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

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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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is before this Court for the second time. On May 28, 1987, this Court declined to exercise its discretionary jurisdiction to review the decision of the First District Court of Appeal, whereupon petitioner The Florida Star sought review in the United States Supreme Court. That Court has returned this case to this Court to consider the following certified question:

> Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear the Appellant's appeal [petition for discretionary review] in this cause from the First District Court of Appeal?

There are two independent reasons why the jurisdictional question should be answered in the affirmative. First, jurisdiction vested in this Court when The Florida Star timely filed its notice invoking the Court's jurisdiction pursuant to Rule 9.120, Florida Rules of Appellate Procedure. From that moment until the Court determined to deny review, the Court possessed exclusive jurisdiction to dispose of the case. For fundamental reasons of judicial policy and economy this Court should conclude its analysis at this point. Should the Court find it necessary to reach the merits of the jurisdictional question, however, there is a second reason the question of the United States

Supreme Court should be answered in the affirmative. The jurisdictional briefs submitted in support of The Florida Star's petition for review demonstrated a basis for the exercise of the Court's discretionary jurisdiction to decide the merits of this case.

PROCEDURAL BACKGROUND

This action arises from The Florida Star's inadvertent publication of the name of an alleged rape victim in the "Police Reports" section of the newspaper. The alleged victim, B.J.F., sued The Florida Star for the publication and was awarded $100,000 by a jury. The Florida Star appealed the judgment entered in favor of B.J.F. based on the jury verdict, and, on December 15, 1986, the First District Court of Appeal rendered a written opinion affirming the judgment. Rehearing was subsequently denied on January 23, 1987. The discretionary jurisdiction of this Court was timely invoked on February 20, 1987, and on May 28, 1987, this Court denied review.

On August 26, 1987, ninety days after this Court denied review, The Florida Star filed its Jurisdictional Statement seeking review of the decision of the First District in the United States Supreme Court. B.J.F. moved to dismiss, arguing, inter alia, that the appeal was untimely. According to B.J.F., this Court's decision not to review the

decision of the First District indicated that this Court was without jurisdiction and thus that the First District was "the highest court of [this] State in which a decision could be had," 28 U.S.C. §1257, for purposes of United States Supreme Court review. Thus, B.J.F. argued, The Florida Star's time to appeal ran from the date the First District Court of Appeal denied rehearing, January 23, 1987, not from the date this Court denied review, May 28, 1987. Because the appeal was not filed within ninety days of the earlier date, B.J.F. concluded, it was untimely and should be dismissed.

On December 14, 1987, the United States Supreme Court, recognizing that the extent of this Court's jurisdiction is uniquely "a question of law of the State of Florida" for this Court's determination, certified the jurisdictional question to this Court. This brief follows.

ARGUMENT

I. This Court Always Has Jurisdiction To Decide Whether to Grant or Deny Review of Any Case in Which a District Court of Appeal Issues a Majority Opinion Stating the Basis For Its Decision.

This Court should answer the question of the United States Supreme Court in the affirmative. This Court always has jurisdiction to decide whether to grant or deny review where there is a written majority opinion of a district court of appeal. First, the rule in Florida is that jurisdiction vests in an appellate court upon the timely filing of a

proper notice, regardless of whether such appellate review is discretionary or as of right. Such notice invoking this Court's discretionary jurisdiction was clearly filed in this case. Second, this Court has heretofore announced that it absolutely "lacks jurisdiction to review" only one class of cases, namely, per curiam decisions of the district courts of appeal rendered without majority opinion. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). A reviewable majority opinion was clearly rendered by the First District in this case. Finally, the rule suggested by B.J.F. would create a procedural nightmare for appellate courts and advocates alike and for this reason alone should be rejected by this Court.

A. Jurisdiction Vested in This Court Upon The Timely Filing Of The Florida Star's Notice of Appeal.

Rule 9.120(b), Fla.R.App.P., provides:

> The jurisdiction of the Supreme Court described in Rule 9.030(a)(2)(A) shall be invoked by filing two copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the district court appeal within 30 days of rendition of the order to be reviewed.

