IN THE SUPREME COURT OF FLORIDA

Fla. S.Ct. Case No. 71,615

U.S. S.Ct. Case No. 87-329

The Florida Star,

Appellant,

v.

B.J.F.,

Appellee.

On Certified Question From
The United States Supreme Court

Reply Brief of Amici Curiae The Miami Herald Publishing Company, The Florida First Amendment Foundation, The Florida Press Association, and The Florida Society of Newspaper Editors

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SUMMARY OF ARGUMENT

B.J.F.'s arguments are without merit. First, B.J.F.'s claim that Florida Star should not have sought review in this Court in the first instance has no basis. Both federal and Florida policy require that an appellant, such as Florida Star, exhaust its state court remedies before seeking United States Supreme Court review. This policy properly encourages the presentation of important issues to this Court.

Second, the 1980 amendment to the Florida Constitution was intended to bar "record proper" review. Accordingly this Court has consistently held since that time that it has "no jurisdiction to review" per curiam affirmances without opinion of the district courts of appeal. In the interest of certainty and judicial economy, amici urge the Court to retain this bright-line jurisdictional rule. In all other cases review should be sought in this Court.

Third, this Court previously has declined to explain why review was denied in a particular case, a rule which avoids re-opening and re-evaluating prior jurisdictional determinations. B.J.F. offers no compelling reason why this Court should abandon the rule of stare decisis on this point.

Finally, B.J.F. claims that her theory would not lead to widespread confusion and waste at the highest

appellate levels, yet there is no reason to accept this claim. The decision reached by the Court in this case will have dramatic precedential effect. Accordingly, the rule adopted by the Court in this case should resolve this jurisdictional question for all cases. The rule proposed by B.J.F. cannot do so and this Court should reject it.

Amici's proposal, in contrast, would serve the policies and comport with the current practices of the Court. It would promote certainty among litigants, comity between the state and federal systems, and preserve the sanctity and internal processes of this Court. It eliminates the need, created by B.J.F., for the Court either to explain its jurisdictional rulings, or to reopen closed files in order to respond to certified questions such as that now before the Court.

Amici therefore respectfully suggest that the Court hold:

(i) Jurisdiction to review decisions of the district courts of appeal rendered with majority opinion vests in this Court upon the timely filing of a notice invoking the Court's discretionary jurisdiction pursuant to Rule 9.120, Fla.R.App.P.;

(ii) Pursuant to the policy announced by this Court in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court has jurisdiction to grant or deny review in all cases decided by the district courts of appeal except per curiam affirmances rendered without majority opinion; and

(iii) Once jurisdiction has vested in this Court, this Court retains jurisdiction to review a case until such time as the Court disposes of it -- by denying review or by deciding it on the merits.

ARGUMENT

I. The Florida Star Properly Sought Review In This Court Before Proceeding In The United States Supreme Court.

As a matter of federal and Florida policy and constitutional doctrine, this Court should have the opportunity to review issues prior to their presentation to the United States Supreme Court, whenever there is a colorable basis for jurisdiction in this Court. This policy is effectuated in 28 U.S.C. §1257, which requires exhaustion of state court appellate remedies.

Section 1257, as consistently interpreted by the United States Supreme Court, permits an appellant to seek Supreme Court review only of state court judgments rendered by the highest court of the state in which a decision can be obtained. If the decision to be reviewed is not a decision of the highest state court which exists, the appellant must be able to demonstrate "affirmatively" that a decision could not have been had in that court, whether as a matter of law or because the court was actually asked and declined review. Fisher v. Perkins, 122 U.S. 522, 526, 7 S.Ct. 1227, 1228, 30

L.Ed. 1192 (1887); Mullen v. Western Union Beef Co., 173 U.S. 116, 19 S.Ct. 404, 43 L.Ed. 635 (1899).

In Mullen, as in this case, the basis of the judgment, and therefore the availability of state supreme court review, was unclear. The Court nonetheless held that the appellant was required to seek review in his state supreme court. The Court held:

> But, if the case had reached the supreme court, that tribunal might have ruled that the judgment could not be sustained on these grounds, and then have considered the grave constitutional question thereupon arising.
>
> And although the supreme court might have applied the rule that, where a judgment rests on grounds not involving a constitutional question, it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.
>
> We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the state, and, this being so, the writ of error cannot be sustained.

