IN THE SUPREME COURT OF FLORIDA

WYON DALE CHILDERS,

Petitioner,

Case No. SC06-1346

v.

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee/Cross Appellant in the District Court of Appeal (DCA) will be referenced in this brief as the State. Petitioner, Wyon Dale Childers, the Appellant/Cross Appellee in the DCA and the defendant in the trial court, will be referenced as Petitioner or proper name.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, which can be found at Childers v. State, 31 Fla. L. Weekly D377 (Fla. 1st DCA Feb. 2, 2006)(en banc):

Petitioner, an Escambia County Commissioner, was indicted and convicted of bribery, and unlawful compensation or reward for official behavior, for his involvement with fellow Commissioner Willie Junior regarding the county's purchase of a soccer complex from Joe Elliot. Childers, at D378. Junior entered into a plea agreement with the State in which Junior agreed to testify truthfully regarding Elliot and petitioner's involvement. Id. Elliot was acquitted. Id. After Elliot's trial, Junior provided additional information. Id. The State filed a "Notice of Revocation of Terms of Plea Agreement", but the trial court found that "there has been substantial compliance with the written plea agreement[.]" Id. Petitioner sought to introduce the State's revocation notice and the original indictment, while

excluding the court's order on the revocation notice. Id. at 378-379. The trial court excluded all of the evidence relating to the notice, the Elliot verdict, and the original indictment. The court found the evidence was irrelevant, and "the prejudice would outweigh any probative value." Id. at D379.

The First District applied the right for the wrong reason doctrine, and held that the notice was relevant, but its probative value was substantially outweighed by the danger of unfair prejudice. The First District found that that revocation notice was of limited probative value because the introduction of the trial court's order finding Junior had complied would have substantially reduced the notice's impact. The court also found that because of the other testimony, the notice only served to emphasize facts already in evidence, and petitioner had vigorously cross-examined Junior about the plea agreement, the right to revoke, and Junior's changes in testimony. Id. The First District also found that the notice would have been highly prejudicial as it was similar to admitting an opinion by the State on Junior's character, truthfulness, and credibility. Id. On cross-appeal, the First District found that the trial court had erred by denying Escambia County's claim of restitution.

The First District denied petitioner's motion for rehearing. Childers v. State, 31 Fla. L. Weekly D1764 (Fla. 1st DCA June 28, 2006).

SUMMARY OF ARGUMENT

Petitioner has failed to establish that this Court has discretionary jurisdiction to review the First District's opinion in Childers v. State.

ARGUMENT

ISSUE I

> WHETHER THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE FIRST DISTRICT'S OPINION IN CHILDERS V. STATE, 31 FLA. L. WEEKLY D377 (FLA. 1ST DCA FEB. 2, 2006)? (Restated)

Standard of Review.: Article V, § 3(b)(3)-(4), Florida Constitution, provides that the Florida Supreme Court:

> (3) May review any decision of a district court of appeal that … that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.
>
> (4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance...

This Court's discretionary jurisdiction to review the decisions of the district courts is limited to these areas of review as the District Courts were not intended to be intermediate courts. Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958).

Argument: First, Petitioner seeks discretionary jurisdiction by claiming that the First District's decision is in express and direct conflict with Jones v. State, 846 So.2d 662, 662-663 (Fla. 2d DCA 2003), Sheppard v. State, 753 So.2d 748,748-749 (Fla. 2d DCA 2000), and Sims v. State, 746 So.2d 546, 547 (Fla. 2d DCA 1999), regarding the issue of restitution. The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejecting "inherent" or "implied" conflict). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, at 1359.

In the case at bar, the State had requested restitution arguing that "Escambia County suffered a loss of nearly $1 million when it sold the soccer complex after the commission's purchase." Childers, at D381. "The trial court denied restitution, ruling that Escambia County was not a 'victim' as that term is used in section 775.089, Florida Statutes (2002)." Id. The First District held that "[w]here a governmental entity

incurs financial losses because it is the victim of the defendant's criminal activity, rather than incurring costs relating to investigation, supervision or prosecution, we hold that restitution is recoverable." Id. at D382.

There is no conflict between the First District's decision and the cases cited by petitioner. In Sheppard v. State, the court found it was err to award the Division of Insurance Fraud restitution for its investigative cost, although the State was not precluded from seeking those cost as pursuant to the another statute. In Sims v. State, the court held that State was not a victim and therefore not entitled to $1,022 for the supervision cost of Sims' unsuccessful probation. In Jones v. State, 846 So.2d 662, 662 (Fla. 2d DCA 2003), the court held that the Sheriff's Office was not a victim entitled to receive restitution for investigative cost. In the aforementioned cases, the agencies were not victims of the crime, but instead, the agencies were attempting to obtain restitution for the cost of the investigation, supervision, or prosecution of the offense or offender. The principle of law established in these cases was restitution may not be awarded for these costs. To the contrary, because the First District found that Escambia County had incurred financial losses because it was the victim of the defendant's criminal activity, the principles of law do not conflict, and there is no jurisdiction to review this issue.

