IN THE SUPREME COURT OF FLORIDA

THE FLORIDA STAR

Appellant,

v.

B.J.F.

Appellee.

FLORIDA SUPREME COURT
CASE NO. 71,615

UNITED STATES SUPREME COURT
CASE NO. 87-329

APPELLANT'S INITIAL BRIEF ON CERTIFIED QUESTION OF LAW FROM THE UNITED STATES SUPREME COURT

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CERTIFIED QUESTION FROM THE SUPREME COURT

This case is now before the Court on a question of Florida law certified by the United States Supreme Court pursuant to Article V, Section 3(b)(6) of the Florida Constitution and Florida Rule of Appellate Procedure 9.150:

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

A review of this Court's jurisdiction and the historical development of its jurisdiction compel an affirmative answer to this question. The merits of this case also compel an affirmative response.

STATEMENT OF FACTS

This action arose from the The Florida Star's publication of the name of a rape victim which was admittedly a deviation from The Star's policy and professional ethics. In its "Police Reports" section, the newspaper restated information contained in the Jacksonville, Florida Sheriff's records. B.J.F. filed a report with the Jacksonville, Florida Sheriff's Department that she had been robbed and raped by an unknown assailant. The Sheriff's Department released its incident report of this tragic crime by placing the report in the department's press room and allowed unrestricted access to it. (Appellant's Jurisdictional Statement at 5, hereinafter cited as "J.S.")

A reporter-trainee for The Florida Star, a small weekly newspaper which primarily serves Jacksonville's black community, copied the information from the report, including B.J.F.'s name, and gave the information to her newspaper. The newspaper has a policy under which it does not publish the names of rape victims. However, another reporter inadvertently failed to delete B.J.F.'s name from the newspaper's republication of the information in the police report. There was no factual dispute that B.J.F.'s name was published in error and in violation of The Star's own policy. (J.S. at 5)

The article appears to be a criminal violation of Section 794.03, Florida Statutes. That statute imposes penal sanctions for any publication of the name of any victim of any sexual offense in any instrument of mass communication. The statute does not impose civil sanctions, nor does it draw a distinction where the identifying information is provided by a government agency. (J.S. at 5-6)

STATEMENT OF THE CASE

B.J.F. brought a civil suit against both the Sheriff of Jacksonville and The Florida Star. B.J.F.'s sued the Sheriff on the grounds that he breached a statutory duty to refrain from causing or allowing to be published B.J.F.'s name in an instrument of mass communication. B.J.F. settled her action against the Sheriff prior to trial. (J.S. at 5-6)

B.J.F.'s remaining claim against The Florida Star was based upon an implied civil cause of action for negligence per

se based upon Section 794.03. B.J.F. did not plead or prove the elements for invasion of privacy, other than the implied, per se cause of action based upon the penal statute. (J.S. at 6)

Prior to trial, the trial court denied The Florida Star's motion to dismiss the complaint on the ground that the theory of recovery violated the First and Fourteenth Amendments of the United States Constitution. At trial The Florida Star moved for a directed verdict on the ground that this civil application of Section 794.03 violates the First Amendment of the United States Constitution. The trial court denied the motion and specifically upheld the constitutionality of the statute, ruling:

> On that argument the court specifically rules that Statute 974.03 (sic) is constitutional. I take into consideration the First Amendment rights of the press, but I also take into consideration the recent decisions about Florida appellate courts which have stated without equivocation that those First Amendment rights must be ballast (sic) to some extent within the realms of propriety against the rights of privacy of the citizens. I do not feel that the statute is overly broad. I think it is restricted to the rather narrow provisions of Section -- of Chapter 794 of the Florida statutes which deals with the rather sensitive area of criminal offenses. Your motion on that ground will be denied. (Trial transcript at 85-86)

(J.S. at 3-4; Appellant's Reply at 9-10, hereinafter cited as Reply)

The Florida Star again challenged the constitutionality of the statute in the First District Court of Appeal, specifically arguing that:

> It is a violation of the 1st and 14th Amendments to hold a newspaper civilly liable for the accurate publication of the name of a rape victim where that name is lawfully obtained from a police report.

(J.S. at 4; Reply at 10-11)

Likewise, Amicus The Florida First Amendment Foundation challenged the constitutionality of Section 794.03 arguing:

> A newspaper cannot be held liable for damages for the inadvertent but truthful publication of the name of an alleged rape victim where: (A) the victim reported the crime to the police and; (B) the police released the information to the newspaper.
>
> A. Absent a state interest of the "highest order" Florida Statute Section 794.03 is unconstitutional when applied to publish the truthful publication of lawfully obtained facts of public concern.
> ...
> B. Section 794 is unconstitutional on its face because it does not provide a method of balancing the asserted state interest in confidentiality against First Amendment rights. (Amicus Initial Brief to the First District Court of Appeal at -i-)

(Reply at 11-12)

The First District Court of Appeal affirmed the trial court's final judgment. That court's one paragraph ruling on the First Amendment issue expressed the opinion that B.J.F.'s name was private, and publication was forbidden as a matter of law under Section 794.03 Florida Statutes. The Florida Star v. B.J.F., 499 So.2d 883 (Fla. 1st DCA 1986). (J.S. at A2-A3)

Subsequently, The Florida Star filed its Notice and Jurisdictional Brief petitioning the Florida Supreme Court for discretionary review (Case No. 70,089), on the grounds that the decision expressly and directly conflicted with decisions of this Court and decisions of other district courts of appeal on the same question of law, that the decision expressly declared Section 794.03 Florida Statutes to be valid, and that the decision expressly construed provisions of both the Florida and federal constitutions. In its unpublished order of May 28, 1987, this Court stated that it had "determined that it should decline

to accept jurisdiction...." (emphasis added) and denied The Florida Star's Petition for Review. (J.S. at A1-A2) See also The Florida Star v. B.J.F., 509 So.2d 1117 (Fla. 1987). Importantly, the Clerk's office did not summarily reject The Florida Star's Jurisdictional Brief, as it does where a party attempts to seek this Court's review of a district court of appeal decision without an opinion.[1/]

Thereafter, on August 26, 1987, The Florida Star appealed to the United States Supreme Court, arguing that the decision on the federal questions conflicts with well-settled First Amendment principles applied by the United States Supreme Court, federal courts and state courts. (J.S. at 6-16) Those courts have clearly prohibited legislatively mandated punishment for the publication of truthful information which was not improperly obtained from a state agency. Accordingly, because Section 794.03 imposes criminal sanctions for the truthful

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[1/] According to the Clerk of the Florida Supreme Court Jurisdictional Briefs filed on PCA's are summarily rejected without being presented to the Justices for consideration. The denial is issued in a form order which reads: "It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). No Motion for Rehearing will be entertained." See also Supreme Court of Florida Manual of Internal Operating Procedures Section II.A.1.(a) ("When a notice 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.) See also England and Williams, Florida Appellate Reform One Year Later 9 Fla. State. L. Rev. 221, 237 (1981) ("[T]he supreme court's Manual of Internal Operating Procedures has been amended to indicate that the Clerk's office will automatically dismiss requests for discretionary review where the district court has not written an opinion in the case.")

publication of information, even where that information is provided by a state agency, the statute is clearly unconstitutional. Therefore, the implied cause of action for strict liability based upon the unconstitutional statute cannot be stand.

