

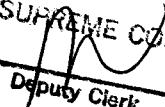
087

IN THE SUPREME COURT OF THE STATE OF FLORIDA

PAUL VINCENT WEIR, )  
 a/k/a Peter Vincent Weir )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )

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Case No. 77,091  
 4th DCA No. 90-2680

**FILED**  
 SID J. WHITE  
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PETITIONER'S REPLY 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 to the Petitioner's Initial Brief. The symbol "R" will refer to the Respondent's Answer Brief.

**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

As discussed in the Petitioner's Initial Brief, 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 precedent 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. Pettis, 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. Further, in State v. Stevens, 563 So.2d 188 (Fla. 1st DCA 1990), 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. As stated above, statutes affording the state the right of appeal should be narrowly construed. It necessarily follows that cases extending this right should also be limited to their facts. 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. Respondent argues that the trial court was precluded from questioning the constitutionality of the statute by the doctrine of stare decisis. However, the statute affects the substantive, as opposed to procedural rights of the accused, and is therefore subject to constitutional attack. 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 Petitioner would rely on the argument and case law set forth in the Petitioner's Initial Brief, adding the following response to Respondent's Answer Brief. The Respondent argues that this Honorable Court should answer the certified question affirmatively in cases where "the interest of justice and judicial economy" would be served. However, the case sub judice does not involve a situation where the court deferred ruling for purposes of judicial economy. Counsel for the state was not prepared to go forward and requested that the court allow the physician witnesses to testify one time, for both the motion and the trial. (A 14,22) The trial court deferred ruling at the suggestion of the state, and without objection from the state. The trial court did not make a unilateral decision in the interest of judicial economy. Counsel for the defense requested that the court rule pre-trial. (A 9,23) Consequently, Respondent's request is inapposite to the instant facts. The Respondent should not be allowed to seek a remedy available only for pre-trial review, after agreeing to the postponement of the ruling.

Furthermore, Respondent's suggestion to allow interlocutory review by the state in cases involving the "interest of justice and judicial economy" would serve to open a "pandora's box" of litigation. Such a holding would be construed broadly, allowing endless numbers of petitions to be filed in the district courts.



The appellate courts would be inundated with petitions proclaiming unfair treatment by trial courts and the lower courts would be hindered in the timely resolution of trials.

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

As stated in Petitioner's Initial Brief, the 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 904.804 (2)(b) unconstitutional.

Respondent argues that the trial court was precluded from declaring Florida Statute 90.804 (b)(2) unconstitutional under the doctrine of stare decisis. Respondent cites State v. Lott, 286 So.2d. 565 (Fla. 1973) for the proposition that a trial court is bound by rules of practice and procedure adopted by this Honorable Court. However, Lott dealt with a trial court's declaration that Florida Rule of Criminal Procedure 3.191 was unconstitutional. The Court stated that the "questioned rule merely provides the procedure through which the constitutional right to speedy trial is enforced in this state and is a proper exercise of this Court's constitutional power to promulgate rules of practice and procedure." Id. at 566. Respondent also relies on State v. Battle, 302 So.2d. 782 (Fla. 3rd DCA 1974) wherein the district court held

that a trial court's denial of the state's motion for experts pursuant to Florida Rule of Criminal Procedure 3.210 (c) was improper. The court stated that the rule was binding on the trial court. Id. at 783.

Florida Statute 90.804 (b) (2) is not procedural in nature. It does not "merely provide the procedure through which" a constitutional right is invoked. The dying declaration exception itself involves the constitutional right against the establishment of religion, the right of confrontation and the right to effective assistance of counsel. The statute involves the substantive rights of an accused and therefore the trial court was not estopped from determining whether it violates basic constitutional guarantees.

Additionally, the Respondent extensively quotes State v. Dwyer, 332 So.2d 333 (Fla. 1976). (R 14) In Dwyer, the trial court had found Florida Statute 877.03 unconstitutional, despite a Florida Supreme Court case directly on point finding the statute constitutional. Id. at 334. The Court held that its ruling finding the statute constitutional was binding on the lower court. The Court stated:

Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise." Id. at 335

In the case at bar, Petitioner was unable to find any case directly on point dealing with the constitutional issues raised in this appeal. Counsel respectfully submits that there are no cases decided by this Honorable Court addressing the constitutionality of

the Florida Statute 90.804 (2)(b). Consequently, the trial court was within its authority to decide the issues raised by Petitioner.

As stated in the Petitioner's Initial Brief, the trial court held that the statute violates the constitutional proscription against the establishment of religion by allowing the admission of statements where their sole basis of credibility is the assumption that the declarant would not meet his Maker with a lie on his lips. The court found that, absent a predicated showing by the state as to the declarant's reputation for truth and veracity, or his religious belief, the statute was unconstitutional. The court also held that the statute impermissibly shifted the burden to the accused to prove that the statements were suspect. These findings by the trial court were not negated in the Respondent's Answer Brief.

#### 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. Furthermore, the trial court was not precluded from addressing the constitutionality of the statute by the doctrine of stare decisis. The statute is substantive, as opposed to procedural. It does not involve the procedure for invoking a constitutional right, but abrogates the rights themselves. Additionally, Petitioner was unable to discover any rulings by this Honorable Court addressing the issues raised in this appeal. Accordingly, Petitioner respectfully requests that this Honorable Court affirm the trial court's order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 Dawn S. Wynn, Esq., Department of Legal Affairs, 111 Georgia Avenue, West Palm Beach, Florida, this 25 day of March, 1991.

*Ama Custody for*

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