IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL VINCENT WEIR,
a/k/a Peter Vincent Weir

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 77,091

4th DCA No. 90-2680

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner was the Respondent before the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Seventeenth Judicial Circuit in and for Broward County, Florida. The **Respondent** was the Petitioner before the Fourth District Court of Appeal and the Prosecution in the Circuit Court.

In the brief, the parties will be referred to as they appear before this Honorable Court. The symbol "A" will designate the Appendix attached hereto.

STATEMENT OF THE CASE

Petitioner was arrested and charged with Second Degree Murder on October 30, 1989. (A 1) The Respondent filed an Information charging Petitioner with Second Degree Murder on December 12, 1989. (A 2-3) The Petitioner was declared indigent and the Office of the Public Defender was appointed on December 19, 1989. (A 4) Discovery was conducted and the defense filed a pre-trial Motion In Limine to exclude a dying declaration made by the victim. (A 5-7)

On September 26, 1990, the Wednesday preceding the Monday trial date, the trial court entertained pre-trial motions. (A 8-32) The defense was present with witnesses on the Motion in Limine and requested the trial court to make a pre-trial ruling on the motion. (A 9) The state was prepared to go forward with the officer who took the decedent's statement, but did not have witnesses present for medical testimony. (A 14) The state repeatedly expressed concerns over the convenience of its physician witnesses. (A 13,14,22) The trial court stated that it was willing to decide the Motion in Limine during trial to accommodate the state's witnesses. (A 14) The state then suggested that the physician's testify once, for both the motion and for trial:

> Ms. Bell: It would be ideal, and I know it may be a pipe dream, too, if we can have the physicians in here, hear their testimony and have them testify just once so we could hear it for purposes of this motion, have the jury hear what they have to say and then get them out of here. (A 22)

Defense counsel again requested that the trial court make its ruling pre-trial so that he could prepare his opening statement accordingly. (A 23) The trial court stated that he could not make

his ruling before the Monday trial date as one of the state's doctors was not available until that time. (A 23) The Petitioner agreed to stipulate to a statement of facts in lieu of that physician's testimony. (A 26) That suggestion was not accepted by the Respondent. Moreover, the Assistant State Attorney did not call the witnesses when requested to by the court to inquire about their availability later that week. (A 25-26) The court acknowledged that it could not rule on the motion without testimony and instructed the attorneys to decide how they wanted to handle it. (A 26) The trial court proceeded to take evidence on the motion. The state at no time objected to the motion being bifurcated and ruled on during trial. In fact, the bifurcation was necessary in that the Respondent relied on the testimony of the physicians when arguing the Motion in Limine. (A 72)

On October 1, 1990, the jury was picked and sworn, opening statements were made, and the Respondent began two days of testimony. The trial court found Florida Statute 90.804 (2)(b) unconstitutional and granted the Petitioner's Motion in Limine at the end of the second day of trial, October 2, 1990. (A 73-78) The state then filed a Petition for Writ of Common Law Certiorari with the Fourth District Court of Appeal, seeking reversal of the trial court's mid-trial ruling. An emergency stay was issued and the trial was postponed. (A 81-82) The Fourth District Court of Appeal accepted certiorari jurisdiction and issued the Writ, reversing the trial court. (A 90-92) The case proceeded and the Petitioner was acquitted on October, 1990. (A 89) The Fourth District Court of

Appeal certified the following question as one of great public importance:

> "Whether a District Court of Appeal has certiorari jurisdiction to review an order granting a criminal defendant's Motion in Limine filed prior to trial but not actually ruled on until trial commenced, at the trial judge's direction, where such order poses potentially irreparable harm to the State because appeal or retrial are not available in the event of an acquittal?"

Petitioner timely filed a Notice to Invoke Discretionary Review with this Honorable Court.

ISSUES ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ACCEPTING CERTIORARI JURISDICTION TO DECIDE THE LEGALITY OF A RULING ON PETITIONER'S PRE-TRIAL MOTION IN LIMINE, WHEN SAID RULING WAS RESERVED UNTIL MID-TRIAL AT THE REQUEST OF THE RESPONDENT?

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ISSUING A WRIT OF COMMON LAW CERTIORARI REVERSING THE TRIAL COURT'S ORDER?

