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In the Supreme Court of Florida

U'DREKA KYNSHERE ANDREWS,

Appellant,

v. CASE NO. SC17-1034

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEALS
BASED ON A CERTIFIED QUESTION

ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, U'Dreka Andrews, the defendant in the trial court, will be referred to as appellant, the defendant or by her proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a petition for writ of certiorari in a criminal case that was remanded for resentencing in light of *Miller v. Alabama*, 567 U.S. 460 (2012). The First District Court of Appeals denied the petition finding there was no clearly established Florida law regarding *ex parte* hearings on the appointment of experts as required to grant the petition. *Andrews v. State*, 218 So.3d 466 (Fla. 1st DCA 2017), *review granted*, 2017 WL 3484341 (Fla. June 21, 2017). The First District certified the question of:

> whether an indigent defendant who is represented by private counsel *pro bono* is entitled to file motions pertaining to the appointment and costs of experts, mitigation specialists, and investigators *ex parte* and under seal, with service to the justice administrative commission and notice to the state attorney's office, and to have any hearing on such motions *ex parte*, with only the defendant and the commission present.

Andrews, 218 So.3d at 470.

Procedural history

The jury convicted Andrews of first-degree murder, burglary, and robbery. *Andrews v. State*, 975 So. 2d 1135 (Fla. 1st DCA 2008). Andrews was 17 years old at the time of the offense. The trial court originally sentenced her to life imprisonment without parole.

Andrews appealed her conviction and life sentence to the First District Court of Appeals. The First District held that *Miller* did not apply retroactively but certified the question to the Florida Supreme Court as a matter of great public importance. *Andrews v. State*, 142 So.3d 982, 983 (Fla. 1st DCA 2014). The Florida Supreme Court reversed concluding that *Miller* was retroactive. The Florida Supreme Court remanded this case for resentencing in conformity with

chapter 2014-220, Laws of Florida. *Andrews v. State*, 177 So. 3d 1262 (Fla. 2015) (No. SC14–1711).

Prior to the resentencing, on January 12, 2016, *pro bono* defense counsel, Mr. Ufferman and Ms. Frusciante, filed a written motion for an *ex parte* hearing regarding the appointment of experts for the *Miller* juvenile resentencing hearing. (A-3-A-7). The motion requested an *ex parte* determination "to avoid revealing privileged information or work-product to the Office of the State Attorney." (A-4). The motion cited *Ake v. Oklahoma*, 470 U.S. 68 (1985); a federal statute, 18 U.S.C. 3006A(c)(1); and two state trial court orders permitting *ex parte* determinations, *State v. McGill*, CITE (Sept. 10, 2015 - *Miller* resentencing) and *State v. Kiepponger*, * CITE (*Graham* resentencing). (A-9; A-10).

At the January 13, 2016 hearing, in front of Judge Dempsey, defense counsel Ufferman explained that this was a *Miller* resentencing case and that he was requesting public funds for experts for the resentencing. (A-11-A-17; A-12-A-13). Defense counsel requested both an investigator and a psychiatrist. (A-13). Defense counsel also explained that, as he had written in his motion, he sought an *ex parte* determination because he did not "think the State should be involved in the process of the defense having experts." (A-13). Rather, in his view, only the Justice Administrative Commission (JAC) should be involved. (A-13).

The trial court inquired why experts were needed. (A-13). Defense counsel explained that he needed an investigator to develop mitigation. (A-14). Defense counsel also explained that he needed a psychiatrist because "one of the bigger issues is going to be juvenile brain development" and that he needed a psychiatrist "to testify to court about the factors that are set forth in the statute." (A-14).

The prosecutor, Ms. Cappleman, took no position on the motion. (A-15). No date for the resentencing was set. (A-15). The trial court summarily denied the motion for an *ex parte* hearing in a written order. (A-18).

Andrews, represented again by the same pro bono counsel, filed a petition for writ of certiorari in the First District Court of Appeals arguing the hearing on the motion should be *ex parte* because they discussions regarding the type of expert may reveal trial strategy to the prosecutor. She also argued that due process and equal protection required that she be treated the same as defendants who are represented by Public Defender's Office or private counsel, who would not be required to divulge details to the prosecutor regarding the hiring of experts. The First District denied the petition but certified a question. *Andrews v. State*, 218 So.3d 466 (Fla. 1st DCA 2017).

This appeal follows.

SUMMARY OF ARGUMENT

Andrews asserts that the trial court departed from the essential requirements of the law by denying the motion for an *ex parte* hearing regarding the appointment of experts. But the applicable sentencing statute and the rule of court governing hearings on sensitive matters during discovery, as well as the caselaw interpreting the rules of discovery, all support the trial court's ruling. The current rules of court do not contemplate *ex parte* hearings, only in camera hearings. There was no error, much less a departure from the essential requirements of clearly established law. There is no clearly established Florida law regarding the matter of *ex parte* hearings. Thus, the First District properly denied the petition.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S RULING DENYING THE MOTION FOR AN *EX PARTE* HEARING ON THE APPOINTMENT OF EXPERTS VIOLATES THE ESSENTIAL REQUIREMENTS OF CLEARLY ESTABLISHED LAW? (Restated)

Andrews asserts that the trial court departed from the essential requirements of the law by denying the motion for an *ex parte* hearing regarding the appointment of experts. But the applicable sentencing statute and the rule of court governing hearings on sensitive matters during discovery, as well as the caselaw interpreting the rules of discovery, all support the trial court's ruling. The current rules of court do not contemplate *ex parte* hearings, only in camera hearings. There was no error, much less a departure from the essential requirements of clearly established law. There is no clearly established Florida law regarding the matter of *ex parte* hearings. Thus, the First District properly denied the petition.

The trial court's ruling

On January 12, 2016, *pro bono* defense counsel, Mr. Ufferman and Ms. Frusciante, filed a written motion for an *ex parte* hearing regarding the appointment of experts for the *Miller* juvenile resentencing hearing. (A-3-A-7). The motion requested an *ex parte* determination "to avoid revealing privileged information or work-product to the Office of the State Attorney." (A-4). The motion cited *Ake v. Oklahoma*, 470 U.S. 68 (1985); a federal statute, 18 U.S.C. 3006A(c)(1); and two trial courts orders permitting *ex parte* determinations.

