

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

CASE NO. SC05-\_\_\_\_\_

2d DCA No. 2D05-5408

Lower Court No. 2004 CF 2129 NC

THE SARASOTA HERALD-TRIBUNE, ET AL.

Respondents.

\_\_\_\_\_ /

**EMERGENCY MOTION TO STAY THE EFFECT  
OF THIS COURT'S NOVEMBER 17, 2005 ORDER**

COMES NOW the Petitioner, State of Florida, by and through the undersigned counsel, and moves that this Court stay the November 22, 2005, Order of the Second District Court of Appeal in Case No. 2D05-5408, and as grounds therefore states:

1. Petitioner seeks the immediate grant of a stay of the Second District Court of Appeal's November 22, 2005, opinion entered in Sarasota Herald-Tribune et. al. v. State of Florida. In response to Petitioner's emergency request, the Second District certified the following question to be one of great public importance to wit:

**IN ORDER TO PROTECT THE PRIVACY OF THE VICTIM'S FAMILY, DOES A TRIAL COURT HAVE LEGAL AUTHORITY TO BAR ALL MEMBERS OF THE MEDIA FROM VIEWING PHOTOGRAPHS OF A MURDER VICTIM THAT HAVE BEEN INTRODUCED INTO EVIDENCE**

**DURING A PUBLIC TRIAL AT WHICH THE STATE SEEKS THE DEATH PENALTY?<sup>1</sup>**

In addition, the State's believes that the Second District's opinion directly violates Florida statutory law, incorrectly construes the Florida and Federal Constitutions in a manner that elevates the Respondents' First Amendment rights beyond the exemptions created under Florida law and conflicts with decisional authority from other courts on this point. Campus Communication v. Earnhardt, 821 So. 2d 388 (5th DCA 2002), rev. denied, 848 So. 2d 1153 (Fla. 2002), cert. denied, 2003 U.S. LEXIS 8622 (Dec. 1, 2003); Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988); Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1 (Fla. 1982).

2. This case originated on November 14, 2005, when the Respondents, media outlets who are covering the murder trial of Joseph Smith, sought certiorari review in the Second District Court of Appeal of the trial court's order prohibiting Respondents from viewing, copying or publishing photographs or videotape depicting the brutalized and decomposing body of the

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<sup>1</sup> In their objection to the Second District Court of Appeal's certification of the above question the Respondents stated "[t]his Court has already answered this question in the only constitutionally permissible way- by holding that a court can preclude access to evidence introduced at a public criminal trial, but only if it does so consistent with the United States Constitution."

11 year old female victim in the case of the State of Florida v. Joseph Smith as she appeared at the crime scene and during the medical examiner's post mortem.

3. On November 15, 2005, the Second District ordered that the trial judge, Judge Owens, issue a written order setting forth the basis for his ruling denying Respondents' access to the photographs introduced at trial. The circuit court's "Order Finding That Specific Crime Scene And Autopsy Photographs Are Exempt From Public Records Law And/Or Shall Not Be Viewed, Released, Inspected Or Copied Per § § 119.071(2)(h)2 and 406.135(c) Fla. Stat." setting forth its analysis was filed with the Second District on the morning of November 17, 2005.

4. As noon approached, the Second District Court of Appeal issued its November 17, 2005, preliminary Order granting the certiorari Petition. The Order quashed the trial court's non-disclosure order and allowed "the media representatives to review those items that have been admitted into evidence and published to the jury in accordance with State v. Rolling, 22 Media L. Rep (BNA) 2265 (Fla. 8th Cir. Ct. 1994)." This Order was issued without providing an opportunity for the State or other interested parties to respond to the allegations in the Petition, including the factual representations made in the Respondents' unofficial court transcript.

5. The Second District's November 17, 2005, preliminary Order relied on the 1994 trial court order entered in the murder trial of Gainesville serial killer Danny Rolling. State v. Rolling, 22 Media L. Rep. (BNA) (Fla. 8th Cir. Ct. 1994). In Rolling, media outlets were permitted to view, but not reproduce, photographs of the murder victims.