In response, Appellee filed a Motion to Dismiss The Florida Star's Appeal or Affirm the First District Court of Appeal's decision in the United States Supreme Court. (Appellee's Motion to Dismiss or Affirm, hereinafter cited as "MTD") Appellee argued that the judgment of the First District Court of Appeal was that of the highest court in Florida from which a decision could be had, therefore, the appeal was untimely. (MTD at 10-15) Appellee predicated her argument on the fact that the First District Court of Appeal had denied The Florida Star's Motion for Rehearing, Motion for Rehearing En Banc, and Request for Certification of the Case to this Court for further review on January 23, 1987, and argued that The Star should have appealed the First District Court of Appeal's decision to the United States Supreme Court within 90 days of that January 23, 1987 order. However, Appellee did admit that if this Court did possess jurisdiction to review the First District Court of Appeal's decision, then The Florida Star's appeal to the United States Supreme Court is timely. Appellee's grounds for dismissal rest solely upon the theory that this Court did not have jurisdiction "whatsoever" to review the First District Court's decision, therefore, the "highest court" in Florida "in which decision could be had" was the First District Court of Appeal.

(MTD at 11) The unstated implication of Appellee's argument is that this Court denied The Florida Star's petition for discretionary review solely because it lacked jurisdiction, and that this Court did not engage in any judicial act when it determined not to exercise its discretion to accept jurisdiction.

In its Reply to Appellee's motion, The Florida Star argued that the appeal was timely, because The Florida Star was required to seek discretionary review from this Court before presenting the case to the United States Supreme Court. Stratton v. Stratton, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed 142 (1915) (a party must "invoke the exercise of such discretion in order that, upon refusal to do so, there might be no question concerning the right to review in this Court.") When the highest court of a state declines to exercise discretionary authority, the state court judgment which is subject to discretionary review by the higher court then becomes the judgment which is subject to review by the United States Supreme Court. Interstate Circuit Inc. v. City of Dallas, 390 U.S.676, 678 n.1, 88 S.Ct. 1298, 1300 n.1, 20 L.Ed 2d 225, 228 n.1 (1968). However, in that circumstance, the 90-day time limitation in which to seek review in the United States Supreme Court runs from the date of the refusal to grant review by the highest court, not the date of the lower court judgment. American Railway Express Co. v. Levee, 263 U.S. 19, 20-21, 44 S.Ct. 11, 12-13, 68 L.Ed 140, 142-143 (1923). (Reply at 2-3) The Florida Star's Reply also set forth the grounds upon which The Florida Star had sought discretionary review in this Court. The Star explained that the Florida Supreme Court had

jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and could have exercised its discretion to review the First District Court of Appeal judgment had it chosen to do so. (Reply at 4-9)

Thereafter, the United States Supreme Court issued its order in which it certified a question to this Court, inquiring whether under Florida law this Court did have jurisdiction to review the First District Court of Appeal decision. The United States Supreme Court retained jurisdiction over the appeal pending this Court's answer of the certified question.

SUMMARY OF ARGUMENT

This Court obtained jurisdiction to determine whether to grant discretionary review of the First District's decision upon the filing of the notice of intent to seek discretionary review. Thereafter, this Court had the power to determine whether it had jurisdiction under Article V, Section 3(b)(3) and whether it chose to exercise its discretion to review the case.

The legislative history of the 1980 constitutional amendment reveals that the underlying intent of the amendment was to eliminate this Court's jurisdiction over PCAs and overrule Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965)

Clearly, this Court cannot and does not accept jurisdiction and grant discretionary review in all cases in which jurisdiction is present. A ruling that this Court's denial of a petition for discretionary review is a substantive ruling on the merits of jurisdiction will create uncertainty for litigants, overburden the court system, and operate to deny Appellant United States Supreme Court review where it was available to other parties under the same procedural circumstances.

Appellant did provide this Court with valid reasons upon which it could have chosen to exercise its discretion under Article V, Section 3(b)(3) and review the First District Court of Appeal decision. This Court should answer the certified question of law from the United States Supreme Court in the affirmative.

ARGUMENT

I. THIS COURT HAD JURISDICTION TO DETERMINE WHETHER TO GRANT DISCRETIONARY REVIEW UNDER ARTICLE V, SECTION 3(b)(3)

The Florida Supreme Court's May 28, 1987 determination that it should decline to accept jurisdiction to review this case was clearly a valid judicial act which this Court was empowered to engage in under Article V, Section 3(b)(3) of the Florida Constitution. If Appellee's argument that this Court did not have jurisdiction is correct, then the logical conclusion is that the Court did not have the power to issue its order denying The Florida Star's petition for discretionary review because jurisdiction never vested. This analysis is totally contrary to appellate principles as established in cases decided by this Court and the district courts of appeal.

The filing of a notice of appeal or a notice of intent to seek discretionary review over a case vests jurisdiction in the reviewing court. See Florida Rule of Appellate Procedure 9.120(b); Lelekis v. Liler, 240 So.2d 478 (Fla. 1970); Payne v. State, 493 So.2d 1104 (Fla. 1st DCA 1986), approved and remanded on other grounds, 498 So.2d 413 (Fla. 1986). In Payne, the First District explicitly rejected appellant's argument that the Florida Supreme Court does not acquire jurisdiction over a case until it determines to review the case on the merits. The First District specifically considered an order the trial court entered after the appellant had filed his notice to seek discretionary

review from this Court, and ruled that once the prescribed notice is filed, jurisdiction vests in this Court.

