective jurors is subject to the judge's sound discretion. Essix v. State, 347 So.2d 664 (Fla. App. 3rd Dist. 1977). The materiality and propriety of voir dire questions are to be decided by the judge. Pait v. State, 112 So.2d 380 (Fla. 1959); Story v. State, 53 So.2d 920 (Fla. 1951). The trial judge controls the time and extent of voir dire, Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931), as well as the scope and breadth of the examination. Underwood v. State, 388 So.2d 1333 (Fla. App. 2nd Dist. 1980); Jones v. State, 378 So.2d 797 (Fla. App. 1st Dist. 1979).

It is also incontrovertible that a trial judge's decision setting parameters on the scope and breadth of counsel's examination of prospective jurors shall not be

disturbed absent a clear abuse of discretion. Essix v. State, supra., at 665; Mizell v. New Kingsley Beach, Inc., 122 So.2d 225 (Fla. App. 1st Dist. 1960); Kalinosky v. State, 414 So. 2d 234 (Fla. App. 4th Dist. 1982).

The purpose of voir dire is to insure that the chosen venire is objective and impartial, and the examination of jurors

> should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require, in order to obtain in every cause a fair and impartial jury, whose minds [are] free and clear of all such interest, bias, or prejudice...

Pinder v. State, 27 Fla. 370, 8 So. 837, 838 (1891).

The inquiry permitted of prospective jurors is not so limited as petitioner suggests, (Pet's. Brief, Pg. 20) and petitioner's claim that questions concerning juror's social and ideological views are "irrelevant" belies a fundamental misunderstanding of the nature of voir dire inquiry in a criminal trial. To be sure, those kinds of questions are unrelated to "statutory qualifications and disqualifications". (Pet's. Brief, Pg. 20) The statutorily mandated criteria for disqualifying jurors however, are a minor, perhaps insignificant portion of the overall process of juror qualification.[9] The more critical seg-

[9]The statutory criteria for disqualification of potential jurors are found in Sec. 40.013, Fla. Stat. Those criteria are limited to: a) Persons who are under prosecution for, or who have been convicted of a felony. b) The governor, members of the cabinet, sheriffs and deputies, municipal police officers, and court officials. c) Persons interested in the issue to be tried. d) Expectant mothers and underemployed parents who have custody of children under six years of age.

ment of juror voir dire is the process of insuring that the jury is "free and clear of all...interest, bias, or prejudice". Pinder v. State, supra., at 838. Counsel's duty in that regard is not always a facile task. The potential juror may attempt to conceal prejudice out of a desire to avoid embarrassment, to conform to expected responses, or even for more sinister reasons. See: Broeder, Voir Dire Examination: An Emperical Study, 38 S. Cal. L. Rev. 503, 506, 511, 512, (1965), Cited with Approval In Groppi v. Wisconsin, 400 U.S. 505, 510, 27 L.Ed. 2d 562, 91 S.Ct. 514 (1971). Apart from the problem of intentional misrepresentations by jurors, inquiring counsel is also confronted with the dilemma of determining whether the prospective venireman himself is aware of his own biases. Courts have consistently recognized that jurors are often unaware of their own prejudices and preconceptions, and do not acknowledge them when publicly asked 'general' questions on voir dire. E.g., United States v. Shavers, 615 F.2d 266, 268 (5th Cir. 1980) [general questions were "too broad" and might not reveal latent prejudice]; United States v. Dellinger, 472 F. 2d 340, 367, (7th Cir. 1972) ["We do not believe that a prospective juror is so alert as to his own prejudices [as to reveal prejudice in response to general questions]]; United States v. Dennis, 339 U.S. 162, 183, 94 L.Ed. 734, 70 S.Ct.

(footnote 9 continued)

e) Persons seventy years of age and older. Under Sec. 40.013, a trial judge has discretion to excuse lawyers, physicians, hardship cases, and jurors who have previously served within two years.

519 (1950) (Frankfurter, J., Dissenting) ["one cannot have confident knowledge of influences that may play and prey unconsciously on judgment"].

Florida courts have recognized the inherent difficulty in uncovering the hidden prejudices and predispositions of jurors during voir dire, and have concluded that "counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors..." Jones v. State, 378 So.2d 797, 798 (Fla. App. 1st Dist. 1980); Stano v. State, 473 So.2d 1282 (Fla. 1985). It is consequently essential to explore, at least to some extent, the backgrounds and attitudes of potential jurors, in order for the inquiring attorney to discover actual bias and cause for challenge. Kiernan v. Van Schaik, 347 F. 2d 775, 779 (3d Cir. 1965); United States ex. rel. Bloeth v. Denno, 313 F.2d 364, 372 (2nd Cir. 1963); Delaney v. United States, 199 F.2d 107, 112-113 (1st Cir. 1952).

Petitioner asserts that utilizing a mailed jury questionnaire will unduly burden the court system. (Pet's. Brief, Pg. 21). That allegation is utterly without basis and is in fact contravened by available authority, which indicates the use of such questionnaires **facilitates** judicial economy. See: A. Ginger, Jury Selection in Criminal and Civil Trials, Sec. 12.21 at 768 (2d ed. 1985) [jury questionnaires prepared by attorneys "save...costs"]; Jurywork: Systematic Techniques Sec. 2.08 at 2-44 (A. Krause and B. Bonora eds. 2d ed. 1985) [a supplemental questionnaire saves valuable court time by eliminating the need to repeat the same question to each juror."]