At the January 13, 2016 hearing in front of Judge Dempsey, defense counsel Ufferman explained that this was a *Miller* resentencing case and that he was requesting public funds for experts for the resentencing. (A-11-A-17; A-12-A-13).

Defense counsel requested both an investigator and a psychiatrist. (A-13). Defense counsel also explained that, as he had written in his motion, he sought an *ex parte* determination because he did not "think the State should be involved in the process of the defense having experts." (A-13). Rather, in his view, only JAC should be involved. (A-13).

The trial court inquired why experts were needed. (A-13). Defense counsel explained that he needed an investigator to develop mitigation. (A-14). Defense counsel also explained that he needed a psychiatrist because "one of the bigger issues is going to be juvenile brain development" and that he needed a psychiatrist "to testify to court about the factors that are set forth in the statute." (A-14).

The prosecutor, Ms. Cappleman, took no position on the motion. (A-15). No date for the resentencing was set. (A-15). The trial court summarily denied the motion for an *ex parte* hearing in a written order. (A-18).

The First District's decision

The First District denied the petition but certified a question as one of great public importance. *Andrews v. State*, 218 So.3d 466 (Fla. 1st DCA 2017). The First District denied the petition because Andrews "failed to establish that the trial court departed from the essential requirements of the law." *Id.* at 467. The First District explained that to obtain a writ of certiorari, a petitioner must show that the challenged order constitutes a departure from the essential requirements of law, which results in material injury that cannot be remedied on appeal. *Id.* at 468 (citing *Suarez v. Steward Enters.*, 164 So.3d 132, 134 (Fla. 1st DCA 2015)). The First District noted that certiorari relief is "an extremely rare remedy that will be provided in very few cases." *Id.* (citing *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So.3d 450, 455 (Fla. 2012)). A ruling departs from the essential requirements of the law when it constitutes a violation of a clearly

established principle of law, which may derive from controlling case law, rules of court, statutes, or constitutional law, resulting in a miscarriage of justice. *Id.* (citing *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 890 (Fla. 2003)).

But, as the First District noted, a petition for writ of certiorari "cannot be used to create new law." *Id.* (citing *Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So.3d 712, 723 (Fla. 2012)). The First District noted that Andrews cited to "no Florida case law, Florida statute, or Florida rule of court that requires motions for appointment of experts and costs to be conducted on an *ex parte basis*" and their "independent research disclosed none." *Id.* at 470. The First District found the "persuasive," but was "constrained" to deny her petition "because the trial court's order does not violate a clearly established principle of law." Id. at 470.

The First District rejected Andrews' reliance on Florida Rule of Judicial Administration 2.420, because that rule govern the confidentiality of court records, not *ex parte* hearings. *Id.* at 468.

The First District also rejected Andrews' reliance on *Ake v. Oklahoma*, 470 U.S. 68 (1985), because unlike the defendant in *Ake*, Andrews was not denied expert assistance. *Id.* at 470. The trial court appointed the experts the defense requested in this case, just did not require the prosecutor to leave during the hearing. The First District noted that "*Ake* did ***not*** hold that an indigent defendant is entitled to obtain expert assistance *ex parte*." *Id.* (emphasis added).

The First District rejected any analogy to *State v. Hamilton*, 448 So.2d 1007 (Fla. 1984), because *Hamilton* involved a claim of insanity under rule 3.216(a), but that rule did not apply to Andrews's case because there was no claim of insanity at the *Miller* resentencing.

The First District then certified the following question as one of great public importance:

> whether an indigent defendant who is represented by private counsel *pro bono* is entitled to file motions pertaining to the appointment and costs of experts, mitigation specialists, and investigators *ex parte* and under seal, with service to the justice administrative commission and notice to the state attorney's office, and to have any hearing on such motions *ex parte*, with only the defendant and the commission present.

Id. at 470.

Judge Wolf dissented in part. *Andrews*, 218 So.3d at 471 (Wolf, J., dissenting). He believed a defendant represent by *pro bono* counsel was entitled to an *ex parte* hearing on the appointment of experts and investigators. His concern was the improper disclosure of defense strategies and type of experts to the prosecutor. He was concerned that allow the State to attend the hearing was the "classic cat out of the bag material." *Id.* at 471.

Furthermore, he thought there was a equal protection violation because there was no rational basis for treating "two equally situated criminal defendants differently." *Id.* at 471. While indigent defendants represented by *pro bono* counsel who are seeking costs, have to petition the court for the appointment of experts, indigent defendants represented by Public Defenders and Regional Conflict Counsels do not have to petition the court for the appointment of experts. *Id.* at 472. Judge Wolf thought that the prosecutor's only interest in being present at the hearing was financial but believed the State's financial interest could be adequately protected by the Judicial Administration Commission (JAC). *Id.*

Preservation

This issue is preserved. The defense counsel properly filed a motion seeking the same relief in the trial court that he seeks on appeal and properly obtained a ruling. *Baker v. State*, 71 So.3d 802, 814 (Fla. 2011) (explaining to be preserved,

the issue or legal argument must be raised and ruled on by the trial court quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008), and § 924.051(1)(b), (3), Fla. Stat.). The issue is preserved.[1]

Standard of review

If this were a direct appeal after resentencing, the standard of review would be abuse of discretion. The rule of criminal procedure governing hearings on sensitive matters during discovery, Florida rules of criminal procedure rule 3.220(m), provides only for in camera hearings for sensitive matters and it provides that a trial court "may consider the matters contained in the motion in camera." Because the rule use the word "may," the standard of review necessarily is an abuse of discretion. *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So. 2d 189, 194 (Fla. 2003)(stating that "the scope and limitation of discovery is within the broad discretion of the trial court" guided "by the principles of relevancy and practicality" citing *SCI Funeral Servs. of Fla., Inc. v. Light*, 811 So.2d 796, 798 (Fla. 4th DCA 2002)).