The axiom that every Court has jurisdiction to determine its own jurisdiction is an elemental principle of American jurisprudence which Florida courts have long recognized. State ex rel B.F.Goodrich Co. v. Trammell, 140 Fla. 500, 192 So. 175 (Fla. 1939); Curtis v. Albritton, 101 Fla. 853, 132 So. 677 (Fla. 1931); Al-Fassi v. Al-Fassi, 433 So.2d 664, 665 n1 (Fla. 3rd DCA 1983), ("[I]t is elemental in American jurisprudence...that a court has jurisdiction to determine its own jurisdiction...."); Department of Business Regulations, Division of Alcoholic Beverages and Tobacco v. Provende Inc., 399 So.2d 1038, 1041 (Fla. 3d DCA 1981) ("[E]very court has jurisdiction to hear and determine the question of its own jurisdiction."); Allbright v. Hanft, 333 So.2d 112, 114 (Fla. 2d DCA 1976) ("[The] court did have jurisdiction to decide whether it had jurisdiction....").

Likewise, this Court has specifically ruled that this principle applies where it is faced with a decision regarding its own limited jurisdiction. Sun Insurance Co. v. Boyd, 105 So.2d 574 (Fla. 1958). In that case, this Court denied a petition for review because it lacked jurisdiction under the Florida constitution. However, this Court awarded an attorney's fee to the Workers' Compensation claimant who had successfully resisted his opponent's application for Florida Supreme Court review, stating:

> Obviously when this Court makes a determination that the conditions essential to its exercise of

> jurisdiction under the Constitution do or do not exist, it thereby exercises an inherent power or jurisdiction...[C]ounsel is not in fact contending for an award of fees for services rendered in a proceeding over which the court has no jurisdiction - but rather for services in connection with obtaining a determination of the preliminary issue which the Court certainly had jurisdiction to decide.

Id. at 575. (emphasis added)

When The Florida Star filed its notice of intent to seek discretionary review, this Court was vested with jurisdiction to determine whether it would exercise its discretion to hear the case on the merits.

II. THE LEGISLATIVE HISTORY OF THE 1980 CONSTITUTIONAL AMENDMENT REVEALS THE INTENT TO ELIMINATE FLORIDA SUPREME COURT JURISDICTION ONLY OVER THOSE DISTRICT COURT OF APPEAL DECISIONS WHICH ARE NOT ACCOMPANIED BY AN OPINION

A comprehensive history of the 1980 constitutional amendment and its subsequent public enactment is set forth in England, Hunter and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147 (Winter 1980). The authors maintain that the most important purposes of the 1980 amendment was to overrule Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), and eliminate supreme court review of district court of appeal per curiam affirmed opinions:

> During discussions which led to the adoption of the 1980 provision, it was estimated that 25 to 35 percent of the pre-amendment discretionary petitions for conflict review arose from cases in which the district courts had written no decision. The elimination of these cases from the supreme court docket will save

> judicial and administrative labor in the court in the processing and review of those matters. It may be expected that the court will amend the appellate rules to alter the format and size of jurisdictional briefs in conflict cases, and amend its manual of internal procedures to state that attempts to file based on alleged conflict found in district court decisions without opinions will be returned to the petitioning attorney by the clerk's office, without being seen by any justice or his staff.

Id. at 191. (footnotes omitted)

Likewise, in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court reviewed the newly enacted amendment in a case in which the petitioner attempted to invoke certiorari review of a per curiam affirmed decision of the Fourth District Court of Appeal on the grounds of conflict. The Court's examination of whether the decision provided the Court with grounds to exercise its jurisdiction began with the premise that the 1980 constitutional amendment must be viewed in light of the historical development of the decisional law at the time of its adoption and the intent of the framers and adopters.

Jenkins noted that the 1956 amendment to the Florida Constitution, which created the District Courts of Appeal, was intended to assure that most district court of appeal decisions would be final and absolute. In theory, the Florida Supreme Court was to function as a supervisory body, and would exercise its appellate power where essential to settle issues of public importance and perserve uniformity of principle and practice. Within the first years following the 1956 amendment, the court would not review a district court of appeal decision affirmed per curiam without opinion, except in cases of conflict resulting in

injustice to a litigant. See Lake v. Lake, 103 So.2d 639 (Fla. 1958).

Subsequently, in Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), this Court decided that it did have the jurisdictional power to review district court of appeal decisions which were rendered per curiam affirmed without an opinion, if the Florida Supreme Court could discern a conflict with another district court of appeal decision from the "record proper." By the time Foley was decided, this Court had already accepted conflict certiorari jurisdiction in cases where there was a per curiam affirmed majority decision without an opinion. Huguley v. Hall, 157 So.2d 417 (Fla. 1963).

Due to the ever-burgeoning caseload, in the 1970's members of this Court once again questioned the advisability of reviewing per curiam affirmed decisions where there was either no opinion or only a dissenting opinion. See Florida Greyhound Owners and Breeders Assoc. Inc. v. West Flagler Associates, Ltd., 347 So.2d 408 (Fla. 1977). Justice England specifically urged that the Court recede from Foley. Id. at 411.

In November of 1979, this Court proposed an amendment to Article V, Section 3 of the Florida Constitution to limit its jurisdiction because of the extreme case overload:

> [t]his Court [represented to the legislature and the public] that one of the intents and effects of the revision of Section 3(b)(3) was to eliminate the jurisdiction of the Supreme Court to review for conflict purposes per curiam decisions of the District Courts of Appeal rendered without opinion, regardless of the existence of a concurring or dissenting opinion. These same representations were made consistently to the public at large proceeding the ballot on the proposed amendment. There can be little

> doubt that the electorate was informed as to this matter, because opponents of the amendment broadcast from one end of the state to the other that access to the Supreme Court was being "cut off", and that the District Court of Appeal would be the only and final courts of appeal in this state. With regard to review by conflict certiorari of per curiam decisions rendered without any opinion, they were absolutely correct."

Jenkins at 1359. (emphasis added)

Jenkins then stated that under Section 3(b)(3), as amended in 1980, the Court may only review a decision of the district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or the Supreme Court on the same question of law. Furthermore, the Court also ruled that a dissenting or concurring opinion cannot support jurisdiction under 3(b)(3) because such opinions do not constitute decisions of the district courts of appeal.

In Chief Justice England's special concurrence in Jenkins, he noted that the Appellate Structure Commission which analyzed the Florida Supreme Court's jurisdiction demonstrated that the problems within the Supreme Court were not attributable to the court's liberal acceptance of cases for review, but rather from mandatory jurisdiction and from the review of PCA's under the Foley doctrine. At that time, the Florida Supreme Court was granting only less than 5% of the discretionary petitions presented to it. Jenkins at 1360.

