IN THE SUPREME COURT OF FLORIDA

WYON DALE CHILDERS,

Petitioner, CASE NO. SC06-1346

v.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, First District State of Florida

Nathan Z. Dershowitz, Esq.
admitted *pro hac vice*
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
Telephone: (212) 889-4009

Richard G. Lubin, Esq.
Florida Bar No. 188249
Richard G. Lubin, P.A.
1217 S. Flagler Drive
Second Floor, Flagler Plaza
West Palm Beach, FL 33401
Telephone: (561) 655-2040

of counsel:
Alan M. Dershowitz, Esq.

Attorneys for the Petitioner
Wyon Dale Childers

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

COURT RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal affirmed Mr. Childers' convictions for bribery and unlawful compensation or reward for official behavior on February 2, 2006 by an *en banc* decision comprised of a 28-page *per curiam* Opinion and nine separate concurrences/dissents. ("Feb Op.") That Court denied his subsequent motion for certification on June 28, 2006 by another *en banc* opinion (a 7-page *per curiam* Opinion and five additional opinions) ("June Op."), because the issues did not "present substantial questions." On July 14, 2006, he timely filed a notice to invoke the discretionary jurisdiction of this Court, and an application to this Court for an emergency stay of the mandate and present surrender date of July 31, 2006.[1]

SUMMARY OF ARGUMENT

This Court should invoke its jurisdiction pursuant to Rules 9.030(a)(2)(A)(i), (ii), (iii) and (iv) and Rule 9.030(a)(3) of the Fla. R. App. P., and Art. V, §2(a), and §3(b)(3), (7) and (8) of the Florida Constitution.

ARGUMENT

I. Restitution

The First District Court of Appeal reversed the trial court's denial of

[1] Petitioner respectfully requests that Justice Bell recuse himself from deciding the instant application for reasons well known to Justice Bell.

restitution to Escambia County, holding that the County *did* fit the definition of a "victim" entitled to restitution under section 775.089 Fla. Stat. (2002). (Feb. Op. at 23-28) This decision expressly and directly conflicts with decisions of other district courts interpreting § 775.089, a question of significance to defendants and counties throughout this State. Rule 9.030(a)(2)(A)(iv).

Judges Kahn and Benton expressly noted the conflict (see Feb. Op. at 42, n.2; 70-71) and Judges Polston and Kahn stated in separate opinions that they would have certified this issue. (June Op. at 36, 48-49) See Jones v. State, 846 So. 2d 662, 662-63 (Fla. 2nd DCA 2003) ("sheriff's office does not qualify as victim for payment of restitution pursuant to section 775.089(1)(c)"); Sheppard v. State, 753 So. 2d 748 (Fla. 2nd DCA 2000) ("Division of Insurance Fraud is not a 'victim' in this case and cannot receive restitution."); Sims v. State, 746 So.2d 546, 547 (Fla. 2nd DCA 1999) ("The State does not qualify as a victim for payment of restitution...").

II. The Evidentiary Issue

The trial court foreclosed defense efforts to show bias and prejudice during cross-examination of the State's key witness about an acquittal verdict in another trial at which he testified, and the State's efforts to revoke the witness's plea. (Feb. Op. 1-4) The First District found error, but *sua sponte* applied the "tipsy

coachman" rule to hold the evidence properly excludable under § 90.403, Fla. Stat. (2002), because, on balance, admission would have unfairly prejudiced the State. (Feb. Op. 21-22) Judges Polston and Kahn stated in separate opinions that they would have granted certification on this issue. (June Op. at 36, 48-49) Discretionary review should be granted because the decision is expressly in direct conflict with Supreme Court precedent, and improperly construes Federal and State Constitutional provisions. Rule 9.030(a)(2)(A)(iii) and(iv).

The trial court's ruling that the evidence was relevant was held by the First District to be an error of law. Having ruled that the excluded evidence was relevant, the First District should have reversed the conviction; instead, improperly conducting a balancing test, it concluded the evidence was excludable as a matter of discretion.

This Court has clearly held that an appellate court may not exercise discretionary review where the trial court did not do so in the first instance. Robertson v. State, 829 So. 2d 901, 906-09 (Fla. 2002)(Third District erred in applying "tipsy coachman" rule to find evidence admissible on an alternate basis, where trial judge never made threshold findings necessary to alternate basis). Discretionary review should be granted to re-affirm that an appellate court may not exercise discretion de novo.