But this is not a direct appeal after resentencing. It is a pre-sentencing interlocutory appeal of a non-final order made prior to the resentencing and the standard for reversal in such a situation is even higher. In such a procedural

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[1] While the State took no position on the motion for an *ex parte* hearing, the State, because it was the prevailing party below, may make any argument on appeal in support of the trial court's denial of the motion. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 645 (Fla. 1999) (explaining that if there is "any theory or principle of law which would support the trial court's judgment," the district court is "obliged to affirm that judgment" citing *Chase v. Cowart*, 102 So.2d 147, 150 (Fla. 1958)). A corollary of the tipsy coachman principle is that the normal rule of preservation does not apply to the appellee or the respondent. The State, as respondent in this case, is free to advance any argument for the first time on appeal.

posture, the trial court's order must violate the essential requirements of clearly established law.

Essential requirements of clearly established law

To obtain a writ of certiorari, the petitioner must demonstrate: 1) a departure from the essential requirements of the law; 2) resulting in material injury for the remainder of the case; and 3) that cannot be corrected on postjudgment appeal. *Davidson v. State*, 105 So. 3d 672, 673 (Fla. 1st DCA 2013). A departure from the essential requirements of law does not mean mere legal error. Rather, the concept requires a violation of a clearly established principle of law. *Sullivan v. Jones*, 165 So. 3d 26, 28 (Fla. 1st DCA 2015).

Andrews meets none of the three criteria. The order does not depart from the essential requirements of the law; the order did not result in material injury for the remainder of the case; and the error, if any, in the order can be corrected on postjudgment appeal.

The trial court's order does not violate the essential requirements of clearly established law. The only clearly established state law regarding the matter is the rule of criminal procedure governing discovery and the Florida cases interpreting that rule. Fla. R. Crim. P. 3.220(m); *State v. Calloway*, 937 So. 2d 139 (Fla. 3d DCA 2006) (granting the State's petition for writ of certiorari of an *ex parte* order excluding a defense expert taped interview of the defendant from discovery without hearing from the prosecution). But that rule provides only for in camera hearings for sensitive matters, not *ex parte* hearings. "In camera" hearings means neither party is present, not that one party, the prosecutor, is excluded.

Andrews' petition also fails to meet the "resulting in material injury for the remainder of the case" criteria for certiorari review. Andrews was not harmed by the trial court's order, much less irreparably harmed, because all of the defense

experts' information is discoverable. Opposing counsel admitted during the hearing in the *McGill* case that the defense would have to disclose the expert during discovery and that the prosecutor would be able to depose the defense expert during discovery. (A-37). What difference does it make whether the prosecutor learns the defense expert's name on Monday at the motion hearing or on Tuesday as part of discovery? It is simply a matter of timing. The issue presented to this Court in the petition is solely a matter of timing which necessarily does not violate the essential requirements of the law.

The entire petition totally ignores the fact that Florida has one of the most comprehensive discovery practices in the nation. Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness* , 36 N.C. J. Int'l L. & Com. Reg. 319, 332, n.43 (2011) (noting that North Carolina goes further than any other jurisdiction in authorizing defense discovery from the prosecution but that, in other areas, Florida's provisions provided for even broader discovery). Florida's discovery rules are based upon the ABA Criminal Justice Standards for Discovery. Unlike Florida, most states adopted only limited portions of the ABA's discovery standards. Florida's discovery standards are significantly broader than the federal standards for discovery. 18 U.S.C. § 3500 (the Jencks Act). The petition simply ignores that all of the information regarding the expert, including his opinion of the juvenile's mental health, will shortly have to be disclosed by the defense to the prosecution during discovery. The entire issue presented in petition is solely a matter of timing, which can hardly be said to be a valid basis for this Court to exercise its certiorari authority.

In *Jackson v. State*, 202 So.3d 97 (Fla. 4th DCA 2016), *review denied*, 217 WL 1365235 (Fla. Apr. 13, 2017), the Fourth District recently denied a petition for writ of certiorari from a trial court's order refusing to issue subpoenas duces

tecum *ex parte*. In a first-degree murder prosecution, the defendant filed a motion for an *ex parte* and in camera hearing regarding production of records. Defense counsel sought an *ex parte* and in camera hearing to determine the validity of his discovery request and requested that the trial court seal all records of the hearing and any orders entered as a result of the hearing. He also asked the trial court to order the recipients of the subpoenas to keep their existence confidential. Defense counsel asserted that the hearing and subpoenas duces tecum needed to be *ex parte* "as they would necessitate disclosure of the theory of defense in this case, along with associated work product." The trial court held a *ex parte* hearing but denied the request to issue the subpoenas in secret.

Jackson filed a petition for writ of certiorari in the Fourth District contended that he had a right to have these subpoenas for documents issued secretly to gather information potentially relevant to his defense, without revealing his defense strategy to the prosecution relying on the discovery rule governing work product, rule 3.220(g)(1). He argued, in his petition, that the discovery rules should be interpreted "to prevent the opposing party from benefitting from the investigation of its adversary." The Fourth District explained the "exclusion of work product from discovery in the criminal rules applies to tangible items, not to the inference that may be drawn about a lawyer's theory of a case from a discovery request." The Fourth District noted that the "discovery rules do not preclude speculation about an opponent's theory of the case based on the discovery that has been sought." The Fourth District observed that there was no statute, rule, or Florida case entitling a criminal defendant to *ex parte* and confidential subpoenas.

Jackson acknowledged that there was no Florida law entitling a criminal defendant to *ex parte* and confidential subpoenas, but argued due process; fundamental fairness; and the Sixth Amendment constitutional right of

compulsory process, as well as the state equivalent of Article I, § 16(a), of the Florida Constitution, entitled him to *ex parte* and confidential subpoenas. But the Fourth District retorted that the trial court did not preclude the defendant from applying for a subpoena; rather, the trial court "simply refused to issue the subpoenas secretly." The *Jackson* Court concluded that the defendant had "not been compelled to produce any privileged or protected information."

Jackson also asserted that the trial court's refusal to issue secret subpoenas placed him in an uneven position vis-`a-vis the prosecution because the State had confidential investigative subpoena power. But the Fourth District concluded that the State's confidential investigative subpoena power during an active criminal investigation was "not relevant" because the purpose of an investigative subpoena is to allow the State to obtain the information necessary to determine whether criminal activity has occurred. As the Fourth District observed, being "charged with a crime does not confer upon a defendant the same investigative powers enjoyed by the state in uncovering criminal conduct."