(emphasis added). Similar language appears in other rules of appellate procedure which address the commencement of appellate proceedings in Florida's courts. E.g., Fla.R.App.P. 9.100(b); Fla.R.App.P. 9.110(b); Fla.R.App.P. 9.160(b).

Cases interpreting this general rule uniformly hold:

> Upon such filing [of the notice of appeal], the 'jurisdiction of the cause vests absolutely in the appellate Court until such appeal has been finally disposed of . . . .'

Pruitt v. Brock, 437 So.2d 768, 773 (Fla. 1st DCA 1983) (citation omitted) (emphasis added). See, e.g., Lelekis v. Liles, 240 So.2d 478, 479 (Fla. 1970) (same); Pinero v. Pinero, 498 So.2d 637, 638 (Fla. 3d DCA 1986) (same); Burris Chemical, Inc. v. Whitted, 485 So.2d 37, 37 (Fla. 4th DCA 1986) (same).

The general rule that jurisdiction is vested in the appellate court upon the filing of a timely notice applies regardless of whether the review sought is, as here, discretionary. Thus, in Payne v. State, 493 So.2d 1104 (Fla. 1st DCA 1986), the First District discussed the application of the general rule to this Court's jurisdiction and specifically rejected B.J.F.'s contention that this Court's jurisdiction vests only upon its decision to grant review on the merits:

> Appellant's response implies that the supreme court does not acquire jurisdiction over a case until it determines to review the case on the merits. However, Rule 9.120 provides that jurisdiction of the supreme court "shall be invoked by filing two copies of a notice" with the clerk of the district court. This language is identical to that

> found in Rule 9.110, which has been construed as vesting jurisdiction in the appellate court upon the filing of the notice. Lelekis. We see no reason to distinguish between a notice of appeal which seeks review as a matter of right pursuant to Rule 9.110, and a notice that discretionary review is sought pursuant to Rule 9.120. In either case, the disposition by the reviewing court may, or may not, alter the decision of the lower court. Once the notice was filed, jurisdiction vested in the supreme court.

493 So.2d. at 1105 (emphasis added).

In this case there is no dispute that The Florida Star timely filed its notice to invoke the discretionary jurisdiction of this Court. Thus, under Florida law, this Court possessed exclusive jurisdiction of this case from the time the notice was filed until May 28, 1987, when the Court ultimately determined not to grant review.

B. This Court Possessed Jurisdiction to Review This Case Because The First District Rendered A Majority Opinion Explaining The Reasons For Its Decision.

In 1980, the voters of Florida approved an amendment to the Florida Constitution redefining and limiting the jurisdiction of this Court. In pertinent part, the amendment placed the term "expressly" before each of the bases for discretionary jurisdiction in this Court. As shown herein, the purpose of this change was to divest the Florida Supreme Court of jurisdiction to review district court of appeal

decisions rendered without majority opinion, and not, as B.J.F. suggests, to rigidly circumscribe the Florida Supreme Court's jurisdiction by creating strict jurisdictional "pigeonholes."

Prior to the 1980 amendment, the Court would exercise its discretionary jurisdiction to review decisions rendered without opinion. This practice was the result of the Court's 1965 decision in Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965). In Foley, a bare majority of the Court held that it would examine the "record proper" in cases affirmed without prior opinion to determine if the affirmance created a decisional conflict. The process of review was terribly time-consuming and had the predictable, if unintended, effect of dramatically increasing the number of petitions for review filed in the Court. See England, Hunter & Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla.L.Rev. 147, 178 (1980) (hereinafter cited as "1980 Reform").[1/] The 1980 amendment overruled Foley. As former Justice Arthur J. England, Jr., one of the drafters of the 1980 amendment, wrote:

1/ "During discussions which led to the adoption of the 1980 provision, it was estimated that 25 to 35 percent of the preamendment petitions for conflict review arose from cases in which the district courts had written no decision." 1980 Reform, supra, at 191 (footnote omitted).