SUMMARY OF ARGUMENT

The district court erred in accepting certiorari jurisdiction to review a ruling on a pre-trial motion in limine when said ruling was reserved until mid-trial at the request of the Respondent. The record clearly establishes that the Respondent was not prepared to go forward with Petitioner's motion before trial. In fact, the Respondent, concerned about the convenience of its physician witnesses, requested that it be allowed to call its witnesses once, for both the motion and the trial itself. The Petitioner repeatedly requested the trial court to decide the motion prior to trial. Petitioner offered to stipulate to a factual statement in lieu of the physician's testimony. This offer was declined by the Respondent. At no time did the Respondent object to the bifurcation of the hearing.

Further, there is no precendent to support the district court's jurisdiction. The applicable Florida Statutes, 924.07 and 924.071 (1989), specifically restrict the state's right to appeal to pre-trial situations. Statutes affording the state the right of appeal should be narrowly construed. State v. Jones, 488 So.2d 527 (Fla.1986). In the State v. Pettes, 520 So.2d 250 (Fla.1988) this Honorable Court held that the state may seek review of interlocutory pre-trial orders by common law certiorari. Id. at 253. The First District Court of Appeal allowed review of a mid-trial ruling only after a mistrial was granted. The court reasoned that the case reverted to a pre-trial posture after the mistrial was granted. It is clear that a ruling must be made pre-trial in

order to be subject to a writ of certiorari. Consequently, this Honorable Court should answer the certified question in the negative.

The district court also erred in granting certiorari and reversing the trial court. The trial court's order was founded in basic constitutional precepts. The Court held that the statute impermissibly served to establish religion by allowing the admission of statements whose sole basis of credibility was the belief that a declarant would not die with a lie on his lips. The availability of means to impeach such a declaration is irrelevant as to the constitutionality of their admission. Impeachment merely shifts the burden to the accused to establish the declarant's lack of veracity. Thus, the statute, without a requisite predicate establishing the declarant's belief in the morality of truthfulness, is unconstitutional.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ACCEPTING CERTIORARI JURISDICTION TO DECIDE THE LEGALITY OF A RULING ON PETITIONER'S PRE-TRIAL MOTION IN LIMINE, WHEN SAID RULING WAS POSTPONED UNTIL MID-TRIAL AT THE REQUEST OF THE RESPONDENT.

The Respondent had no direct right of appeal of the non-final pre-trial order at issue sub judice. Florida Statute 924.07 and 924.071 (1989), Rule 9.140 Fla.R.App.P. Consequently, the Respondent filed a Petition for Writ of Certiorari with the district court of appeal. In State v. Pettis, 520 So.2d. 250 (Fla. 1988), this Court held that the state may seek review of interlocutory pre-trial orders by common law certiorari. Id. at 253. *See also,* State v. Brea, 530 So.2d. 924 (Fla. 1988). Thus far, no rule or decision of this Court has extended the state's right to review rulings made during trial.

In State v. Stevens, 563 So.2d. 188 (Fla. 1st DCA 1990), the defendant filed a pre-trial motion to suppress. Id. at 189. A hearing was held, but the court deferred ruling until after the trial commenced. Id. The motion was granted and the defense requested a mistrial. Id. The trial court granted the mistrial and the state appealed the court's order suppressing evidence. Id. The defendant then moved to dismiss the appeal arguing that the district court was without jurisdiction to review a ruling made after the commencement of trial. Id. The court denied the motion holding that the case was technically in a pre-trial posture at the time the state appealed. Id. The court advised that:

> In reaching this conclusion, however, we caution the prosecuting authorities to diligently seek pre-trial rulings on pre-trial motions to suppress, for in the

> absence of a mistrial the right to appellate review will most likely be lost where a ruling is deferred. Id. at 190.

The dissent argued that the court was without jurisdiction on the ground that the order sought to be reviewed was not entered pre-trial. Id. Judge Ervin opined:

> "If the trial court had refused to dispose of the motion to suppress before trial, over the state's objection, certiorari might be the appropriate remedy. Given the fact, however, that the state apparently acquiesced in the court's decision to defer ruling on the defendant's motion to suppress until trial, the court's order is obviously not the type of order to which the extraordinary writ should be extended for the simple reason that there has been no 'violation of a clearly established principle of law resulting in a miscarriage of justice.'" (cite omitted.) Id. at 191.