The Fourth District stated that the defendant may ask the trial court to consider the matter in camera. The Fourth District noted that a discovery rule, rule 3.220(m), provided a mechanism for making a showing of materiality without revealing privileged or protected information under which in camera review is permitted. The Fourth District denied the petition concluding the defendant had "not established a departure from the essential requirements of law resulting in any material injury."

Here, the same reasoning as in *Jackson* applies and the result should be the same. As in *Jackson*, rule 3.220(m) provides a mechanism for making a showing without revealing privileged or protected information under which in camera review is permitted but not *ex parte* hearings. And here there is no privileged or protected information that warrants even in camera review.

Here, as in *Jackson*, opposing counsel cites no Florida statute, no Florida rule of court, or any Florida caselaw that requires motions for the appointment of experts be conducted on an *ex parte* basis. Rather, opposing counsel relied on orders from two Florida trial courts. Pet. at 22-23 (citing *State v. McGill*, (Sept. 10, 2015) and *State v. Kiepponger*, CITE (A-9; A-10). But a trial court order is not binding precedent on any judge, including that judge himself, and therefore, cannot be the basis for a "clearly established principle of law." *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case"); *cf. Matusick v. Erie County Water Auth.*, 757 F.3d 31, 61 (2d Cir. 2014)(observing that a district court ruling is not enough to render a right clearly established for purposes of § 1983 civil rights litigation). Furthermore, neither of the trial court orders cite rule 3.220(m) or provide any other legal authority for that matter in their rulings. The two trial court orders are hardly persuasive rulings in their reasoning because they contain no reasoning whatsoever.

Opposing counsel also improperly relies on the language of a federal statute, 18 U.S.C. 3006A(c)(1), requiring *ex parte* hearings instead of the relevant state rule of court. State courts follow state statutes and state rules of court, not federal statutes governing federal capital habeas cases. The federal statute is not valid legal authority to a state when there is no equivalent state statute or state rule of court. The federal statute is totally irrelevant.

Opposing counsel cites numerous other state cases as a basis for reversal in his petition but opposing counsel may not rely on other states' caselaw to show clearly established Florida law. While opposing counsel could rely on other jurisdiction's caselaw in an appeal after the resentencing, he may not rely on other jurisdiction's caselaw to show clearly established Florida law. Moreover, those

cases are not interpreting the applicable Florida rule of court or the applicable Florida statute. Fla. R. Crim. P. 3.220(m); § 921.1401(2), Fla. Stat. (2016). None of the other state cases involves a statute under which the appointment of a defense expert is basically mandatory, as this case does. § 921.1401(2)(c), Fla. Stat. (2016). The other state cases cited in the petition are irrelevant.

Opposing counsel also relies on a United State Supreme Court case and an Eleventh Circuit case. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir 1987) (en banc). But neither case holds that a hearing to appoint a defense expert must be conducted *ex parte*. The majority opinion in *Moore* does not use the phrase "*ex parte*" at all and *Ake* only uses the phrase once in passing in dicta. *Ake*, 470 U.S. at 82. And neither case involves a statute under which the appointment of a defense expert is basically mandatory as this case does. § 921.1401(2)(c), Fla. Stat. (2016).

Because there is no clear Florida law requiring *ex parte* hearings on motion to appointment experts, a trial court does not violate the essential requirements of the law by conducting the hearing with the prosecutor present. Indeed, opposing counsel admitted during the hearing in the *McGill* case that "Florida law is not crystal clear one way or the other on this." (A-35). Therefore, this Court should affirm the First District's denial of the petition.

Merits

Andrews asserts the trial court was required to conduct the hearing on his motion for the appointment of experts without the prosecutor present.

Rules of court

The only rule of court discussing *ex parte* hearings during discovery does not provide for such hearing on those types of motions. The rule of criminal

procedure governing "In Camera and *Ex Parte* Proceedings" during discovery, rule 3.220(m), provides:

> (1) Any person may move for an order denying or regulating disclosure of sensitive matters. The court may consider the matters contained in the motion in camera.
>
> (2) Upon request, the court shall allow the defendant to make an *ex parte* showing of good cause for taking the deposition of a Category B witness

The only *ex parte* hearings envisioned by rule 3.220(m)(2) are regarding Category B witness, not hearings regarding the appointment of experts. And the general rule governing "sensitive matters," rule 3.220(m)(1), provides for in camera hearings, not *ex parte* hearings. "In camera" means the judge alone without either the prosecutor or the defense present, not the exclusion of the prosecutor with defense counsel present.

And the motion for appointment of experts is not a sensitive matter because Andrews ultimately will have to disclose all of the information regarding his defense mental health expert during discovery and the prosecutor will be able to depose that expert prior to the resentencing. *State v. Calloway*, 937 So. 2d 139, 141 (Fla. 3d DCA 2006)(explaining, under the discovery rules, once the defense provided the State with its witness list including its mental health expert, the State was entitled to depose that expert and review materials which the witness relied on in formulating his opinion). Florida's comprehensive discovery rules, which apply to sentencings, mean that all the information that defense counsel collects regarding the defendant's mental health, will have to be disclosed to the prosecution, prior to the resentencing.[2] The appointment is not a "sensitive

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[2] The discovery rules apply to *Miller* sentencings and resentencings. Cf. *Bailey v. State*, 100 So.3d 213, 216 (Fla. 3d DCA 2012) (observing that the reciprocal discovery rules used in criminal proceedings, applies to guilt and penalty phase proceedings citing *Abdool v. State*, 53 So.3d 208, 219-20 (Fla. 2010); *State v. Clark*, 644 So.2d 556, 556 (Fla. 2d DCA 1994); *Sexton v. State*, 643

matter" because the discovery rules require disclosure of all of the expert's information before the *Miller* sentencing anyway.