> By the mid-1970's, a majority of new justices on the court began challenging the Foley doctrine. Their protests helped shape the 1980 amendment, and the legislative debates indicate clearly that the purpose for including the term "expressly" in section 3(b)(3) was to overrule Foley and thereby eliminate supreme court review of PCAs. A written opinion of the district court on the point of law sought to be reviewed is now an essential predicate for supreme court review.

1980 Reform, supra, at 179 (footnotes omitted) (emphasis added).

Shortly after the amendment was adopted, this Court announced its interpretation of the amendment and of its effect on the Court's jurisdiction. Thus, in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), the Court stated:

> Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court.

Id. at 1359 (emphasis added).

The Court's recognition that it absolutely "lacks jurisdiction to review" per curiam decisions rendered without majority opinions is reflected in the Court's internal

operating procedures. When review is sought in these cases, it is automatically denied. An order is issued by the clerk indicating that the Court is "without jurisdiction" to consider such cases:

> When a notice of seeking discretionary review is filed, the clerk's office will determine whether a district court of appeal has written an opinion in the case. If there is no opinion, the case is automatically dismissed. If the district court has written an opinion, the clerk's office dockets the case and assigns it to a panel of five Justices according to a rotation formula.

§II(A)(1)(a), Manual of Internal Operating Procedures of the Supreme Court of Florida (emphasis added).

Understood against this background, the question asked by the United States Supreme Court, as well as that Court's need for guidance, is clear. In Jenkins, the Court explicitly stated that it "lacked jurisdiction to review" per curiam affirmances rendered without majority opinion. Thus, when the United States Supreme Court has had occasion to review such cases, it has been able to rely on this Court's statement in Jenkins. Palmore v. Sidoti, 466 U.S. 429, 431 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984) (affirmance without opinion "den[ies] the Florida Supreme Court jurisdiction to review the case.") (citing Jenkins); see

Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 308, 313 n.4, 83 L.Ed.2d 165 (1984) (Stevens, J., dissenting) (same).

No comparably clear statement of the extent of this Court's "jurisdiction to review" cases in which the district court of appeal has rendered a majority opinion exists to guide the United States Supreme Court. For reasons more fully explained below, amici urge this Court to adhere to the line previously drawn in Jenkins. Only where the district court of appeal issues a per curiam affirmation without majority opinion is there no colorable basis for this Court's jurisdiction, and thus no reason for a litigant to seek review in this Court. In all other cases, this Court has jurisdiction to determine whether to review a pending case on the merits.

C. Fundamental Concerns of Judicial Policy And Economy Counsel That This Court Adhere To The Bright-Line Rule Announced in Jenkins.

The question certified to this Court by the United States Supreme Court is of great importance to appellate courts, advocates and litigants throughout the state of Florida. To seek review of a state court judgment in the United States Supreme Court, a litigant must first exhaust all avenues of review available to him in the courts of the state. That review in the highest court is discretionary is

irrelevant; the litigant must seek such review in order to proceed to the United States Supreme Court. Stratton v. Stratton, 239 U.S. 55, 56-57, 36 S.Ct. 26, 27, 60 L.Ed. 142 (1915) ("Indeed conforming to the rule thus thoroughly established, the practice for years has been in the various states where discretionary power to review exists in the highest court of the state, to invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this court."); American Railway Express Co. v. Levee, 263 U.S. 19, 20-21, 44 S.Ct. 11, 12, 68 L.Ed. 140 (1923) (same). It is therefore essential to the preservation of a litigant's right to United States Supreme Court review of a state court judgment that he know with certainty the avenues of appellate review he is required to pursue in the courts of his state.

