IN THE SUPREME COURT OF FLORIDA

CASE NO: SC08-
L.T. No. 5D07-464

WILLIAM TELANO EVANS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF AN ORDER OF THE
FIFTH DISTRICT COURT OF APPEAL

# PETITIONER'S JURISDICTIONAL BRIEF

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## PRELIMINARY STATEMENT

This Honorable Court should exercise its discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv). This is a significant case involving a growing problem in Florida – gross prosecutorial misconduct – which, as discussed below, may never be subject to review, unless relief by certiorari is granted. Petitioner is charged with a serious offense, punishable by life imprisonment, which, but for the *ex officio* acts of a prosecutor previously assigned to the case, would be barred by the statute of limitations. As discussed below, this Court has jurisdiction and discretionary authority to review the order of the district court.

A conformed copy of the subject Fifth District order is in the Appendix accompanying this jurisdictional brief. The portion of the Court's Order subject to this Motion is designated as the "third issue" in the Order (and in the Petition below), denying Petitioner's request for certiorari review of a trial court order prohibiting the deposition of a prosecutor who, while no longer assigned to the case below, coached the State's key sole fact witness to significantly and adversely change her testimony, as discussed below. William Telano Evans, Petitioner in the case below, will be referred to as "Petitioner." The State of Florida, respondent below, will be referred to as "Respondent" or the "State." All citations to the

appendix are to the appendix in the case below, and appear as "App., Tab __, p. __."

## STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with one count of capital sexual battery, contrary to F.S. §794.011(2), alleging digital vaginal penetration of his step-daughter. The accuser in this case could not specify the date of the incident, it being over 27 years ago. She thrice testified, including in a sworn statement and at deposition, that the alleged act took place after her mother had breast enhancement surgery, at which time the accuser would have been over thirteen years of age.[1] This testimony meant the prosecution was barred by the statute of limitations.

Petitioner filed a Rule 3.190(c)(4) motion to dismiss, alleging there were no material disputed facts, and the undisputed facts showed the alleged conduct in question took place when the accuser was over 13 years of age, so prosecution was barred by the statute of limitations. In an amended traverse (the first traverse was ruled insufficient), the State alleged it would rely on additional facts at trial, that is,

[1] It is undisputed that the accuser had previously testified the incident took place after the breast enhancement surgery, and that she had nothing to add about the timing, as she was "positive" that was when the incident occurred.

the testimony of the accuser, that the incident did not take place when she thrice swore it did, that is, after her mother's breast enhancement surgery, at which time she was over 13 years of age.

The trial court denied the (c)(4) motion, but, finding the State's traverse unspecific as to the new evidence, allowed the accuser to be re-deposed, stating it was willing to reconsider the motion to dismiss, once discovery was completed. A writ of prohibition, seeking review of that order, was filed and denied.

While the writ was pending, Chris France, the prosecutor on the case, rotated off the case, and it was reassigned to Carlos Mendoza. Although Mr. France was no longer the prosecutor of record, he placed two calls to the accuser. The accuser was then re-deposed.[2] At her re-deposition, the accuser testified France told her

[2] This re-deposition was conducted under a substantial handicap. Based on prior misconduct in this case by Mr. France, including the issuance of an illegal subpoena, and being held in contempt, Counsel was concerned Mr. France might seek to poison the well with the witness, and moved for a protective order. It is undisputed the motion was resolved by Mr. Mendoza promising to inquire, of Mr. France, before the re-deposition, as to any conversation he may have had with the accuser, and inform Petitioner's counsel whether any such communications had occurred, and the substance of said communications. It is also undisputed that, just

that the appeal was about the "breast enhancement surgery," and about her testimony about the breast enhancement surgery. (App., Tab 29, pp. 6 - 7). She testified that she did not want the case thrown out, and would not want the case thrown out based on her testimony. (App., Tab 29, p. 9). She stated she did not remember what else Mr. France had told her, except it was about the appeal and the breast enhancement surgery (the seminal issue in the case). (App., Tab 29, p. 7).

At her re-deposition, the accuser agreed and admitted that the only testimony she had ever previously given was that the alleged sexual battery took place after her mother's breast enhancement surgery. (App., Tab 29, p. 8). The accuser was asked if her statement was still accurate and she replied, "apparently not." (App., Tab 29, p. 3). She then asked Mendoza, "Am I supposed to say more or I'm just supposed to answer the questions?" (App., Tab 29, p. 3). She then changed her testimony to say that the sexual battery had also occurred before the breast enhancement surgery. (App., Tab 29, p. 5).