New juvenile life sentencing statute

In the wake of *Miller v. Alabama*, 567 U.S. 460 (2012), the Florida Legislature enacted chapter 2014–220, Laws of Florida, which has been codified in sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. The sentencing proceeding for a sentence-of-life-imprisonment-for-persons-who-are-under-the-age-of-18-years-at-the-time-of-the-offense statute, § 921.1401(2), Florida Statutes (2016), provides:

> In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court **shall** consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:
>
> (a) The nature and circumstances of the offense committed by the defendant.
> (b) The effect of the crime on the victim's family and on the community.
> (c) **The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense**.
> (d) The defendant's background, including his or her family, home, and community environment.
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
> (f) The extent of the defendant's participation in the offense.
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
> (h) The nature and extent of the defendant's prior criminal history.
> (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
> (j) The possibility of rehabilitating the defendant

So.2d 53, 53 (Fla. 2d DCA 1994); and *Booker v. State*, 634 So.2d 301 (Fla. 5th DCA 1994)). The rule of discovery governing the defendant's obligations to provide the prosecution a list of "all witnesses whom the defendant expects to call as witnesses at the trial or hearing." Fla. R. Crim. P. 3.220(d)(1)(A). Florida courts have interpreted this discovery rule to include sentencing hearings. *State v. Clark*, 644 So.2d 556, 556-57 (Fla. 2d DCA 1994) (relying on *Booker v. State*, 634 So.2d 301, 302 (Fla. 5th DCA 1994)). A *Miller* juvenile sentencing hearing is a hearing to which the rules of discovery apply.

The statute requires that the trial court consider the juvenile's "intellectual capacity, and mental and emotional health at the time of the offense." § 921.1401(2)(c), Fla. Stat. (2016).

Because the statute requires the juvenile's mental health to be considered at a *Miller* sentencing, any prosecutor seeking a life sentence without parole for a juvenile is necessarily going to present an expert to testify on that matter. The statute requires the State to present such evidence to obtain a life sentence. And, likewise, the defense will have to present an expert to show that a life sentence should not be imposed under the statute, as well as to rebut the prosecutor's expert.

No specialized showing required

Opposing counsel mistakenly asserts that a juvenile must make a specialized showing of the need for a mental health expert for a *Miller* sentencing hearing. IB at * citing *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir 1987) (en banc). While that maybe true of a typical defendant in the guilt phase of a normal criminal case, it is not true of juvenile defendant in a *Miller* juvenile sentencing hearing. The juvenile sentencing statute basically mandates the appointment of a mental health expert. There is no specialized showing required for the appointment of a mental health expert under the statute. All a defense counsel needs to do to establish his need for an expert is to quote the new statute, which requires "intellectual capacity," as well as "mental and emotional health," be considered at the sentencing hearing, to the judge. Indeed, that is basically all defense counsel did at the hearing in this case, albeit perfunctorily. Mr. Ufferman told the judge that he needed a psychiatrist "to testify to court about the factors that are set forth in the statute." (A-14). While defense counsel did not quote the language of the statute, § 921.1401(2), which states that a trial court at a juvenile life sentencing

hearing "shall" consider the juvenile's "intellectual capacity, and mental and emotional health at the time of the offense" or even identify which particular statute he was referring to or what factors the statute set forth, defense counsel's core argument was that he needed a mental health expert because the statute had such factors listed in it. The appointment of a defense expert is mandatory under the statute, so there is no real need for any hearing, much less an *ex parte* hearing. No specialized or particularized showing of need for an mental health expert is required for a *Miller* sentencing hearing under the statute.

Because there is no need for a specialized showing, no "confidential work-product information" regarding mental health is required to be disclose at the motion hearing (if counsel even has such information at the time the motion for the appointment of an expert is being made). Instead, defense counsel can use the language of the statute itself to establish a need for a mental health expert rather than revealing any details of his sentencing strategy, which is exactly what Mr. Ufferman did in this case.

Opposing counsel's reliance on *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir 1987) (en banc), as support for the proposition that a showing of a special need for an expert is required, is misplaced. In *Moore*, the Eleventh Circuit in federal habeas review, rejected a claim that a state trial court violated due process denying the defendant a "criminologist or other expert witness." Id. at 709-718. The *Moore* Court discussed both *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and observed that a defendant "must demonstrate something more than a mere possibility of assistance from a requested expert." *Moore*, 809 F.2d at 712. But *Moore* involved a criminal prosecution, not a *Miller* juvenile sentencing hearing. *Moore* was a Georgia prosecution for rape and murder. Moreover, *Moore* did not concern Florida's new juvenile sentencing statute. Nor does *Moore* address the core issue of whether the

hearing must be *ex parte*. Because the Eleventh Circuit in *Moore* does not use the phrase "*ex parte*" at all in its opinion, *Moore* does not apply.

Opposing counsels' reliance on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is also misplaced. Under *Ake*, the defendant, whose mental condition is at issue, is entitled, under the due process clause, to appointment of a mental health expert at state expense. As to *ex parte* hearings, the *Ake* Court wrote:

> A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. When the defendant is able to make an ***ex parte*** threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.

Ake, 470 U.S. at 82-83. But the phrase "*ex parte*" is used only once and in passing by the *Ake* Court. It is not part of the holding of *Ake*. The holding of *Ake* was when the prosecutor put the defendant's mental state at issue either at trial or at sentencing, the defendant is entitled, under due process, to a defense expert. *See also McWilliams v. Dunn*, 137 S. Ct. 1790, 1793-94 (2017) (noting there is a "threshold criteria" to *Ake* of the issue being "seriously in question" and "a significant factor," then a defendant must have "access to a competent psychiatrist" under due process and holding the expert must be a defense expert not a court expert). Moreover, *Ake* concerned insanity and a determination by counsel after consulting with the expert whether such a defense should even be presented. *Ake* has nothing to say on the matter of *ex parte* appointments of experts under Florida's new juvenile sentencing statute, which requires mental health testimony, which is the sole issue in this case.

Any trial court would violate *Ake* by denying a juvenile an expert for a *Miller* sentencing when the statute requires expert testimony and the prosecution is necessarily going to present such evidence in its attempt to obtain a life sentence.