In affirming the trial court's decision to preclude cross-examination to show bias and prejudice, the First District expressly construed § 90.403, Fla. Stat. (2002), and, in doing so, subverted the constitutional guarantee that an accused has the right to confront adverse witnesses under both the Sixth Amendment of the Federal Constitution and Article I, §16 of the Florida Constitution. As Judge Kahn noted (Feb. Op. at 44; joined by Judges Ervin, Browning and Polston), "Florida courts have routinely applied the premise of Davis v. Alaska [415 U.S. 308 (1974)] to establish 'that a defendant has the right to fully cross-examine an adverse witness to reveal any bias, prejudice or improper motive the witness may have had in testifying against the defendant.'" Supreme Court review should address the First District's construction of the State "balancing" statute, §90.403, as favoring the State – in contravention of the Constitutional requirement that the balance be weighted heavily in favor of defendant. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973). Discretionary review should be granted to address this improper interpretation of the Constitutional right to confrontation as subordinate to concerns of prejudice to the State.

III. The District Court's *En Banc* Powers

This case presents several related questions, including State and Federal Constitutional questions, concerning the district courts' *en banc* power, which are

within this Court's jurisdiction to decide. Because the questions are important ones, this Court should exercise its discretionary authority to review them.

Article V, §4(a) of the Florida Constitution provides that "Three judges shall consider each case and the concurrence of two shall be necessary to a decision." Art. V, §2(a) grants the Supreme Court power to "adopt rules for the practice and procedure in all courts including the administrative supervision of all courts ...."

Pursuant to §2(a), this Court promulgated Rule 9.331 of the Florida Rules of Appellate Procedure, which permits a majority of the judges of a district court of appeal to order that a proceeding pending before the court be determined by the full court, rather than a three judge panel. The rule provides that "*En banc* hearings shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions."

This Court has addressed the constitutionality of Rule 9.331 insofar as it authorizes *en banc* consideration to maintain intra-district uniformity. See Chase Federal Savings & Loan Ass'n v. Schreiber, 479 So. 2d 90 (Fla. 1985), recognizing the overarching importance of avoiding intra-district decisional conflicts.

But this Court has apparently never addressed the provision of Rule 9.331 which provides for *en banc* consideration in cases of "exceptional importance," which raises significantly different concerns. Nor has this Court defined what is a

case of "exceptional importance;" whether the district courts have unfettered discretion to deem a case of exceptional importance (and thus power to circumvent Article V, §4(a)'s three judge rule); whether the district court must articulate why a case is of "exceptional importance;" or how that phrase relates to this Court's discretionary jurisdiction, under Rule 9.030(2)(A)(vi), to pass upon a question certified by a district court to be of "great public importance."[2]

This case raises all of these questions. It also raises the question whether the First District may use the *en banc* machinery as a vehicle to disqualify a panel judge by rendering his decision of no force and effect, as Judge Allen noted he did here.

The *en banc* First District decided that "The constitutional propriety and practical necessity of an *en banc* procedure in the district courts of appeal, conducted in conformity with rules promulgated by the Supreme Court of Florida, do not present substantial questions." June Op. at 7. This establishes jurisdiction in

[2] If the First District did not have authority to consider the case *en banc*, this Court should exercise its discretionary original jurisdiction to issue a writ of prohibition to require the First District to withdraw the *en banc* decision and to prevent the impending, future incarceration of the defendant that would result if the *en banc* decision is permitted to stand. See English v. McCrary, 348 So. 2d 293, 296 (Fla. 1977). If *en banc* consideration was appropriate because the case is of "exceptional importance," then it is also of great public importance, and the First District should certify it for review by this Court. Under this Court's original mandamus jurisdiction, this Court has jurisdiction to grant a writ of mandamus to compel the First District to certify the case.

this Court pursuant to Rule 9.030(a)(2)(A)(i) and (ii). See H. Anstead, G. Kogan, T. Hall, R. Waters, The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova. L. Rev. 431, 506 (Spring 2005)("For jurisdiction to exist, the district court's opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point," citing Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973); Dykman v. State, 294 So. 2d 633,634-35 (Fla. 1973)). The June 2006 decision upholding the *en banc* consideration, over Childers' complaints that *en banc* consideration was improper, expressly declared valid Rule 9.331 (which is a statute for these purposes) and, in so doing, had to construe Art. V, §4(a), the "provision of the state ... constitution" Childers had invoked in his challenge. See Cantor v. Davis, 489 So.2d 18 (Fla. 1986). Resolving constitutional doubts "is a highly important function [of this Court] because it results in more predictable organic law." 29 Nova. L. Rev. at 505.