Id. at 124, 19 S.Ct. at 407, 43 L.Ed. 635 (emphasis added). It follows that a litigant must be able to prove that all avenues of review available in the courts of his state have been exhausted before proceeding in the United States Supreme Court.

In this case, Florida Star seeks United States Supreme Court review of a decision of the First District Court of Appeal. The First District is clearly not the highest court of Florida which exists. Accordingly, it became Florida Star's burden to demonstrate that it had exhausted all available avenues of state court review. The only way Florida Star could meet this burden, indeed, the only way Florida Star could itself be sure, was to seek review in this Court, precisely as it did. The class of cases for which it "affirmatively appears" that review is unavailable in this Court as a matter of law is that comprised of district court of appeal affirmances without opinion. In all other instances, the only satisfactory demonstration of the unavailability of review in this Court is an actual denial of such review. Accordingly, Florida Star was required by Florida law and United States Supreme Court precedent to seek review in this Court first.

None of the authorities cited by B.J.F. support B.J.F.'s view of the certified question. In Dresner v. Tallahassee, 375 U.S. 136, 84 S.Ct. 235, 11 L.Ed.2d 208 (1963), the only other case in which the United States Supreme Court has certified a jurisdictional question to this Court, this Court ultimately held that discretionary review in the district court of appeal and in this Court should have

been sought. Dresner v. Tallahassee, 164 So.2d 208 (Fla. 1964). In Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967), the Court stated:

> The Florida Supreme Court seems to have decided that it lacks jurisdiction on appeal to consider per curiam denials of certioriari by the Florida District Court of Appeal.

Id. at 237 n.1, 88 S.Ct. at 365 n.1, 19 L.Ed.2d 438. In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Court stated:

> The Supreme Court of Florida had earlier held that it was without jurisdiction.

Id. at 80 n.5, 90 S.Ct. at 1895 n.5, 26 L.Ed.2d 446. In Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the Court stated:

> The Second District Court of Appeal affirmed without opinion, 426 So.2d 34 (1982), thus denying the Florida Supreme Court jurisdiction to review the case.

Id. at 431, 104 S.Ct. at 1881, 80 L.Ed.2d 421. And, in Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984), the dissent noted:

> Because the District Court of Appeal's decision in this case was rendered without any statement of reasons, it does not 'expressly' decide a constitutional

> question or 'expressly' conflict with other authority as the jurisdictional provision in the Florida Constitution requires for discretionary review in the Florida Supreme Court.

Id. at 11 n.4, 105 S.Ct. at 314 n.4, 83 L.Ed.2d 165 (Stevens, J., dissenting).

As the foregoing quotations make clear, none of the cases cited by B.J.F. suggests that Florida Star was not required to seek review in this Court before proceeding to the United States Supreme Court. The only cases in which review was not sought and that omission was held to be proper were those in which the appellant could know and demonstrate as a matter of law that review in this Court was unavailable -- circumstances which clearly do not obtain in this case.

II. The 1980 Amendment To The Florida Constitution Adding The "Expressly" Limitation To This Court's Jurisdiction Was Intended To Abolish "Record Proper" Review.

The cornerstone of B.J.F.'s argument is that the 1980 amendment to the Florida Constitution fundamentally altered this Court's jurisdiction -- changing it from a system of discretionary review into one composed of rigid jurisdictional pigeonholes designed to restrict the Court's exercise of discretion. In fact, the legislative history of the amendment, as well as this Court's consistent

interpretation of it, lends no support to this theory. As previously explained by amici and Florida Star, the purpose of amending the jurisdictional provision to require "express" conflict or "express" construction was to overrule Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), and abolish "record proper" review.

B.J.F. argues that this interpretation is in error, contending that, in its reported decisions declining review, this Court has frequently stated that it had "no jurisdiction" to review the case under consideration. According to B.J.F., the acceptance of amici's argument -- namely, that this Court has jurisdiction to grant or deny review whenever the district courts of appeal issue a majority opinion -- would require the Court to reverse all of its reported jurisdictional decisions. B.J.F. is mistaken. There is no inconsistency between amici's argument and this Court's jurisdictional decisions. Most of the cases cited by B.J.F. as "requiring reversal" involve per curiam affirmances without opinion or their equivalent, the only class of cases which this Court has consistently held it has "no jurisdiction to review." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Of the remaining cases, none describes, as

the Court did in Jenkins, an entire and objectively identifiable class of decisions not subject to review as a matter of law.[1/]

Finally, B.J.F.'s contention that amici's argument "would reopen the flood gates" in this Court is mistaken on two levels. First, the same number of jurisdictional briefs would likely be filed in this Court under both B.J.F's and amici's analyses. In either case, an appellant desiring to preserve his choices would be required to seek review in this Court in any case in which a majority opinion was issued.