But the trial court did not deny Andrews funds for an expert. Rather, the trial court merely permitted the prosecutor to remain in the courtroom.

This is equally of true of the numerous state cases cited by Andrews in the brief. IB at *. None of those state cases involve a state statute which mandates the appointment of a defense mental health expert, as this case does. § 921.1401(2)(c), Fla. Stat. (2016).

Confidential mental health experts in Florida

Florida law provides for confidential mental health experts in certain situations by explicit rules of court. But, if defense counsel intends to call that mental health expert to testify, those same rules the require the defense to disclose the expert and the expert is subject to being deposed prior to the trial by the prosecution. *State v. Calloway*, 937 So. 2d 139, 141 (Fla. 3d DCA 2006) (explaining under the discovery rules, once the defense provided the State with its witness list including its mental health expert, the State was entitled to depose that expert and review materials which the witness relied on in formulating his opinion).

For example, the rules of criminal procedure provides for a confidential expert for a preliminary determination of insanity, Fla. R. Crim. P. 3.216(a). But, if defense counsel intends to rely on an insanity defense at trial, that expert must be disclosed to the prosecution. Fla. R. Crim. P. 3.216(b).[3] Likewise, if defense

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[3] The rule of criminal procedure governing the "Notice of Intent to Rely on Insanity Defense," rule 3.216(b), provides:

> When in any criminal case it shall be the intention of the defendant to rely on the defense of insanity either at trial or probation or community control violation hearing, no evidence offered by the defendant for the purpose of establishing that defense shall be admitted in the case unless advance notice in writing of the defense

counsel intends to rely on any other type of mental health defense at trial, defense counsel must disclose that expert to the prosecution. Fla. R. Crim. P. Rule 3.216(e).[4] The prosecution will then depose that expert and the State will have all the expert's information.

While there certainly are parallels between the penalty phase of a capital trial and a *Miller* juvenile sentencing hearing, there are difference as well. IB at * (citing and quoting Fla. R. Crim. P. 3.216(a)). For example, in a capital case, often defense counsel hires a confidential mental health expert to determine if the defense is going to present mental mitigation at the penalty phase at all. If the mental health expert does not help the mitigation case, defense counsel decides not present any mental mitigation and no mental mitigation is presented during the penalty phase. In such a case, the defense mental health expert remains confidential. But once defense counsel decides to present mental mitigation in a capital case, the defense mental health expert's name and report are discoverable. Indeed, defense counsel is required to given the prosecution separate notice of the intent to present expert mental mitigation, as well as list the expert as a witness

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shall have been given by the defendant as hereinafter provided.

[4] The rule of criminal procedure governing the "Time for Filing Notice of Intent to Rely on a Mental Health Defense Other than Insanity," rule 3.216(e), provides:

> The defendant shall give notice of intent to rely on any mental health defense other than insanity as soon as a good faith determination has been made to utilize the defense but in no event later than 30 days prior to trial. The notice shall contain a statement of particulars showing the nature of the defense the defendant expects to prove and the names and addresses of the witnesses by whom the defendant expects to prove the defense, insofar as possible. If expert testimony will be presented, the notice shall indicate whether the expert has examined the defendant.

for the penalty phase. Fla. R. Crim. P. 3.202.[5] The prosecutor in the capital case is then free to depose the defense expert.

But none of that logic applies to the defense in a juvenile *Miller* sentencing. In a *Miller* sentencing, unlike those situations, the statute has made the decision for defense counsel. The statute governing proceedings for juveniles convicted of certain crime requires that the trial court consider the juvenile's "intellectual capacity, and mental and emotional health at the time of the offense." § 921.1401(2)(c), Fla. Stat. (2016). The prosecutor, who intends to seek a life sentence without parole for a juvenile, rather than just accept a sentence less than life without parole, is necessarily going to present an expert to testify because the statute requires the State to present such evidence to obtain a life sentence. The defense has little choice but to present a defense mental health

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[5] The rule of criminal procedure governing "Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial," rule 3.202(b), provides:

> Notice of Intent to Present Expert Testimony of Mental Mitigation. When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.

The rule requires that the notice "contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation . . ." Fla. R. Crim. P. 3.202(c). The rule also requires that the defendant who wishes to present mental mitigation be examined by the State's mental health expert. Fla. R. Crim. P. 3.202(d). If the defendant refuses to cooperate with the State's expert, the trial court is authorized to prohibit the defense mental health experts from testifying. Fla. R. Crim. P. 3.202(e)(2).

expert to rebut the State's expert. The defense in a juvenile *Miller* sentencing hearing must present mental mitigation both because the statute requires it and to rebut the prosecutor case for a life sentence. There is no real decision for defense counsel in *Miller* sentencing to make and therefore, there is no need for a confidential mental health expert to help the attorney decided to present mental mitigation in the first place. The juvenile sentencing statute requires that mental mitigation be presented at the hearing. There is no confidential option at a *Miller* sentencing.

Furthermore, the defense in a *Miller* hearing will have to disclose all of this information anyway. Because the statute requires mental health evidence be presented at sentencing, *ex parte* appointment of the expert is a waste of time. There is no point in the appointment of a "confidential" expert in such cases because all of the information is discoverable. In the end, the defense in a juvenile *Miller* hearing will have to disclose all of this information anyway.

Not privileged

Andrews asserts that the hearing must be *ex parte* under the Fifth Amendment. In *Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987), the United States Supreme Court held that the defendant waived his Fifth Amendment rights against self-incrimination when he put forth a mental health defense. *see also Powell v. Texas*, 492 U.S. 680, 684–85 (1989)(holding a defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence). The opinion of the expert is not privileged in a *Miller* juvenile sentencing hearing. All the information is discoverable. *State v. Calloway*, 937 So. 2d 139, 141 (Fla. 3d DCA 2006)(explaining, under the discovery rules, once the defense provided the State with its witness list including its mental health expert, the State was entitled to

depose that expert and review materials which the witness relied on in formulating his opinion).

Nor does the concept of attorney work product apply. As the Fourth District recently observed, the "exclusion of work product from discovery in the criminal rules applies to tangible items, not to the inference that may be drawn about a lawyer's theory of a case from a discovery request." *Jackson v. State*, 202 So.3d 97, 98 (Fla. 4th DCA 2016), *review denied*, 2107 WL 1365235 (Fla. Apr. 13, 2017).