Jurisdiction to review also exists pursuant to Rule 9.030(a)(2)(A)(iii) because the First District's opinion "expressly affect[s] a class of constitutional or state officers;" that is, it "directly ... affect[s] the duties [and] powers" of the judges on district courts. Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974). The decision effectively grants district court judges – a class of constitutional or state officers –

the power to nullify a panel decision, and concomitantly eliminates the power of the three judges on the panel to determine the appeal by their votes. It also effectively grants the judges of the district courts de facto power to disqualify a colleague on the bench. This is itself an extraordinary usurpation of power (by some judges) and concomitant diminution of the power of any judge who is the target of such an attack.

Use of the *en banc* mechanism as a means to disqualify a colleague – which Judge Allen admits was his goal – cannot be reconciled with Estate of Carlton, 378 So. 2d 1212 (Fla. 1979). In Carlton, this Court ruled that a challenged appellate judge "must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstance." Id. at 1216. Rule 9.030(a)(2)(a)(iv) thus provides an additional basis for the exercise of discretionary jurisdiction by this Court, authorizing review of a district court decision that "expressly and directly conflict[s] with a decision ... of the supreme court on the same question of law." This issue is also cognizable under this Court's exclusive jurisdiction, under the Constitution, to develop rules governing practice and procedure before the Florida Courts. Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991); Fla. Const., Art. V, §2(a).

Judge Allen's intemperate opinion attacking Chief Judge Kahn – one of only

two opinions explaining the reasons for voting for *en banc* consideration – itself warrants action by this Court, under its Constitutional rule-making and supervisory powers. Judge Allen explained that none of the issues in this case supported his vote for *en banc* consideration. He claimed to be protecting the honor of the Court; quoting from immoderate newspaper articles from 1998 and 2002 that speculated about the relationships among defendant, the late Governor Lawton Chiles, and attorney Fred Levin, he jumped to the conclusion that, since Judge Kahn (who has been on the Court of Appeals since 1991) had once been a partner of Levin, any decision Judge Kahn authored would carry a "breath of scandal" and lead the public to believe that Judge Kahn was returning past favors and allowing Messrs. Levin and Childers to, again, "snooker the bastards." Judge Allen wrote that it was his concern for the public's perception of the integrity of his Court if Childers' conviction were overturned in an opinion authored by Judge Kahn that led him to vote for *en banc* consideration; had Judge Kahn and the panel decided to affirm Childers' conviction, Judge Allen, apparently, would not have raised any concerns. It was thus the particular defendant and the particular result which raised his ire. Implicit in his opinion is the proposition that the ordinary procedures of the First District, the integrity of the original panel, the law, and the rights of the petitioner Childers all had to be subordinated to the protection of the Court's

"image."

This case should not be permitted to remain in this posture. Consideration by this Court is necessary to enforce the rule of Carlton, to restore confidence in the integrity of the State's judiciary, and to insure that Mr. Childers was treated with the same consideration – no more and no less – as any other defendant in this State.

Finally, this Court has jurisdiction in this matter pursuant to the State Constitutional grant to this Court of authority to issue "all writs necessary to the complete exercise of its jurisdiction." Fla. Const. Art. V, §3(b)(7). That jurisdiction is available because this case calls into question the fundamental integrity of this State's criminal justice system and the promise of equal justice to all, and thus "vitally affects the public interest of the State." State ex rel. Pettigrew v. Kirk, 243 So. 2d 147, 149 (Fla. 1970). See also Monroe Educ. Ass'n v. Clerk, District Court of Appeal, Third Dist., 299 So. 2d 1, 3 (Fla. 1974)(Court's all writs jurisdiction extends to "certain cases [that] present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved that require expedition."); Fla . Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982)(endorsing standard of Couse v. Canal Authority, 209 So. 2d 865 (Fla. 1968); court's all writs authority exists over any matter falling within Court's "ultimate

power of review").

CONCLUSION

This Court has discretionary jurisdiction to review the decisions below, which the Court should exercise to consider the merits of the petitioner's argument.

Respectfully submitted and served,

_____
Nathan Z. Dershowitz, Esq.
(admitted *pro hac vice*)

of counsel:
Alan M. Dershowitz, Esq.

_____
Richard G. Lubin, Esq.
Florida Bar No. 188249

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner's Jurisdictional Brief has been furnished via Federal Express to Trisha Meggs Pate, Assistant Attorney General, Office of the Attorney General, PL-01, the Capitol, Tallahassee, Florida 32399-1050 on this 18th day of July, 2006.

By:

_____

Nathan Z. Dershowitz

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief was prepared using Times New Roman 14-point font in compliance with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

Nathan Z. Dershowitz, Esq.