Second, amici's argument does not suggest, much less require, any change in the scope or contours of this Court's jurisdiction. The Court's jurisdiction is defined by the Florida Constitution as interpreted by this Court, and amici's argument does not alter that fact, nor does it alter the type or number of cases this Court may decide to review.

1/ The cases cited by B.J.F. are not to the contrary. School Board of Pinellas County v. District Court of Appeal, 467 So.2d 985 (Fla. 1985); Davis v. Mandau, 410 So.2d 915 (Fla. 1982); and Pena v. Tampa Federal Savings and Loan Association, 385 So.2d 1370 (Fla. 1980), all concern denials of review of per curiam affirmances and their equivalent.

In Bailey v. Hough, 441 So.2d 614 (Fla. 1983), and Petrik v. New Hampshire Insurance Co., 400 So.2d 8 (Fla. 1981), the Court examined the jurisdictional briefs and decisions under review, found a lack of conflict, and ultimately denied review. Far from supporting B.J.F.'s theory, these cases reveal the inherent flaw in it. The Court may accept a case only to deny review a year or more later. Should that happen, under B.J.F.'s theory an appellant would be precluded from seeking United States Supreme Court review.

The crucial difference between amici's position and B.J.F.'s is that amici recognize that only this Court can decide whether it possesses jurisdiction to review a case whereas B.J.F. would transfer this essential responsibility to appellants.

III. This Court Has Never Explained Its Rationale For Denying Review In A Case In Response To A Certified Question And Should Not Do So Now.

In their initial briefs, amici and Florida Star relied on Greene v. Massey, 384 So.2d 24 (Fla. 1980), in which this Court declined to answer a certified question which asked the Court to explain why review had been denied in a particular case. B.J.F. characterizes this argument as a "request [that] the Court . . . lie to the United States Supreme Court." Brief of Appellee at 25. This is as mistaken as it is vituperative.

B.J.F.'s characterization of amici's argument is based on a misinterpretation of Greene. B.J.F. contends that "the question [certified in Greene] was incapable of an accurate answer because it depended upon the subjective intent of persons unavailable, and simply could not be answered in any objective way." Brief of Appellee at 26. But this contention is belied by the clear language of the case, which is quoted in full in the Brief of Amici at 15.

The Greene Court in no way suggests that its refusal to "revisit" its decision is based on the impossibility of doing so. While noting the change in its membership, the Greene Court clearly grounds its decision on the premise that a per curiam order denying review is a facially complete opinion which is the law of the case and not subject to further explanation by the Court.

Contrary to B.J.F.'s suggestion, the circumstances in the case at bar are no different. The explanation which B.J.F. seeks -- "jurisdiction" or "no jurisdiction" -- is as much a "subjective" explanation as the one the Court declined to give in Greene. It would require the Court to explain what led to its decision to deny review, an explanation the Court does not generally give and as to which the justices voting to deny review may well differ.

Finally, B.J.F. alleges that amici's argument that judicial economy would not be served by answering the certified question is tantamount to inviting this Court to "participate in a scheme." This is absurd. Amici are at least as concerned as B.J.F. that this Court "answer the certified question accurately." Amici recognize, however, that whatever this Court decides it must and should be guided

in its interpretation of the law by the many policies which will be affected, as well as by the corollary need to avoid a construction of the law which would lead to absurd results.[2/]

IV. B.J.F.'s Theory Would Require Appellate Litigants To Function As Courts And Deprive This Court Of Its Essential Role.

Finally, amici argued that B.J.F.'s theory of appellate review, if accepted by this Court, would unnecessarily create an unwieldy and uncertain system in which duplicative appeals would be encouraged. Amici gave principled reasons why such a system should not be adopted, and indeed could not have been the intent of the drafters of the Florida Constitution.