Furthermore, this issue concerns the experts' opinions, not attorneys' opinions. Experts' opinions are not work product, or, at very least, testifying experts' opinions are not work product. *Republic of Ecuador v. Hinchee*, 741 F.3d 1185 (11th Cir. 2013) (holding an expert's personal notes and e-mail communications with other experts were not exempt from disclosure under Rule 26(b)(1), under the work-product doctrine); *Thomas v. State*, 191 So. 3d 500, 501 (Fla. 4th DCA 2016) (finding the work-product doctrine applied to a non-testifying defense expert who conducted a latent fingerprints examination citing *State v. Fitzpatrick*, 118 So.3d 737, 755 n.13 (Fla. 2013)).[6] The information is not privileged.

No tactical advantage

Contrary to opposing counsels' argument, in most cases, there is no tactical advantage that the prosecutor will gain from the prosecutor's presence at the

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[6] The State does not agree with the holding in *Thomas v. State*, 191 So.3d 500, 501 (Fla. 4th DCA 2016). The work product rule does not include experts. rule 3.220(g)(1). It is quite a stretch to include a temporarily retained expert to be a member of a legal support staff. But the correctness of the *Thomas* decision does not matter in this case because the expert in this case would have to testify, so the distinction between testifying and non-testifying experts does not matter.

hearing. At the motion for appointment of experts stage of the case, the expert has not been hired yet. The expert has not examined the defendant or written a report or even collected prior mental health records at that early stage. In most cases, the only information the prosecutor will acquire is the fact that the defense wishes to hire a mental health expert which the prosecutor will already know from the language of the *Miller* statute. The prosecutor may also learn the defense expert's name and area of expertise from the hearing but the prosecutor will shortly acquire the expert's name and area of expertise from discovery. Indeed, the prosecutor will learn the substance of the expert's opinion in detail, during discovery. *State v. Calloway*, 937 So. 2d 139, 141 (Fla. 3d DCA 2006) (explaining, under the discovery rules, once the defense provided the State with its witness list including its mental health expert, the State was entitled to depose that expert and review materials which the witness relied on in formulating his opinion). It is hard to see the any real "tactical advantage" to a busy felony prosecutor from merely knowing the expert's name and area of expertise a little earlier than if the hearing was conducted *ex parte*.

Moreover, this is a resentencing, not a trial, so most of defense counsel "strategy" and thinking regarding the case is already known to the prosecutor from the prior trial. Defense counsel's "strategy" regarding sentencing is already known to the prosecutor from the text of the *Miller* statute and from the two prior sentencings.

The initial brief simply ignores that all of the information regarding the expert, including his opinion of the juvenile's mental health, will shortly have to be disclosed by the defense to the prosecution during discovery. The tactical advantage, if any, which in most cases, will merely consist of knowing the expert's name from the hearing, is simply a matter of timing.

Judge Wolf's concern that allowing the prosecutor to attend the hearing will disclose defense strategies and potential expert witnesses to the prosecutor and was "classic cat out of the bag material." *Andrews*, 218 So.3d at 471 (Wolf, J., dissenting). But that is only true if there is a cat in the bag. In most cases, there is no cat in the bag. Disclosing the name and type of expert discloses nothing about defense strategy in particular case and in most cases as well. It is the rare case where the name of the expert will itself disclose defense strategy and an even rarer case where that defense strategy will not have to be disclosed in much greater and more substantively detail very shortly in discovery.

***Ex parte* hearings in general**

The State has a due process right to be present. *Ex parte* hearings are not the norm for a reason. The criminal justice system is adversarial and prosecutors are essential to that system. As the Supreme Court observed, state and federal government spend vast sums of money on lawyers to prosecute crimes and prosecutors are "essential to protect the public's interest in an orderly society." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *Ex parte* hearings should be the exception, not the rule. The default rule should be that all hearings are attended by the attorneys for both parties.

This Court should permit *ex parte* hearings only if *pro bono* counsel certifies, in the particular case, that the name and type of expert would disclose the defense strategy. Defense counsel should have to certify that in this particular case, informing the prosecutor of the name and type of expert likely to disclose his strategy. In other words, the general rule should be that the prosecutor is present because in many cases, such as this one, there no sentencing strategy that naming the expert would reveal. Opposing counsel relies on hypothetical

regarding a cell tower expert for a reason and that reason is that there is no sentencing strategy that identifying the mental health expert would have revealed in this case. And that is equally true in many if not most cases. The name and type of expert will tell the prosecutor little or nothing about the defense strategy in the vast majority of cases and therefore there no need for any ex parte hearing in most cases. And in the few cases where revealing the information about the expert would actually reveal the defense, counsel can certify to the court that an ex parte hearing is necessary. At the *ex parte* hearing, defense counsel can explain to the court how the name would reveal the strategy and if the judge does not believe counsel's explanation, the judge can continue the hearing and allow the prosecutor to attend.

The State's financial interest

Amicus asserts that the hearing are not really *ex parte* hearing because JAC will be attending the hearing on behalf of the State and can represent the State's financial interest. But that is not completely accurate. The JAC attorney has no knowledge of the case unlike the prosecutor. At the appointment of expert's stage of the case, the prosecutor is the person with the most detailed knowledge of the case. The judge would have little to no independent knowledge of the case at that point and even defense counsel is unlikely to know details of the State's case before discovery. So, the judge cannot rely on the JAC attorney for critical information about the case. For example, for a judge to know whether *Ake* applies and the appointment of an expert is a constitutional matter, the judge must know if the prosecutor intends to present evidence regarding the defendant's mental status. Only the prosecutor can answer that question which means a trial court is literally in the dark about whether the appointment of an expert is matter of constitutional magnitude or whether it is an abuse of discretion issue under state

law. So, the single most important legal question before a trial court when addressing the matter of appointments of experts, the JAC attorney cannot answer. Additionally, the judge cannot rely on the JAC attorney for critical information about how such an expert would fit into the case.