Petitioner next claims that the District Court's application of the right for the wrong reason doctrine is expressly in direct conflict with this Court's precedent. Appellant contends that the First District should have reversed when it found that State's Notice to Revoke Witness Junior's plea agreement was relevant, instead of finding that the trial court was nevertheless correct to exclude the evidence on the alternative ground that the danger of unfair prejudice outweighed the probative value as the trial court had not decided that issue.

Appellant overlooks the fact that the First District found that "the trial court's rulings were based upon findings that the excluded evidence was either irrelevant or of insufficient probative value when weighed against the danger of unfair prejudice." Childers, at D380. Thus, the trial court had decided the issue. Secondly, this Court has approved the application of the "right for the wrong reason" doctrine. In Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999) this Court held that "even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling[.]" Id. at 644.

Contrary to petitioner's assertions, the present case does not conflict with this Court's decision in Robertson v. State,

829 So. 2d 901 (Fla. 2002). In Robertson, the Third District found that the trial court had properly admitted Robertson's ex-wife's testimony about a prior incident on the alternative grounds that it was similar fact evidence even though those grounds had never been presented to the trial court. However, the evidence code has certain statutory requirements which must be met to admit similar fact evidence. This Court found that the Third District had misapplied the right for the wrong reason doctrine in that the record did not support an evidentiary basis to admit the evidence when the statutory requirements had not been met. Id. at 908-909. In the case at bar, the First District did not determine that evidence was admissible on a ground for which there was no evidentiary or legal basis or in violation of a statute. Thus, there is no conflict with Robertson.

Petitioner next contends that the district court's power to hear a case en banc presents a question of great public importance. However, the Florida Constitution limits this Court's discretionary jurisdiction to hear only questions certified by the district courts to be of great public importance. Art. V, ' 3(b)(4). The First District did not certify a question. Petitioner further contends that this Court has jurisdiction to determine the District Court's power to hear a case en banc because the decision expressly construes a

provision of the state or federal constitution or expressly affects a class of constitutional or state officers. This Court has stated that "[t]he dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary, (1961 ed. unabr.)." Jenkins v. State, at 1359. The language in the dissenting and concurring opinions are not a part of the decision and may not be used to establish discretionary jurisdiction. Id.

As for petitioner's claim that the First District's decision construes the constitution: "A decision of a district court of appeal is not reviewable under article V, section 3(b)(3) merely because it has the practical effect of construing a provision of the state or federal constitution. Section 3(b)(3) plainly requires a written statement explaining or defining the disputed constitutional language." Padovano, Philip J., Florida Appellate Practice, § 3.8, at 50 (2005 ed.)(footnotes omitted). Miami Herald Publishing Co. v. Brautigam, 121 So. 2d 431, 432 (Fla. 1960)(finding that the Court lacked jurisdiction when the trial court had not construed a controlling provision of the Florida or Federal Constitution.). Likewise, the provision providing for jurisdiction in cases which expressly affects a class of constitutional or state officer does not provide for

jurisdiction in cases in which the decision inherently or impliedly affects a class. "The use of the term "expressly' in section 3(b)(3) plainly requires a written opinion explaining the impact of the decision upon the class of officers in question. Thus, a decision that inherently affects a class of constitutional or state officers without expressing an intention to do so, is not subject to review by the supreme court." Padovano, Philip J., Florida Appellate Practice, § 3.9, at 52 (2005 ed.)(footnotes omitted). This Court stated that "a decision which 'affects a class of constitutional or state officers' must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction, a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974). The majority decision in the case at bar only addressed the merits of the issues the parties raised, and did not discuss its reasons for the en banc review. Childers, at D378n.1. Accordingly, the decision of the court did

not "expressly" construe a provision of the state or federal constitution or expressly affect a class of constitutional or state officers.

Lastly, petitioner contends that this Court has original jurisdiction pursuant to Article V, Section 3(b)(7) of the Florida Constitution which grants this Court the power to issue "all writs necessary to complete the exercise of the court's jurisdiction." This writ "can only be issued to preserve the power of the court to fully and effectively decide cases that have been, or will be, **presented on independent jurisdictional grounds**. For example, the all writs provision of section 3(b)(7) has been used to obtain a stay or injunction to preserve the status quo of a proceeding that is pending in the supreme court **on another jurisdictional basis**." Padovano, Philip J., Florida Appellate Practice, § 3.18, at 37 (2005 ed.)(emphasis added). Accordingly, the all writs provision does not provide this Court with the independent jurisdiction to review the First District's decision. Accordingly, because petitioner has failed to establish an independent basis for which this Court could exercise its discretionary jurisdiction, there is no need to recall and stay the mandate.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Nathan Z. Dershowitz**, Esq., Dershowitz, Eiger & Adelson, P.C. 220 Fifth Avenue, Suite 300, New York, NY 10001, and **Richard G. Lubin**, Esq., Richard G. Lubin, P.A., 1217 S. Flagler Drive, Second Floor, Flagler Plaza, West Palm Beach, Florida 33401, by MAIL on ____ day of July, 2006.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Attorney for State of Florida

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APPENDIX

Ex. A Childers v. State, 31 Fla. L. Weekly D377 (Fla. 1st DCA Feb. 2, 2006)(en banc)

Ex. B Childers v. State, 31 Fla. L. Weekly D1764 (Fla. 1st DCA June 28, 2006)(en banc)