In his Jenkins concurrence, Chief Justice England reviewed the procedure by which the amendment was enacted. After meetings of Justice Sundberg and a Florida Bar committee, the committee and Justice Sundberg drafted a statement of agreed principles. The proposal included the retention of discretionary

review of written opinions of district courts in which attorneys would be free to invoke discretionary review by filing a petition "asserting decisional conflict."

The Senate adopted the amendment which was submitted on November 28, 1979, and the amendment was also adopted by the House. From November 28, 1979 to March 11, 1980 there were intense efforts to develop public support for the amendment. Proponents advanced two principal grounds in favor of the amendment: that it would eliminate delay in the Supreme Court; and it would also reduce the cost of litigation by reducing the number of multiple appeals and make district court decisions final in most matters. Id. 1363.

At this stage, there was opposition to the amendment by some attorneys who raised several criticisms including that the amendment would cut off or limit access to the supreme court for resolution of First Amendment cases, that general access to this Court would be curtailed, that district court judges would be given the power to prevent review of their decisions by the Supreme Court by issuing a PCA, and that the amendment was unnecessary because the case load was in fact diminishing. Despite these criticisms, the amendment obtained widespread editorial endorsement by most major daily newspapers in Florida. Jenkins at 1363. The amendment passed with 60% of voter approval on March 11, 1980.

In summarizing the enactment of the 1980 amendment, Chief Justice England stated that its history clearly revealed

> [T]he public debate and informational literature make abundantly clear that the voters were asked to approve

> an appellate court structure...[in which there is] finality of decisions in the district courts of appeal, with further review by the supreme court to be accepted, within the confines of its structural review, based on the statewide importance of legal issues and the relative availability of the Court's time to resolve cases promptly.

Jenkins at 1363.

Clearly, the 1980 amendment has provided this Court with enormous power to decide whether to exercise its broad discretion to to accept cases under Article V, Section 3(b)(3). Obviously, this Court does not accept jurisdiction in all those cases in which jurisdiction exists for it to do so. For example, according to the Clerk of the Florida Supreme Court, in 1987 this Court was presented with 605 petitions asserting conflict, 21 petitions asserting a declaration of statutory validity, 25 petitions asserting constitutional construction, and 13 petitions asserting that a decision expressly affects a class of constitutional or state officers.[2/] Certainly, this Court could not and did not accept all of those cases in which the power to exercise its discretion was present.

A review of the opinions published during 1987 reveals that this Court issued 66 published opinions in cases where jurisdiction is founded on Article V, Section 3(b)(3). Therefore, based on an annual total of 664 petitions which asserted Article V, Section 3(b)(3) as the jurisdictional basis, this Court accepted only 9.9% for discretionary review. It would

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2/ Statistics provided by Sid White, Clerk of the Florida Supreme Court on January 11 and 13, 1988.

be improper to assume that the other 598 petitions (90.1%) of the cases in which this Court denied discretionary review did not assert a valid jurisdictional basis. The essence of discretionary jurisdiction is that the Court need not automatically accept all cases presenting a jurisdictional basis for doing so. Indeed, under Article V, Section 3(b) subsections (3) through (9), this Court is never required to review any district court of appeal decision. Subsections 3(b)(3) through (b)(9) all contain the phrase "[m]ay review" or "[m]ay issue" in defining the Florida Supreme Court's jurisdiction. As evidenced by this language, this Court obviously has the power to decline review even where there is a valid jurisdictional basis for it.

An examination of Subsections (b)(4) and (5), which grants jurisdiction in those cases where a district court of appeal certified a question, certified conflict, or certified an issue as requiring immediate resolution clearly reveals the breadth of the Florida Supreme Court's discretinary power. Importantly, even in those cases where a district court of appeal invokes Article V, Section 3(b)(4) or (5) as a jurisdictional basis, this Court can decline to review the case. See Dep't of Insurance v. Teachers Insurance Co., 404 So.2d 735, 736-739 (Fla. 1981) (England, J., dissenting):

> Internal control by this Court over its affairs was clearly intended. This is particularly significant when it is recalled that bypass certification demands that we also accelerate the cases on our Court's docket....[w]e must not accept these cases merely because they have been certified by a district court. This provision was specifically designed to guarantee our exercise of discretion...."

Id at 738. Thus, even in cases where the district court of appeal expresses a view that Florida Supreme Court jurisdiction should be exercised, it is within this Court's total discretion to deny review.

No doubt the Court follows internal principles in deciding whether to exercise discretion over a case presenting one of the jurisdictional bases of Article V, Section 3(b)(3). However, litigants should not be required to stake their appellate rights on such uncontrollable and unknown factors as whether the Court has enough time to consider the case. Likewise, litigants should not have to speculate as to whether four justices will consider the case sufficiently important to merit review. In reviewing the legislative history surrounding the enactment of the 1980 amendment which limited the Court's jurisdiction, it is clear that the amendment was not intended to create the uncertainty which Appellee attempts to interject in this case. This Court has jurisdiction to consider review of district court of appeal decisions which are accompanied by a written opinion.

III. ANSWERING THIS CERTIFIED QUESTION TO THE EFFECT THAT THIS COURT'S ORDER DENYING DISCRETIONARY REVIEW IS A SUBSTANTIVE RULING ON THE MERITS OF JURSDICTION WILL CREATE HAVOC IN FLORIDA'S APPELLATE PROCESS

This Court's order which denied The Florida Star's Petition for Discretionary Review only stated that the court had declined "to accept jurisdiction." The order did not give any

further explanation of reasons, such as it does where it denies review of a PCA because the Court is "without jurisdiction." supra at 5 n. 1. Appellee now speculates that this Court decided that it did not have jurisdiction to accept the case under Article V, Section 3(b)(3). This novel construction by the Appellee should not be permitted to defeat The Florida Star's challenge in the United States Supreme Court to the First District Court of Appeal decision on this crucial First Amendment issue.

This Court's acceptance of Appellee's argument would have an ominous effect for any future petitioners who will then be put in the untenable position of having to guess whether this Court will accept review, and forfeiting their rights to seek United States Supreme Court review if their guesses are wrong.

Prior to this case, attorneys could be sure that if a district court of appeal issued a written opinion giving the reasons for its decision, a party could petition this Court for review by asserting the decision met the jurisdictional requirements under Article V, Section 3(b)(3) of the Florida Constitution, with further review by the United States Supreme Court available if this Court declines its discretionary jurisdiction.[3/] If this is no longer true, litigants will be unable to predict with any certainty whether this Court will decide to accept review, or will foreclose United States Supreme

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[3/] See infra at 26-27 for Florida cases reviewed by the United States Supreme Court after this Court denied discretionary review.