The rule suggested by B.J.F. would render such certainty impossible and thereby create a procedural nightmare for appellate courts, advocates and litigants. A litigant would have two choices. He could try to predict which court would ultimately recognize jurisdiction in the case and file a petition for review only in that court. A litigant who files only in the United States Supreme Court however, would risk the objection that he has not exhausted his state court remedies. Conversely, a litigant who files

only in the Florida Supreme Court and is denied review, would risk the objection, made by B.J.F. here, that the later appeal to the United States Supreme Court is untimely.[2/]

Alternatively, a litigant could file a petition for review in both the Florida Supreme Court and the United States Supreme Court simultaneously, simply to protect his rights. Yet, because the grounds for appeal are so different in the two courts, the litigent would be required to prepare (and pay for) two very different briefs. In addition, the litigant would likely need to seek a stay in the United States Supreme Court because the appeal in that Court would not be ripe for review unless and until this Court denied review, or otherwise disposed of the case. The litigant would also need to move to expedite proceedings in this Court. And, despite these extraordinary precautions, the litigant could still be unsuccessful; the motions could be denied and both Courts accept or decline jurisdiction contemporaneously. The situation is further aggravated by

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2/ This case clearly demonstrates the pitfalls of the rule proposed by B.J.F. The Florida Supreme Court denied The Florida Star review more than ninety days after the First District Court of Appeal denied rehearing. Were B.J.F. correct, The Florida Star could never have sought United States Supreme Court review; the paper's appeal would have been untimely the day it became ripe for review. Such a result could never have been intended by this Court, the United States Supreme Court, or the people of Florida when they voted to adopt the 1980 amendment to the Florida Constitution.

the fact that, on some occasions, this Court agrees to review a case on the merits, but after briefing or argument determines that review was improvidently granted.

But the difficulties facing a litigant in The Florida Star's posture pale compared to the difficulties such a rule would cause this Court. Not only would the rule suggested by B.J.F. needlessly increase the workload of this Court, it would have the corollary effect of potentially depriving this Court of the opportunity to review significant legal issues. Thus, the number of petitions for review filed in this Court and the United States Supreme Court for purely protective purposes will increase, as will the number of certified jurisdictional questions akin to the one now before this Court. As a result, the Court's valuable time will be disproportionately devoted to jurisdictional issues. At the same time, important cases, worthy and demanding of this Court's review, may bypass the Court as litigants evaluating their cases decide that seeking Florida Supreme Court review is too risky.

Perhaps more importantly, the rule suggested by B.J.F. would invite unwanted and undesirable intrusion into this Court's inner processes. Typically, this Court does not explain why review is granted or denied. Indeed, one purpose of the 1980 amendment was to relieve the Court of this chore. See 1980 Reform, supra, at 198. Thus, according to

the Court's Manual of Internal Operating Procedures, the Justices vote only to grant review or deny it; they do not write an opinion stating the reasons. §II(A)(1)(a), Manual of Internal Operating Procedures of the Supreme Court of Florida. Were B.J.F. correct, the Court would be forced to fundamentally change its own decision-making process. The amici therefore urge this Court to adhere to the "bright-line" definition of its jurisdiction announced in Jenkins and Payne.

II. On At Least One Occasion, This Court Has Refused To Advise A Federal Court Of Its Specific Reasons For Denying Review In A Particular Case.

The rule suggested by B.J.F. would require this Court to explain its reasons for denying review in this case, and likely in future cases. In effect, it would force the Court to prepare opinions on the grant or denial of jurisdiction, which the Court does not now do.

On at least one occasion in recent years, the Court has refused to explain its reasons for denying review when asked to do so by a federal court. In Greene v. Massey, 384 So.2d 24 (Fla. 1980), this Court refused to answer the question certified by the Fifth Circuit Court of Appeals because it would have required the Court to explain the per curiam opinion it had rendered:

> We decline to revisit our original decision in Sosa v. State, 215 So.2d 736, by delving behind the face of the per curiam opinion in an attempt to define more clearly the intent of this Court in that decision. Greene and his codefendant had sought, and were denied, direct review of the decision of the District Court of Appeal, Second District, in their petition for certiorari to this Court. It would not now be appropriate for us to play the role of advocate in second guessing our predecessors in their reasons for denial of the writ. All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965).

Id. at 28 (emphasis added).