B.J.F. recharacterizes this argument rather meanly as a request by Florida Star "that this Court do something for it, anything for it, which would salvage its appeal." Brief of Appellee at 27. This is simply false. Amici and

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2/ Dresner v. Tallahassee, 164 So.2d 208 (Fla. 1964), relied on by B.J.F. for the proposition that this Court has answered similar certified questions before, is inapposite. Dresner addressed the question whether, under Florida law, a particular circuit court decision was reviewable by a district court of appeal. The issue of whether discretionary jurisdiction could have been exercised, but was not, was not raised as to any court. Accordingly, B.J.F.'s contention that because Dresner did not lead to a flood of certified questions, neither will this case, is mistaken. This case, if resolved in the fashion suggested by B.J.F. would, unlike Dresner, give rise to certified questions whenever this Court declines to exercise its jurisdiction to review a written majority opinion of a district court of appeal.

Florida Star simply have urged this Court to construe its jurisdictional mandate in a sensible way that avoids the absurd twists and detours of B.J.F.'s theory. As shown in the initial briefs and herein, Florida Star properly sought review of the First District Court of Appeal decision in this Court, and upon being denied review by this Court, sought review in the United States Supreme Court.

It is important to note that B.J.F. does not deny the difficulties which the adoption of her theory would cause. Instead, she attempts to comfort this Court with the assurance that the confusion which will certainly result will "present itself only infrequently."[3/] Brief of Appellee at 29, 31. According to B.J.F., "perhaps 90% of the time," it will be "relatively easy to ascertain" whether review is available in this Court. While this may reflect the experience of counsel for B.J.F., it does not reflect the experience of counsel for amici. More to the point, an appellant's burden in the United States Supreme Court when he has not sought review in the highest court of his state could not be satisfied by the appellant's assurance that he could "ascertain" that review was unavailable to him in this

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3/ A tone of excessive self-confidence pervades B.J.F.'s brief. At one point, it notes "as we have already opined, the problem will arise only infrequently . . . ." Brief of Appellee at 31. This hubris is the central flaw in B.J.F.'s argument. It presumes that litigants can infallibly "opine" and determine for themselves whether this Court has jurisdiction without recourse to its guidance.

Court. As B.J.F. correctly notes, "the highest court . . . in which a decision could be had is not always this Court." Brief of Appellee at 29. The difficulty, which B.J.F. ignores, is that an appellant cannot know with certainty that this is true in his case (unless it is a per curiam affirmance without opinion) unless and until he seeks review in this Court.

B.J.F.'s argument that the relationship between this Court's jurisdiction and the jurisdiction of the United States Supreme Court is not this Court's problem is simply false. Neither this Court's jurisdiction nor the certified question can be considered in a vacuum. As B.J.F. knows, because she suggested it to the United States Supreme Court, the certified question was asked for one reason: to determine whether it was proper for Florida Star to seek review in this Court (under Florida law) in order to determine whether Florida Star's appeal was timely (under federal law). The relationship between the Florida Constitution and the federal jurisdictional statute is thus crucial in interpreting and answering the certified question. It is therefore not enough to suggest, as B.J.F. does, that this Court should abandon the difficult problems this relationship presents. Brief of Appellee at 36.

This Court, as the highest court of Florida, must concern itself with the ramifications of its decisions. It

cannot, as B.J.F. instructs, ignore the hard cases, such as when a jurisdictional decision is deferred pending consideration of the merits and this Court ultimately determines not to review the case. In such circumstances, an appellant in B.J.F.'s system would be unable to seek review in the United States Supreme Court through no fault of his own. Such a scenario clearly reveals the inherent weaknesses in B.J.F.'s theory, and B.J.F. cannot avoid those weaknesses by asserting that they are not at issue in this case. In fact, the problem is no different in kind in this case than in the deferred jurisdiction case, only a little less obvious. In both instances, B.J.F.'s theory would lead to the loss of essential avenues of appellate review, confusion, and a waste of judicial resources.

CONCLUSION

The Court should answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on: George K. Rahdert and Bonita M. Riggens, Rahdert Acosta & Dickson, P.A., 233 Third Street North, St. Petersburg, Florida 33701; and Joel D. Eaton, Podhurst Orseck Parks Josefsberg Eaton Meadow & Olin, P.A., 800 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 11th day of March, 1988.

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