Court review by declining to exercise jurisdiction. Attorneys cannot be assured that their own subjective opinions (or even those of the district courts of appeal) that certain cases are of great public importance will correspond with the opinion of four Justices of this Court. Furthermore, if part of this Court's process of whether to accept review of a case is partially based upon the Court's case load at any given time, as was alluded to in Jenkins at 1363, attorneys will be unable to ascertain on a continuing basis whether the Court will be overloaded with petitions for discretionary review which, therefore, theoretically could reduce a litigant's chances of having their case accepted by this Court.

Acceptance of Appellee's construction of this Court's ruling would create havoc within this state's appellate process. It is a well-established principle that a party may not seek review in the United States Supreme Court until that party has totally exhausted all avenues of relief within its own state court system by presenting the case to the highest state court in which review is available. See 28 U.S.C. §1257(2); Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551, 65 S.Ct. 770, 772-773, 89 L.Ed. 1171, 1176-1177 (1945). The obvious rationale for the rule is to ensure that the state court system has full opportunity to consider and rule upon federal questions before such questions are presented to the United States Supreme Court.

The history of this case now reveals that The Florida Star may have unknowingly faced a Hobson's choice regarding the avenues of review available from this First District Court of

Appeal's decision. If this Court gives credence to Appellee's unsupported theory, future litigants will be forced to either make an irrevocable choice between filing in the Florida Supreme Court and the United States Supreme Court, or simultaneously filing in both courts. If a party decides to speculate that this Court will exercise its discretionary authority to review his case, but thereafter the Court decides not to accept jurisdiction, the 90-day time period for seeking review in the United States Supreme Court will almost always have expired, such as in this case.

Another litigant with a nearly identical case on the merits faces this Hobson's choice in Cape Publications, Inc. v. Hitchner, (Case No. 71,554). In Hitchner, the Fifth District Court of Appeal decision was rendered on November 5, 1987. Cape Publications, Inc. v. Hitchner, 12 F.L.W. 2535 (Fla. 5th DCA Nov. 13, 1987). Appellant petitioned this Court for review on December 4, 1987. Petitioner expects it will take at least two months for a determination of whether this Court will accept jurisdiction. If this Court chooses to deny review of the case, under Appellee's theory Petitioner will belatedly discover that it should have appealed to the United States Supreme Court by February 3, 1988 which is 90 days after the district court of appeal decision.

Appellant has identified eight cases since 1980 in which this Court found the case was in "apparent conflict" with another decision, accepted review, but later denied review or dismissed the case for lack of jurisdiction. In Bondurant v. Geeker, 515

So.2d 214 (Fla. 1987), this Court "accepted jurisdiction...based on apparent conflict." Upon closer examination, the Court stated that it did not find express and direct conflict and dismissed the petition for review as improvidently granted.

Likewise, in State v. Hightower, 509 So.2d 1078 (Fla. 1987) the Court "accepted jurisdiction of this case because of apparent conflict" with State v. Lanier, 464 So.2d 1192 (Fla. 1985). However, after closer examination of Hightower in view of the principles in Lanier,
the Court concluded that the decision did not conflict with Lanier and denied review.

Other cases involving a petition dismissed or denied because of the lack of jurisdiction after the Court initially accepted jurisdiction are Wainwright v. Taylor, 476 So.2d 669 (Fla. 1985) (jurisdiction accepted on apparent conflict; petition for review dismissed); State v. Brown, 476 So.2d 660 (Fla. 1985) (jurisdiction accepted on apparent conflict; appearance of conflict resolved, therefore, petition for review dismissed); Bateman v. State, 446 So.2d 97 (Fla. 1984) (jurisdiction accepted because of apparent express and direct conflict; after briefing on the merits and oral argument, no conflict found; petition for review denied on the basis of lack of jurisdiction); Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983) (jurisdiction accepted on apparent conflict; cause distinguishable on its facts, therefore, jurisdiction discharged); and Diners Club, Inc. v. Brachbogel, 395 So.2d 11156 (Fla. 1980) (court entertained

jurisdiction because of apparent conflict; apparent conflict was resolved and writ discharged).

The litigants in these cases no doubt petitioned in the good faith belief that they had a sound jurisdictional basis to do so. This Court accepted jurisdiction to review those cases, but later found that there was no conflict, meaning that there was no jurisdiction. The ultimate failure to find conflict in these cases which led to denial or dismissal of the petitions after briefing on the merits would not operate to bar review of any federal issues those cases may present, because it is obvious that this Court had the jurisdictional power to consider the merits of those cases and thereafter order a denial or dismissal. However, under Appellee's theory, the fact that those litigants relied upon this Court's initial determination that it had jurisdiction, but later learned that the Court had decided the cases did not fulfill the Court's jurisdictional requirements, would terminate the parties' further appellate rights. Under that theory, the subsequent finding by this Court of a lack of jurisdiction would give rise to the same assertion that the litigants should have sought United States Supreme Court review within 90 days of the district court of appeal decisions. This Court should not accept this view of the character and nature of its discretionary jurisdiction. To do so will result in a precedent which creates total uncertainty concerning the fundamental right of parties to seek appellate review.

A. Previous Denials of Discretionary Review by This Court Have Not Operated to Deny Litigants Review in the United States Supreme Court

It is clear that in past cases where parties have asserted they have jurisdiction under Article V, Section 3(b)(3) they have not been barred from seeking further review in the United States Supreme Court after this Court determined not to accept jurisdiction. A good faith legal analysis by attorneys that they can present a colorable jurisdictional argument to this Court which is based upon a district court of appeal decision has not in the past and should not now be viewed as the election of a remedy at which you may subsequently discover you have acted at your peril.

Chandler v. State, 366 So.2d 64 (Fla. 3rd DCA 1978), is a pre-1980 amendment case which is useful to review this argument in the context of Appellee's argument. In Chandler, one of the issues on appeal was whether the admission of television cameras into the courtroom deprived criminal defendants of their right to a fair trial. Upon the affirmance of the Third District Court of Appeal, the defendants asserted appellate jurisdiction and also filed a petition for writ of certiorari. In a per curiam decision of September 27, 1979, this Court ruled that it did not have appellate jurisdiction and that it did not have certiorari jurisdiction. Chandler v. State, 376 So.2d 1157 (Fla. 1979). Thereafter, the defendants docketed an appeal in the United States Supreme Court, which reviewed the appeal and affirmed the case. See, Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed 2d 740 (1981). Importantly, in Chandler, the United States

Supreme Court accepted review of the case, even though it was filed much later than 90 days after the Third District's decision.