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prior to the deposition, counsel for Petitioner, inquiring of Mr. Mendoza for the promised disclosures, was told by Mr. Mendoza that he had not made inquiry of Mr. France, and did not do so because he was afraid to find out the answer.

It is undisputed that, after the deposition, Mr. Mendoza again promised to follow up, and relay to Petitioner's counsel, the form and substance of the France communications to the accuser. It is also undisputed that Mr. Mendoza failed to keep that promise. As a result, the deposition of Mr. France was noticed and a subpoena duces tecum issued – at the invitation of Mendoza. The State successfully moved to quash the subpoena, and Petitioner sought certiorari relief in the district court. The Fifth District denied the petition, ruling, in pertinent part:

> Certiorari is not available to address any alleged error in granting the state's motion to quash subpoenas, because any harm in this ruling, if erroneous, could be remedied on plenary appeal. See e.g., *Palmer v. WDI Systems, Inc.*, 588 So.2d 1087(Fla.5th DCA 1991).

Motions for rehearing and rehearing *en banc* were denied. On November 3, 2008, Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction.

## SUMMARY OF ARGUMENT

Petitioner seeks conflict review by this Court. The conflict appears within the four corners of the Fifth District's order, based on a citation to authority. *See Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981). The trial court, in error, quashed the subpoena to depose Chris France. The Fifth DCA ruled any harm caused by quashing the subpoena was remediable upon plenary appeal, and, thus, not addressable by certiorari review, citing *Palmer v. WDI Systems*, 588 So.2d 1087

(Fla. 5th DCA 1991). *Palmer* is distinguishable from the instant case. This ruling is in express and direct conflict with *Nussbaumer v. State*, 882 So.2d 1067 (Fla. 2nd DCA 2004), *Ivester v. State*, 429 So.2d 1271 (Fla. 1st DCA 1983), and *Donaldson v. State*, 369 So.2d 691 (Fla. 1st DCA 1979).

Unless this Court accepts jurisdiction, gross prosecutorial misconduct, including coaching and potential witness tampering, will go unaddressed, and Petitioner will never receive a fair trial, in detriment to the administration of justice, via the *de facto* license given to prosecutors henceforth.

## ARGUMENT

I. **The Portion of the Fifth District Order in Evans v. State, Holding Certiorari Relief is Unavailable to Address Alleged Error in Quashing Petitioner's Subpoena to Depose Prosecutor Accused of Misconduct, is in Express and Direct Conflict With the Decisions of the First District in *Donaldson v. State*, 369 So.2d 691, 294 (Fla. 1st DCA 1979), *Ivester v. State*, 429 So.2d 1271, 1273 (Fla. 1st DCA 1983), review denied 440 So.2d 352 (Fla. 1983) and of the Second District in *Nussbaumer v. State*, 882 So.2d 1067, 1071 (Fla. 2nd DCA 2004).**

"A petition for writ of certiorari is appropriate to review a discovery order when the order departs from the essential requirements of law, causing material injury throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." *Nussbaumer v. State*, 882 So.2d 1067, 1071 (Fla. 2nd DCA 2004). It is the third prong of the *Nussbaumer* requirements that is at

issue here.

As stated, where a trial court ruling "effectively" may not be remediable on plenary appeal, certiorari review is appropriate. *Id.* The lack of an adequate remedy on plenary appeal is best demonstrated by the fact that, although the argument that the trial court erred in quashing the subpoena directed to the former prosecutor might be successfully asserted on appeal, the appellate court could conclude that the error was not prejudicial or fundamental. The trial court's improper denial of Mr. Evans' rights to due process, under the Confrontation Clause, and his discovery privileges, would not be "reversible error unless there was a showing that but for the admission of such evidence a different result would have been reached at the trial." *Donaldson v. State*, 369 So.2d 691, 294 (Fla. 1st DCA 1979). Thus, certiorari relief was available to review to review the order quashing the France subpoena.

Finally, review of the trial court's improper denial of discovery, on plenary appeal, could also be barred as harmless error. *See, e.g., Ivester v. State*, 429 So.2d 1271, 1273 (Fla. 1st DCA 1983), *pet. for rev. den.*, 440 So.2d 352 (Fla. 1983), holding "the failure to permit discovery was harmless error." All these cases support the conclusion that the order quashing the subpoena may not be addressable on plenary appeal, and are thus in express and direct conflict with the

Fifth District's order.