The "clearly established principle of law" referred to by Judge Ervin is the requirement that an appeal of an order suppressing evidence must be filed pre-trial. Rule 9.140 (c)(b) Fla. R.App.P. a court's decision to defer ruling over the state's objection prevents the state from exercising its right to appeal and violates a "clearly established principle of law." Thus, certiorari may lie. It is important to note that statutes that afford the state the right to appeal in criminal cases should be narrowly construed. State v. Jones, 488 So.2d 527 (Fla. 1986). The same rule should apply to case law extending the right of appeal. Therefore, Stevens, should be limited to its facts.

In its opinion, sub judice, the Fourth District Court of Appeal stated that the "trial court unilaterally decided to defer ruling on the motion filed prior to trial until it could hear further evidence." (A 90) The court found that this decision by

the trial court should not serve to divest the state of its right to seek certiorari review. This is the pivotal factual conclusion in the lower court's opinion. However, this finding is clearly erroneous in light of the record. As stated above, the Respondent was not prepared for the motion, set five days before trial, in that it did not have medical witnesses present. (A 14) Further, the Assistant State Attorney repeatedly expressed concern over inconveniencing the physician witnesses. Respondent even requested the trial court to allow the physicians to testify one time, for both the motion and the trial. (A 22) Respondent ignored the Petitioner's offer to stipulate to a statement of facts in lieu of the physicians' testimony. (A 26) It is apparent that the Respondent not only failed to object to the court deferring its ruling, but requested the postponement. The Respondent should not then have been allowed to seek a remedy available only for pre-trial review.

Additionally, the lower court justified its departure from the long-established avenues of review by stating that the trial court's order caused irreparable harm to the Respondent. (A 90) However, the court was without jurisdiction to make this finding. Consequently, the court opens the door to deciding substantive issues before deciding whether it has jurisdiction to consider those issues. This is obviously a dangerous precedent. The lower courts decision opens a floodgate that will effectively hinder the timely resolution of ongoing trials. The decision is a veritable "pandora's box" which will serve to disrupt the orderly conduct of

trials and inundate the district courts with petitions proclaiming unfair treatment by trial courts. In Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Co., 101 So.2d. 411 (Fla. 2d DCA 1958), the district court recognized that "in the orderly process for the administration of justice appellate courts should cautiously avoid intrusion and encroachment upon the trial jurisdiction of the circuit court. It is not the function of an appellate court to direct the trial judge in the conduct of the case." Id. at 412. Accordingly, this Honorable Court should answer the certified question in the negative.

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ISSUING A WRIT OF COMMON LAW CERTIORARI REVERSING THE TRIAL COURT'S ORDER

At the onset, Petitioner acknowledges that the district court certified only the jurisdictional question to this Honorable Court. However, it is clearly within the discretion of this Court to address other issues properly raised. Savoie v. State, 422 So.2d. 308 (Fla. 1982). Petitioner respectfully requests this Court to decide whether the district court erred in reversing the trial court's order finding Florida Statute 90.804(2)(b) unconstitutional.

The trial court found the dying declaration exception to the hearsay rule to be unconstitutional in that it violates the precepts of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Specifically, the court held that the statute effectively establishes religion, violates the right of due process and confrontation of witnesses, and, because no confrontation can take place, deprives a defendant effective

assistance of counsel. The court stated:

> "In the absence of a prima facie demonstration by the State that the declarant herein believed in the morality of, and the necessity for, telling the truth - either in court or in the face of impending death - there seems to be no logical basis for receiving into evidence the alleged dying declaration herein. The mere fact of knowledge of impending death does not fill the bill; there must be more before the law can take away from an accused the right to confront one's accuser ... Florida law does not permit the burden of proving innocence to be placed upon the shoulders of an accused. It is the opinion of this Court such is the case when a dying declaration is received into evidence absent predicatory evidence of the reputation of the declarant for either truth and veracity of for religious beliefs." (footnote omitted) (emphasis added) (A 86-87)

The district court's opinion details ways in which a dying declaration may be impeached or discredited. This argument, however, circumvents the constitutional infirmity of the statute. Contrary to the district court's opinion, the issue is not whether the statement can be impeached after it is admitted. The issue is whether its admission violates the precepts of the Constitution. As the trial court pointed out, and the district court recognized, the statute evolved from ecclesiastical foundations. 5 Wigmore on Evidence Sec. 1430-1452. It was believed that a man would not want to meet his "Maker" with a lie on his lips. That belief was later codified in what has come to be called the dying declaration. Such declarations are admitted into evidence without any predicate establishing that the declarant was of the belief that to lie was immoral. Consequently, the burden shifts to the defendant to prove the declarant's lack of veracity. Thus, the statute serves to establish religion by accepting the premise that all men are truthful when faced with death, and therefore, their "Maker". It

further shifts the burden from the state to the defense to discredit this premise.