Since the 1980 amendment to the Florida Constitution, the United States Supreme Court has accepted three cases in which this Court had previously denied petitions for discretionary review.

In Hayes v. State, 439 So.2d 896 (Fla. 2d DCA 1983), the Second District rendered its order denying Appellant's motion for rehearing on its previous affirmance of his conviction on November 2, 1983. Hayes then petitioned the Florida Supreme Court for discretionary review on the basis of conflict. This Court denied review on March 22, 1984 at 447 So.2d 886 (Fla. 1984). Thereafter, on May 21, 1984, Hayes filed his petition requesting review of the Second District decision in the United States Supreme Court. Hayes v. Florida, 105 S.Ct. 1643 (1985). The filing date in the United States Supreme Court was more than six months after the denial of the Second District's motion for rehearing. Under Appellee's theory, Hayes would not have timely filed his petition in the United States Supreme Court.

Likewise, in Meyers v. State, 432 So.2d 97 (Fla. 4th DCA 1983), the Fourth District denied rehearing on June 15, 1983. This Court denied the petition for review on November 29, 1983. 441 So.2d 633 (Fla. 1983). Thereafter, the United States Supreme Court accepted review on a petition filed January 25, 1984, more than six months after the district court rendered its decision.

Florida v. Meyers, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984).

Lastly, in Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1979), the Third District denied rehearing of its reversal of Royer's conviction on October 20, 1980. This Court denied the state's petition for review on March 18, 1981. 397 So.2d 779 (Fla. 1981). On June 16, 1981, the state filed its petition for writ of certiorari to the United States Supreme Court. That Court accepted jurisdiction and affirmed the Third District's decision. Florida v. Royer, 460 U.S. 491, 103 S.Ct 1319, 75 L.Ed. 2d 229 (1983).

In this case, if this Court accepts appellee's argument, it will now be revealed for the first time that the only method by which a litigant can preserve the right to present his case to the United States Supreme Court on a crucial issue is to simultaneously file a petition for discretionary review in this Court, and a petition for writ of certiorari or an appeal in the United States Supreme Court. Presumably, the United States Supreme Court would not accept review of the case if the petition for discretionary review had not yet been ruled upon by the Florida Supreme Court. Therefore, the United States Supreme Court would in that situation most likely defer ruling upon a request for review until a decision was forthcoming from this Court. If the Florida Supreme Court were to decide that it had jurisdiction and accept review, the United States Supreme Court might keep the request for review pending over a long period of time to await the outcome of this Court's decision, or, in the

alternative, might dismiss the request for review without prejudice to file another request based on the Florida Supreme Court's decision at a later date. Obviously, this would be an expensive procedure for the parties involved, requiring two briefs in two courts at the same time. Furthermore, the United States Supreme Court would be further overburdened by requests for review filed by Florida litigants solely for the purpose of preserving their future right to review in that court should the Florida Supreme Court decide not to review their cases. This cumbersome and uncertain procedure assaults the principles of fairness and of judicial economy.

IV. THIS COURT HAD JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE FLORIDA STAR V. B.J.F., 499 SO.2D 883 (FLA. 1ST DCA 1986).

The Florida Star's jurisdictional brief, served on the Florida Supreme Court on March 2, 1987, clearly set forth the basis under Article V, Section 3(b)(3) upon which this Court could have chosen to accept review of the First District Court of Appeal decision had it wanted to exercise its discretion to do so. The Florida Star alleged the grounds as conflict, express validation of a state statute, and express construction of the Florida and federal constitutions.

A. This Court May Wish to Merely Affirm its Jurisdiction to Conduct Discretionary Review and Avoid Delving Into its Private Deliberative Process.

It may be appropriate for this Court to simply affirm that it had jurisdiction to review and rule upon the Appellant's previous Petition for Discretionary Review in accordance with the foregoing analysis. In Greene v. Massey, 284 So.2d 24, 28 (Fla. 1980), the Florida Supreme Court declined to answer certified questions from the Fifth Circuit to the extent that the certified questions involved "delving behind the face of the per curiam opinion in an attempt to define more clearly the intent of this Court in that decision." Justice Sundberg, writing for a unanimous court, pointed out that "it would not be appropriate 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 law of the case and are...no longer open for discussion or consideration in subsequent proceedings in the case."

While the previous proceeding in Greene was rendered earlier in time than the previous proceeding in this case, two pertinent points are apparent from that decision and relevant now. First, a per curiam decision in Greene was nonetheless an adjudication. It is axiomatic that a court must possess jurisdiction before it may adjudicate a case.

Second and more fundamentally, this Court resisted the process of delving into its private deliberations, which culminated in a per curiam decision. To do so here would break with this precedent. To answer the United States Supreme Court

in the negative would set a new precedent requiring similar incursions into the deliberative processes of this Court, in the interest of justice, to test whether or not various per curiam decisions do or do not spell the end of a litigant's right to appellate review.

B. The Word "Expressly" As Contained Within Article V, Section 3(b)(3) Has Been Construed By This Court As Requiring District Court Of Appeal Decisions To Be Accompanied By An Opinion.

In its Motion to Dismiss Appellant's United States Supreme Court appeal, Appellee cited district court of appeal decisions which were not accompanied by an opinion to support the argument that this Court's jurisdiction depends "solely upon the language selected by the district court and expressed on the face of the decision... ." Since the 1980 constitutional amendment there have been few cases which have specifically discussed this Court's exercise of jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution. Most of these decisions have considered or commented upon the construction of the term "expressly" within the context of conflict.

In the Motion to Dismiss or Affirm filed in the United States Supreme Court, Appellee claimed that the term "expressly" prohibited this Court from accepting jurisdiction of this case on the grounds of express validation, and express construction, and limited the determination of conflict to only that decision cited by the First District Court of Appeal. However, Appellee failed to provide the United States Supreme Court with any definition of

the term "expressly" other than to state that it "means precisely what it says."

In reviewing the few cases from this Court in which it has alluded to a definition of this requirement (as previously set forth in Issue II), it is clear that the term "expressly" was added to the constitutional provision merely to ensure that the Florida Supreme Court would review only those decisions of the district courts of appeal which are accompanied by a written opinion. See Jenkins at 1359. Subsequently, this Court's decisions from this Court have construed the term "expressly" within the context of conflict. In Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981), the Court speficially stated "[i]t 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'..." Id. at 1342 (emphasis added). Furthermore, "Discussion...of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review." Id. (emphasis added)

This Court has considered the term "expressly" under Article V, Section 3(b)(3) in only one case not within the context of confict. In School Board of Pinellas County v. District Court of Appeal, 467 So.2d 985 (Fla. 1985), the Court stated that "expressly" meant "within the written district court opinion."