Consistent with Greene, this Court should decline B.J.F.'s invitation to revisit the merits of The Florida Star's petition for discretionary review. Instead, the Court should adopt the clear objective definition of the extent of its jurisdiction suggested by Jenkins and Payne, and answer the question of the United States Supreme Court in the affirmative on that basis.

III. Even If This Court Determines That The Answer to the Certified Question Depends on The Merits Of Discretionary Review In this Case, The Certified Question Should Be Answered In the Affirmative.

Even if this Court determines that the answer to the certified question depends on the merits of the discretionary review sought in this case, the certified question should be

answered in the affirmative. Petitioner The Florida Star and the amici asserted three distinct bases of discretionary jurisdiction -- (i) the decision expressly construed the federal Constitution, (ii) the decision expressly declared valid a state statute, and (iii) the decision was in express conflict with decisions of this Court and the other district courts of appeal on at least three issues.[3/] This Court clearly had the discretion to grant review in this case, regardless of whether it ultimately decided to exercise it.

As a preliminary matter, it is necessary to define the contours of the Court's conflict jurisdiction. The Court has defined "express conflict" in several ways:

> This discussion, of the legal principles which the court applied supplies a sufficient bases for a petition for conflict review. It is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict.

Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981). Likewise, the Court has stated:

3/ The amici specifically address only conflict jurisdiction herein. Amici The Miami Herald Publishing Company and The Florida First Amendment Foundation submitted an amicus brief on that issue when this case was previously before this Court. Amici adopt the arguments of petitioner The Florida Star as to the two remaining grounds of jurisdiction. A more extended treatment of all of the jurisdictional arguments may be found in the Jurisdictional Briefs filed with this Court in March, 1987.

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

The decision of the First District Court of Appeal clearly meets these standards. The "legal principles applied" by the First District "within the four corners of the majority opinion" reveal at least three distinct conflicts. First, although the First District purportedly relied on Doe v. Sarasota-Bradenton Television Co., 436 So. 328 (Fla. 2d DCA 1983), its decision is actually in conflict with it. Doe held that a rape victim could not obtain damages for the publication of her name if the publisher obtained his information lawfully, whereas, the First District upheld a liability verdict under similar circumstance.

Second, the First District held that the name of a victim of crime (rape) is "of a private nature." In contrast, the Fifth District has held that "victims of crime" are "newsworthy." Cape Publications, Inc. v. Bridges, 423 So.2d 426 (Fla. 5th DCA 1982).

Finally, the First District permitted B.J.F. to collect damages for an implied cause of action under section 794.03, Florida Statutes, although such recovery clearly

conflicted with the existing tort of invasion of privacy. Such a holding is in express conflict with Florida decisional law holding that no cause of action should be implied under a criminal statute where it will conflict with or undermine an existing civil remedy. See Roger Rankin Enterprises, Inc. v. Green, 433 So.2d 1248 (Fla. 3d DCA 1983); Vance v. Indian Hammock Hunt and Riding Club, 403 So.2d 1367 (Fla. 4th DCA 1981).

As the foregoing brief recapitulation of the arguments of amici makes clear, at the very least, substantial cause existed for The Florida Star to seek review in this Court before proceeding to the United States Supreme Court. The Florida Star should not now be penalized for following the rules governing appellate review. Accordingly, this Court should advise the United States Supreme Court that it possessed jurisdiction to grant or deny The Florida Star review and permit The Florida Star the opportunity to pursue its appeal in the United States Supreme Court.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative. Additionally, to provide guidance to future appellate advocates and litigants, this Court should advise the United States Supreme Court that:

(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 juris- diction pursuant to Rule 9.120, Fla. R.App.P.;

(ii) Pursuant to the policy announced by this Court in Jenkins v. State, this Court has discretionary jurisdiction to review 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.

Respectfully submitted,

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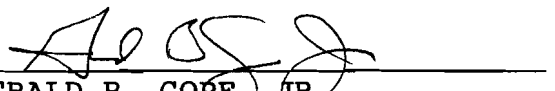
By: 
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CERTIFICATE OF SERVICE

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 15th day of January, 1988.

By: 

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