The trial court's opinion merely finds that the statute, without a prima facie showing by the state that the declarant believed in the morality of telling the truth, is unconstitutional. The trial court afforded the Respondent an opportunity to comply with this predicate. (A 78-79) However, the Respondent could not meet this burden. (A 79) The district court quoted Coatney v. State, 61 Fla. 19. 55 So. 285,286 (1911), for the proposition that the trial court is responsible for determining whether a proper predicate has been laid for a dying declaration. (A 91) Accordingly, the trial court excluded the dying declaration from evidence, finding that "the State is unable to present to this Court any evidence of the attitude of the decedent herein towards life after death, much less the need to speak only the truth as death approaches." (A 85) The trial court determined that the predicate required by law did not sufficiently meet the requisites of the Constitution.

It is clear that the basis for the trial court's order finding the statute unconstitutional is the lack of predicate required before a dying declaration is admitted into evidence. The availability of means for impeachment once the declaration is admitted, is irrelevant to the issue of constitutionality. These avenues of impeachment merely compound the constitutional infirmity of the statute by shifting the burden to the defendant to negate the premise that the declarant spoke the truth in the face of

death. In State v. Cohen, 15 FLW S490 (Fla. Sept. 27, 1990), this Honorable Court found that a similar shifting of the burden to the accused rendered a statute unconstitutional. Sub judice, the defendant is saddled with the burden of affirmatively showing the declarant's lack of veracity, *See*, Carver v. United States, 164 U.S. 694 (1897); Morrison v. State, 42 Fla. 149, 28 So. 97 (1900), or inability to observe the circumstances of his demise. *See*, Jones v. State, 52 Ark. 347, 12 S.W. 704 (1889). Accordingly, the statute cannot pass close constitutional scrutiny.

CONCLUSION

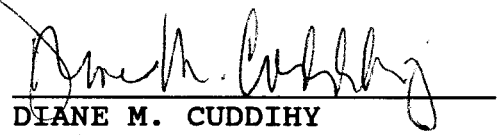
It is clear that the district court erred in granting certiorari jurisdiction to review the legality of a ruling on a pre-trial motion when said ruling was reserved until mid-trial at the request of the Respondent. The applicable statutes limit the state's right of appeal to pre-trial situations. Further, there is no case law to support the jurisdiction of the district court. Both statutes and case law affording the state the right to appeal in criminal cases should be narrowly construed.

The district court's decision opens a "pandora's box" of litigation which will hinder the orderly and timely resolution of ongoing trials while litigants seek mid-trial review of adverse rulings. District courts will be inundated with petitions professing unfair treatment by trial courts. The district court's decision sets a dangerous precedent. Accordingly, this Honorable Court should answer the certified question in the negative.

Furthermore, the district court erred in reversing the trial court's order finding Florida Statute 90.804 (2)(b) unconstitutional. The trial court's order was founded in the basic precepts of the Constitution. The statute clearly serves to establish religion by admitting statements based on the belief that a person would not lie in the face of death for fear of dying in sin. The statute fails to require a predicate to establish the declarant's belief that lying is immoral. Avenues for impeaching a statement after its admission do not remedy the statutes constitutional infirmities, but compound them. The burden is impermissibly shifted to the accused to discredit the statement. Such a shifting of the burden to the defense is clearly unconstitutional. Petitioner respectfully requests that this Honorable Court affirm the trial court's order.

Respectfully submitted,

ALAN H. SCHREIBER
PUBLIC DEFENDER
17TH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was delivered by hand to the Office of the State Attorney, Broward County Courthouse, 201 S.E. 6th Street, Ft. Lauderdale, Fl. 33301, and by U.S. Mail to the Department of Legal Affairs, 111 Georgia Avenue, West Palm Beach, Florida, this 17th day of January, 1991.

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