The panel relies on *Palmer v. WDI Systems, Inc.*, 588 So.2d 1087 (5th DCA 1991), ruling the trial court's denial of the France deposition, if erroneous, was remediable on plenary appeal. *Palmer*, a civil suit, is inapposite, as its holding does not apply in the instant case, and it is in direct conflict with the above-cited authorities. In *Palmer*, the trial court denied discovery on an claim of liability it said did not exist. *Id.* at 1088. Affirming, the Fifth District held plenary appeal sufficient if the denied discovery was proper. *Id.*

In the instant case, like the authorities cited in conflict, and unlike *Palmer*, there is no issue as to relevancy. This case can stand or fall on the result of the France deposition. Further, as discussed above, and unlike *Palmer*, there is no guarantee that plenary review will be available. Thus the Fifth District improperly relies on *Palmer*.

This is clearly a significant case, addressing the latest example of the growing trend of prosecutorial misconduct. There can be no minimizing the impact of such misconduct:

> ... prosecutorial misconduct "is especially egregious in ... a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects," and the effects of the impropriety extend well beyond the trial itself ...

*Salazar v. State*, 991 So.2d 364 (Fla.2008), Pariente, J., specially concurring, citation omitted. While this case is not a death penalty case *per se*, Mr. Evans, who is over 60 years old, prosecuted for an incident some 27 years old, will likely die in prison if convicted. Further, the improper conduct at issue here, witness coaching or tampering, as well as ignoring the waiver by, and failure, of Mendoza to make promised inquiry and disclosure (which made the deposition sought in the quashed subpoena necessary), shows the vital importance of judicial intervention to curb overreaching by the State.

This Court has jurisdiction to review the Fifth District's decision. Discretion exists because of the above cited decisions reaching a contrary result to the order herein at issue. This case would have been dismissed, but for the fact that Mr. France, in his sworn traverse, and without any then existing evidentiary foundation, asserted there was evidence showing that the event had, in fact, occurred earlier, contrary to the thrice sworn testimony of the accuser. The only possible source of this information was the accuser, and Mr. France knew that the judge would dismiss the case unless the accuser changed her thrice sworn testimony.

The law is clear that Petitioner has the right to depose Mr. France. A

prosecutor may be deposed and his testimony used to cross-examine other witnesses at trial. *See, e.g., Phillips v. State*, 608 So.2d 778 (Fla. 1992). Petitioner also has the right to this discovery to find out if the State has engaged in improper coaching of a witness. Where a witness is crucial to the State's case, "evidence of coaching is especially material to that witness's credibility." *Cardona v. State,* 826 So.2d 968, 980-81 (Fla. 2002). In *Cardona*, a witness who had made three pre-trial statements, all consistent, then met with the prosecutor, and her post-meeting trial testimony then contradicted her pre-trial statements. *Id.* at 974-77. This Court found the existence and timing of these contradictions "suggests coaching by the State." *Id.* at 980.

The State wrongdoing in this case is far more egregious than in *Cardona.* Here, we have not only the obvious and material change in the testimony, but we know (1) it is linked directly to the conversation the accuser had with the former prosecutor, and, (2) it is about the intervening statute of limitations appeal. Thus, the holding of *Cardona* is all the more compelling, and Petitioner's ability to make full use of Mr. France's testimony in impeaching the accuser's credibility all the more necessary. The panel decision, barring certiorari relief, blocks the prospective precedential effect of *Cardona*. It not only directly violates petitioner's rights, it interferes with the judicial process.

Additionally, the panel decision improperly prevents review to correct another significant injustice, since the State, as discussed above, had waived any objections to providing this information. The panel decision, declining certiorari relief, and causing material injury by a ruling clearly departing from the essential requirements of law, in express and direct conflict with the clear rulings of the First and Second districts, allows the State to escape the consequences of both the France misconduct, and the Mendoza coverup. Such conduct cannot be allowed if justice is to prevail.

## CONCLUSION

The significance of the issues and the stakes here cannot be overstated. The State Attorneys' Office must be required to keep their agreements and to answer for their manipulation of the evidence in this case. This Court has jurisdiction to do just that. It can exercise its discretion, since the Fifth District order reaches a contrary result to, and is in express and direct conflict with, clear precedent from the First and Second Districts. This Honorable Court should accept jurisdiction, lest this prosecutorial misconduct go unanswered and never again see the light of justice.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with all applicable rules governing computer generated documents, including those as to font size, margins, and pagination, as set forth in Fla. R. App. P. 9.210. This brief utilizes Times New Roman 14 point font.

_____
ATTORNEY

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by (___) Hand Delivery (___) U.S. Mail (___) Facsimile to Carlos A. Ivanor, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, this ___ day of November, 2008.

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