The other cases Appellee cited to the United States Supreme Court do not specifically address the meaning of the term "expressly." See Reaves v. State, 485 So.2d 829, 830 (Fla. 1986)

(dissenting opinion cannot estabish conflict; express and direct conflict means the conflict must appear within the four corners of the majority decision) (emphasis added); Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980) (conflict not established by case cited in per curiam affirmed decision.

Under Article V, Section 3(b)(3) of the Florida Constitution, the "expressly" requirement is fulfilled where there is a district court decision accompanied by a written opinion which discusses the legal principles which the court applied. Accord, Florida v. Rodriguez, 469 U.S. 1, n.4 (1984) (a Florida district court of appeals decision does not "expressly" decide a constitutional question...where the decision was rendered "without a statement of reasons.") (Stevens, J., dissenting). This definition of "expressly" is clearly applicable to cases which allege express validation of a statute, express construction of a constitutional provision, and express and direct conflict. Significantly, three of the four cases Appellee cited to support its argument were cases which considered jurisdiction on the ground of conflict. See supra Reaves; Dodi; Jenkins.

In this case, the district court rejected Appellant's constitutional challenge to Section 794.03 in a decision which was accompanied by a written opinion which expressly validated Section 794.03 and thereby necessarily construed a provision of the federal and state constitutions.

The same principles apply regarding the "expressly" requirement within the context of "express and direct confict"

with another district court of appeal or the Supreme Court on the same question of law. Therefore, Appellant and Amici were not limited and did not limit their jurisdictional argument to Doe, which was the only case cited by the district court. Accord, Ford Motor Co., 401 So.2d at 1342. As previously argued, Appellant was entitled to allege and did allege express and direct conflict between the First District Court's decision and that rendered in Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.), cert. denied, 459 U.S. 865 (1982) and Doe v. Sarasota-Bradenton Florida Television Company, Inc., 436 So.2d 328 (Fla. 2d DCA 1983).

A review of recent cases demonstrates the extremely broad discretionary power which this Court has and sometimes exercises by accepting jurisdiction based upon conflict. In one case, the court found conflict based upon a footnote in one of their previous decisions. White Construction Co. Inc. v. DuPont, 455 So.2d 1026, 1028-1029 (Fla. 1984). Likewise, the Court has also accepted jurisdiction "because the court below misapplied controlling case law to the facts of the case..." State v. Stacey, 482 So.2d 1350 (Fla. 1985). The conflict between this case and Doe and Gardner was apparent "because the court below misapplied controlling case law to the facts of the case." Stacey at 1350.

As in Stacey, this Court had the constitutional power to accept jurisdiction under Article V, Section 3(b)(3) on the basis that the First District Court of Appeal misapplied the controlling case law to the facts of this case.

C. This Court Had Conflict Jurisdiction Under Article V, Section 3(b)(3) of the Florida Constitution.

As was previously argued to this Court, the First District's ruling that B.J.F.'s name "was of a private nature and not to be published as a matter of law" expressly and directly conflicts with the Second District's decision in Doe v. Sarasota-Bradenton Florida Television Co., Inc., 436 So.2d 328 (Fla. 2d DCA 1983). In Doe, the Second District recognized that Florida's constitutional right to privacy provision "must yield to the federal constitution's guarantee of press freedom." Id. at 330. The facts in Doe were similar to the facts in this case. In Doe, the plaintiff was a rape victim who had agreed to testify against the alleged perpertrator of the crime as long as the State promised her that her name and photograph would not be published or displayed. Subsequently, a television news crew videotaped her testimony. The television station played the videotape of the victim's testimony on the evening news and identified her by name.

The victim filed a four-count complaint alleging, inter alia, damages for violation of Section 794.03 Florida Statutes (1981). The trial court dismissed that count of the complaint on the basis of Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 329 (1975).

The Second District Court of Appeal affirmed the dismissal of the complaint and agreed that Cox Broadcasting controlled the case. Id. at 329. That court noted that the plaintiff is complaining about publication of information, which though completely accurate, is embarrassing and painful.

However, the Second District also noted that the media defendant obtained its information from a source already open to public view. The Second District specifically noted that in Cox the information came from:

> public documents made available to a reporter....[and] [i]n neither case was there any indication that the press used improper methods to obtain the information disclosed....[T]he state, despite its promise to appellant, never sought to restrain the video taping as it occurred nor objected or otherwise sought to prohibit the video tape report of appellant's trial testimony....[T]he state never made any effort to ensure that appellant's name and picture remain closed to the public. Because the information was readily available to the public...we must therefore affirm on the basis of Cox Broadcasting.

Id. at 330.

In addressing the specific issue of an implied cause of action based upon Section 794.03 Florida Statutes, the Second District ruled that the statute was inapplicable to the facts in Doe. That court also implied that the statute might be applied in certain situations where information was "not yet available" for public inspection. Id. (emphasis supplied).

As in this case, the Second District Court of Appeal's decision in Doe was based upon facts which are not distinguishable for purposes of analysis in this case. Both cases involve the truthful publication of rape victims' names which the press obtained through legal means. Both victims sued on the ground that Section 794.03 created an implied cause of action for its violation. The Doe court declined to apply the statute on the ground that the press obtained its information from a source already open to public view. To the same effect, in Sarasota Herald Tribune v. J.T.J., 502 So.2d 930 (Fla. 2d DCA

1987), the court noted that the newspaper had obtained the name of the minor from a press release issued by the Sheriff's Department. Likewise in this case, B.J.F.'s name was lawfully obtained by The Florida Star from a source already open to public view, that being the pressroom of the Sheriff's department.

The First District's decision also directly and expressly conflicts with this Court's decision in Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.) cert. denied, 459 U.S. 865, 103 S.Ct. 143 (1982). In Gardner, this Court struck down a statute which forbade the publication of the name of a party to a wiretap before the party was indicted or informed against. This Court affirmed the trial court's ruling that a criminal statute prohibiting publication of truthful information was an unconstitutional restriction on the freedom of the press. The Gardner Court rejected the appellant's argument that the confidentiality of government activity justified a restraint upon the press:

> We do not minimize the the asserted state interests which could be affected by the contemplated publication. We believe it is important to recognize that we are not faced in this cause with a narrowly drawn statute closely tailored to interests such as protecting the national security, protecting the safety of undercover officers, preserving an ongoing investigation, protecting the life of a kidnap victim, or insuring a fair trial.