Report of the Committee on Juries of the Judicial Council of the Second Circuit (Aug. 1984), cited in Jurywork: Systematic Techniques, Supra., Sec. 2.08 at 2-44 n. 49.2; Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 Stan. L. Rev. 545, 563-64 and n.70 (1975) [a more extensive questionnaire would be more revealing and would concomitantly reduce the need for extended face-to-face questioning...face-to-face questioning would then be reserved for the issues on which probing is necessary, such as prejudice against the litigant or bias arising from the facts of the particular case."]

Because questionnaires provide an efficient and economical tool for garnering information vital to the meaningful exercise of jury challenges, numerous other jurisdictions, as well as Florida's sister courts in the federal system, have utilized jury questionnaires to great advantage.[10]

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[10] A partial list of cases that have employed a questionnaire include: United States v. Russell, No. TCR 81-00711 (N.D. Fla. 1982); United States v. Bernstene, No. 80-56-Cr-EPS (S.D. Fla. 1980); United States v. DeLorean, No. 82-910 (B)-RMT (C.D. Cal. 1984); People v. Nelson, No. 9474 (San Mateo County, Cal., 1981); Smith v. Wayt, No.C-79-742 (N.D. Ohio 1983); Jobnecheck v. Blackwell Burner Co., No. G-78-302-CA(7) (W.D. Mich. 1982); Singleton v. Chesapeake & Ohio Ry. Co., No. G-79-321-CA(1) (W.D. Mich. 1982); United States v. Layton, No. CR-80-416-RFP (N.D.) Cal. 1981); United States v. Marcello, No. C-80-274 (E.D. La. 1981); Rokita v. Chesapeake and Ohio Ry. Co., No. G78-786-CAL (W.D. Mich. 1981); Carconi v. Consolidated R.R. Corp. (Conrail), No. 78-72341 (E.D. Mich. 1980) [Judge administered the questionnaire orally]; Odgers v. Ortho Pharmaceutical Co., No. 78-70543 (E.D. Mich. 1980); Wood v. Consolidated R.R. Corp. (Conrail), No. 970075 (E.D. Mich.) 1980); United States v. Colgate Palmolive Co., No. 77-184-Civ-5 (E.D.N.C. 1979); Krause v. Rhodes, No. C-70-544 (N.D. Ohio 1978) [Young, J.); Rutledge v. Arizona Board of Regents, No. C397445 (Maricopa County County, Ariz. 1981); People v. Nelson, 9474 San Mateo County, Cal. 1981); United States v.

At the hearing held on November 8, 1985, respondent offered petitioner the opportunity to modify the proferred questions, to submit additional questions, and even to submit "their own questionnaire". (PA-B,4) The trial court then carefully reviewed each and every question proposed by respondent. (PA-B,13,14,15,16) Of the fifty-two questions originally tendered by respondent, the court accepted nineteen questions as proffered, permitted thirteen more after modification, and completely rejected twenty questions. (PA-B,13,14,15,16) The trial court in effect modified or deleted sixty-three percent of the questions originally proffered by the respondent. The court further mandated, pursuant to petitioner's objection (PA-B,10), that the perjury declaration be deleted from the final draft version of the questionnaire. (PA-B,18,21-22)

Rather than review the questionnaire after it had been extensively revised by the trial court, petitioner instead replied, "I don't have to review it, I object to every line of it". (PA-B,20) When asked by the trial court to prepare an order reflecting the revisions to the questionnaire, respondent answered "Your Honor, with all due respect, this is their

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(footnote 10 continued)

O'Sullivan, No. 60706-76 et. seq., (Superior Court, District of Columbia 1976); People v. York, 1493-82 (Queens County, N.Y., 1982); North Carolina v. Little, (Wake County, N.C., 1975); Commonwealth v. Johnson, No. 37879 a through i (Cambria County, Pa., 1980); Carter v. Carr, No. CA77-3767 (Philadelphia Court of Common Pleas, Pa., 1981); State v. Robles, No. 85-CR-2872 (Bexar County, Texas, 1986); State v. Beck, No. 409463 (Harris County, Texas, 1985); See also; cases listed in Jurywork: Systematic Techniques, supra., Sec. 2.08, at 2-45 through 2-47.

motion. I don't intend to prepare an order, I'm going to be spending time making a motion before the Fourth District Court".

Assuming arguendo that the Fourth District Court of Appeal has jurisdiction to hear the state's Petition for Writ of Certiorari, respondent submits that the prerequisites for issuing such a writ have not been met. A common-law writ of certiorari may only issue if the lower court order or judgment under review constitutes a departure from the essential requirements of law. Jones v. State, 477 So.2d 566, 569, (Fla. 1985) (Boyd, C.J. Dissenting). In a petition for writ of certiorari

> ...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 miscarriage of justice.

Jones v. State, supra.

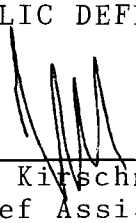
Petitioner has failed to meet the above-described standard for issuance of a certiorari writ. The trial court's order granting respondent's Motion to Submit Jury Questionnaire was a sound and proper exercise of the trial court's broad discretion in matters relating to the selection, qualification, and examination of prospective jurors.

CONCLUSION

WHEREFORE, based on the foregoing arguments and citations to authority, respondent respectfully requests this Honorable Court to answer the certified question in the affirmative, and to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

ELTON H. SCHWARZ
PUBLIC DEFENDER

BY: 

Jay Kirschner
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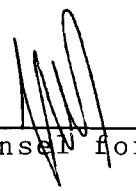
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Richard G. Bartmon, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 21st day of July, 1986.



Counsel for Respondent