A JAC attorney cannot really fully protect the State's financial interests due to his or her lack of familiarity with the case. For example, if the defense is seeking the appointment of a cell tower expert but the prosecutor does not intend to present cell tower evidence, the appointment of such a defense expert is unnecessary (unless the defense intends to present cell tower testimony as an alibi). The JAC attorney can really only object based on the sheer expense of a particular expert or the sheer number of experts requested. The JAC ability to protect the State's financial interest is very limited due to their limited knowledge of the case. The prosecutor should be presented to fully protect the State's financial interest and to answer the trial court questions regarding the case.

Proposed rule

There is a proposed rule pending before this Court regarding *ex parte* hearings. The Criminal Procedure Rules Committee has proposed a rule that would mandate all hearings on motions for the appointment of experts, investigators and other services be *ex parte*. Proposed rule 3.111(f)(2); rule 3.111(f)(3).

The proposed rule should be amended to contain a certification requirement. Defense counsel should be required to certify in the motion that disclosing the name or type of experts or investigator could reveal the defense strategy and then should be required to explain to the judge at the hearing why he certified the particular case. The rule should also authorize the judge to conduct the hearing

with the prosecutor present if the judge does not agree with defense counsel that there is any real possibility that the defense strategy will be revealed.

The rule as proposed improperly permits *ex parte* hearings in all these types of cases as a matter of course. But *ex parte* hearings should be the exception, not the automatic rule. The proposed rule should be returned to the committee with instructions to amend the proposed rule to contain a certification requirement and language that the trial court may conduct the hearing with the prosecutor present if no defense straegy would be revealed.

Equal Protection

Andrews also asserts that he is being treated differently than defendants represented by a defendant represented by a public defender or regional conflict counsel in violation of equal protection. But this is not really a claim regarding the nature of the hearing. Opposing counsel is asserting that his having to seek authorization from the Court in the first place is the violation of equal protection, not that the hearing including a prosecutor is the violation of equal protection. This is not a claim regarding the *ex parte* nature of the hearing; it is a claim that there should be no hearing. It is an argument that *pro bono* counsel or retained counsel seeking costs should not have to move for costs at all. Instead, presumably, opposing counsel is advocating that he should be permitted to spend any amount of money for experts and then just submit the bill to the JAC.

But the First District did not certify that question. Moreover, a defendants who hire their own experts and can personally pay those experts are not really at issue. Equal protection does not require those defendants that are being represented at public expense to be treated the exact same as those defendants that are being represented at private expense. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (stating that the State is not required "to duplicate the legal arsenal" of that

of privately retained counsel; the State is only required to assure an indigent defendant has "adequate" resources and opportunities). The constitution does not require all defendants be treated exactly alike for all purposes.

And, while a defendant who can afford his own experts would not have to file a motion for the appointment of experts at all, that is a transitory state of affairs. Such a defendant would also have to disclose his privately retained experts' information as part of discovery.

Furthermore, even defendants represented by private attorneys often seek public funds for experts, because they lack the money to pay for both a retained attorney and a mental health expert. The type of representation does not determine whether a motion for the appointment of experts at public expense will be filed. And this case is the perfect example of that - while the two attorneys are representing the defendant in this case *pro bono* - these *pro bono* attorneys are seeking public funds for experts.

And, contrary to opposing counsel's argument, a juvenile defendant represented by a retained or a public defender at a *Miller* sentencing would also be required to disclose any mental health findings of the expert in discovery. All four types of defendants, those represented by private attorneys; those represented by *pro bono* attorneys; those represented by the Public Defender; and those represented by conflict attorneys, will have to disclose their experts and their experts' findings to the prosecution. *Bailey v. State*, 100 So.3d 213, 216 (Fla. 3d DCA 2012) (citing cases). By the end of discovery, all defendants, regardless of the type of representation, are being treated the same. All defendants, who participate in discovery, in time, would have to disclose their experts, including wealthy defendants.

There is a rational basis for treating defendants being represented by *pro bono* or retained counsel but who are seeking funds for costs differently than

defendants being represented by the Public Defender Offices or Regional Conflict Counsel Offices. Defendants who are being represented by pro bono counsel present the rare situation after the creation of the Regional Conflict Offices. The Legislature naturally provides funds for the Public Defender Offices and the Regional Conflict Counsel Offices because those criminal cases are the prototypical cases. The Legislature can foresee those expenses and properly budget for them. Treating rare cases on a case-by-case basis does not violate equal protection. *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1072 (7th Cir. 2013) (observing that a law can be underinclusive or overinclusive without running afoul of the Equal Protection Clause citing *New York Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979)).

The solution of allowing pro bono counsel to spend any amount of money for the expert and just submit the bill to JAC is not workable and, indeed, would create an equal protection problem the other way because the Public Defenders certainly do not have unlimited funds for experts and investigators available to them. Courts are even more deferential when public funds are at issue than the normally highly deferential rational basis review. *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1122 (Fla. 4th DCA 2014) (citing *Guttman v. Khalsa*, 669 F.3d 1101, 1123 (10th Cir. 2012)).

Accordingly, the First District's decision denying the petition should be affirmed.

<u>CONCLUSION</u>

The State respectfully requests that this Honorable Court affirm the District's Court's denial of the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by email to Michael Ufferman, 2022-1 Raymond Diehl Road, Tallahassee, FL, 32308; phone: phone: (850) 386-2345; email: ufferman@uffermanlaw.com; Crystal McBee Frusciante, 11110 West Oakland Park Boulevard Suite 388 Sunrise, FL 33351-6808, email: Crystalmcbeelaw@aol.com; Roseanne Eckert, FIU College of Law, 11200 S.W. 8th Street, RDB 1010, Miami, FL 33199-0001, email: reckert@fiu.edi; and Whitney Untiedt of Akerman, LLP on behalf of the Florida Association of Criminal Defense Lawyers,, Three Brickell City Centre, 98 S.E. 7th Street, Miami, FL 33131-1700; email: whitney.untiedt@akerman.com this 16th day of October, 2017.

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief, which has been typed using Bookman Old Style, 12 point, complies with the font requirement of rule 9.210(a)(2), Fla. R. App. P.

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