413 So.2d at 12.

As in Gardner, this case deals with a sensitive and tragic issue, but, nevertheless is not a case which deals with "national security" or protecting lives.

Importantly, in Gardner this Court recognized that the statute considered in that case (Section 934.091 Fla. Stat. (1977)) did not even allow for a balancing of the competing state and private interests in confidentiality against First Amendment rights and was, therefore, unconstitutional on its face:

> Clearly, there is no meaningful way under the statute to balance the asserted overriding governmental interest allegedly inherent in the confidentiality sought here with the restraint on the first amendment rights of the appellee newspaper. The statute as written is thus clearly unconstitutional.

413 So.2d at 12.

This Court's holding that the Gardner statute was an unconstitutional prior restraint on the press, was overbroad, and lacked procedural safeguards which would allow a balancing of interests, is in direct conflict with the First District's ruling on Section 794.03. Like the statute in Gardner, Section 794.03 does not provide a method of balancing a crime victim's privacy interest against the media's First Amendment rights, is a prior restraint on the press, is overbroad, and lacks procedural safeguards.

The First District's decision also conflicts with prior case law which has established the rule that publication of truthful information which is contained in reports or concerned with the dissemination of legitimate news items on subjects of public interest precludes actions for violation of the right of privacy and intentional infliction of emotional distress. Jacova v. Southern Radio and Television Co., 83 So.2d 34, 36 (Fla. 1955); Cape Publications, Inc. v. Bridges, 423 So.2d 426, 427

(Fla. 5th DCA), petition for review denied, 431 So.2d 988 (Fla. 1982), cert denied, 464 U.S. 893, 104 S.Ct. 239 (1983). Based upon these cases, this Court did have jurisdiction to grant discretionary review of the First District's decision because it conflicts with other Florida cases which have applied the same rule of law to substantially similar facts.

D. This Court Had Jurisdiction Under Article V, Section (3)(b)(3) of the Florida Constitution Because the First District Court of Appeal's Decision Expressly Declared Section 794.03, Florida Statutes, to be Valid.

The First District's decision was predicated upon the constitutionality of Section 794.03 of the Florida Statutes, a statute which provides for penal sanctions for any publication of the name of any victim of any sexual offense. The statute is "without exception or procedural safeguards." Gardner v. Bradenton Herald, Inc., 413 So.2d 10, 11 (Fla.), cert. denied, 459 U.S. 865, 103 S.Ct. 143 (1982). There is no authority, under either Florida or federal law, which sanctions such unfettered state authority to engage in a prior restraint criminally penalizing the publication of truthful information. Like the statute this Court considered in Gardner, Section 794.03 is clearly unconstitutional. The statute fails to provide for a meaningful method to balance the asserted private and governmental interest in confidentiality with the prior restraint of First Amendment rights of a free press. Gardner, 413 So.2d at 12. As the Second District recognized in Bertens v. Stewart, 453 So.2d 92 (Fla. 2d DCA 1984), objective guidelines and standards must appear expressly in, or be within the realm, of reasonable inference from the language of the law or rule.

No other Florida appellate court has upheld the validity of civil actions under Section 794.03. In Doe v. Sarasota-Bradenton Florida Television, the court recognized that under the dictates of Cox Broadcasting Corp. v. Cohn, 410 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975), the state cannot punish accurate, truthful information properly obtained from a public source. Id. at 329-330. The Doe court therefore held that Section 794.03 was inapplicable to the facts of that case. See also Williams v. New York Times, Inc., 462 So.2d 38 (Fla. 1st DCA 1984), also declining to permit a civil cause of action for truthful publication of public information of a rape victim's name.

By expressly referring to Section 794.03 and affirming the final judgment against The Star in sole reliance upon that statute, the First District clearly and expressly held Section 794.03 to be valid. The First District's consideration and validation of the statute provided this Court with jurisdiction.

E. This Court had Jurisdiction Under Article V, Section 3(b)(3) Because The First District Court of Appeal's Decision Expressly Construed Provisions of the Florida and Federal Constitutions.

Appellant argued that this Court had jurisdiction to review the First District's decision because it expressly construed a provision of the state and federal constitutions, specifically the freedom of the press provisions of Article I, Section 4 of the Florida Constitution and the First and Fourteenth Amendment to the United States Constitution. The First District held "The information published, the rape victim's

name, was of a private nature and not to be published as a matter of law."

Appellant is aware that there is a distinction between a district court of appeal construing the constitution and applying the constitution. However, in this case, Appellant argued that the First District Court's decision was much closer to a construction of the constitutional guarantees of the First Amendment and the right to privacy, than it was a mere application of those concepts.

CONCLUSION

The question certified by the United States Supreme Court must be answered in the affirmative. To do otherwise would introduce uncertainty and injustice to the appellate process, undermine the jurisdiction of this Court, and could expose the deliberative process of this Court to United States Supreme Court inquiry on a case by case basis. This Court had jurisdiction to evaluate its own jurisdiction and could have exercised its discretion in this case. Subsequently, this case is properly and timely before the United States Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foreoing has been furnished by United States Mail to Joel D. Eaton, Esquire, 800 City National Bank Building, 25 West Flagler Street, Miami, Fl 33130, Louis Hubener, Assistant Attorney General, The Capitol, Tallahassee, Fl 32301; Jane E. Kirtley, Esquire, The Reporters Committee for Freedom of the Press, Room 300, 800 18th Street N.W., Washington, D.C. 20006; Robert P. Latham, Esquire, 6000 First Republic Bank Plaza, 901 Main Street, Dallas, Texas 75202; Alan C. Sundberg, Esquire, Carlton, Fields, et al, First Florida Bank Bldg, P.O. Drawer 190, Tallahassee, Fl 32302; Parker D. Thomson, Esquire, 4900 S.E. Financial Center, 200 S. Biscayne Blvd, Miami, Fl 33131; Paul J. Levine, Esquire, Third Floor, 2950 S.W. 27th Avenue, Miami, Fl 33133; Richard Ovelman, Esquire, One Herald plaza, Miami, Fl 33132; Gerald Cope, Greer, Homer, Cope & Bonner, P.A., Southeast Financial Center, Suite 4870, 200 S. Biscayne Blvd, Miami, Fl 33131 on this day of JANUARY, 1988.

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