6. In response to the Second District's November 17, 2005, Order, the State sought and was granted an emergency stay of the ruling pending an opportunity for the State to file a substantive response to the Respondents' claim for relief. The Second District issued an order late November 17, 2005, granting Petitioners until noon the following day to file a response to the merits of the certiorari petition and, specifically, to address three questions posed by the court, as follows:

1. Whether the language of section 119.071, Florida Statutes (2005), permits retention of confidentiality despite the fact that such evidence has been admitted into evidence and published to a jury?

2. Whether the First Amendment of the United States Constitution allows a trial judge to prohibit the viewing and publication of evidence by the news media or public once it is admitted and show to the jury in open court?

3. (A) Whether the admission of the autopsy and/or crime scene photographs and videotape into evidence constitutes a waiver of the prohibition of the release of those items set forth in section 406.135, Florida Statutes (2005); or

(B)whether the confidentiality requirement of section 406.135 no longer applies because the evidence is no longer in the custody of the medical examiner's office?

7. The State complied with the Second District's ruling and filed its Response on November 18, 2005. In it, the State argued that the Second District's reliance on the Rolling decision was not sustainable in light of the subsequent Legislative enactments pertaining to photographs of sexual battery victims and to autopsy photographs. Section 119.071(2)(h) and 406.135, Florida Statutes.

8. Petitioner argued that the Second District's analysis must be governed by the Florida Legislature's two clear expressions of its intent to keep such images from disclosure absent good cause shown. Section 119.07(2)(h)(2), the public records exemption law, reflects the Legislative intention to exempt from the public record any photographs which depict the victim of a sexual battery, or of an abused or sexually victimized child. By its specific language, this provision applies notwithstanding the introduction of such images into evidence during a court proceeding or the presence of such photographs in the court record.

The section provides:

(h) 1. Any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or

information which reveals the identity of the victim of the crime of sexual battery . . . ; the identity of the victim of a lewd or lascivious offense committed [on a minor]; or the identity of [a child abuse victim] and any criminal intelligence information or criminal investigative information or other criminal record, including those portions of court records and court proceedings, which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in chapter 794, chapter 800 o chapter 827, is exempt from s. 119.07(1) and s. 24(a), Art I of the State Constitution.

Petitioner maintained that section 406.135, Florida Statutes, the, so called, Dale Earnhardt law, was also directly applicable. This section exempts photographs from the public record, as follows:

(1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, [with exceptions for surviving spouse or family and governmental entities in furtherance of its official duties].. . .The custodian of the record, [], may not permit any other person, except an agent designated in writing by the deceased's surviving relative with whom authority rests to obtain such records, to view or copy such photograph or video recording or listen to or copy an audio recording without a court order.

Section 406.135, Fla. Stat.

This exemption was enacted in response to the death of prominent race car driver Dale Earnhardt, whose autopsy photos certain media outlets sought to obtain from the medical examiner. Prompted by its interest in sparing the family the anguish of confronting those photographs in the media, particularly in

light of the dissemination of such lurid images on the internet, the Legislature enacted section 406.135 exempting such photos from the public record. This exemption is subject to the qualifying provision of section 406.135 which permits the court, upon a showing of good cause, to issue an order authorizing any person to view or copy autopsy photographs.

Finally, Petitioner rejected the contention that Respondents' First Amendment right was absolute, arguing that such rights were tempered by the Florida Legislature's expressly created protection for victims who were confronted with the public exposure of photographs depicting a victim following a criminal attack or in connection with an autopsy.

9. On November 22, 2005, the Second District issued its opinion granting Respondents' certiorari petition.

10. The Court's decision no longer relied on the Rolling case, but rather squarely on the Respondents' First Amendment rights. The decision swept aside the State's contention that sections 119.071 and 406.135, as well as Article I section 23, were applicable to the subject photographs. Rather, the court found that the trial court's sole recourse was to Rule of Judicial Administration Rule 2.051.

The Second District reasoned that, despite the broadcast of the trial in its entirety, including broadcast of descriptions of the photographs' contents, over cable television and the

internet, that the effect of the non-disclosure order was to convict the defendant below upon "secret evidence." Accordingly, the Second District reasoned that the trial court had no authority under Rule of Judicial Administration Rule 2.051 to prevent the Petitioners from viewing, but not publishing, the image of the murdered girl's body as it appeared upon her being discovered in a field five days after her abduction. In a concurring opinion, Judge Cassaneuva voiced his opinion that the photographs were not only not subject to view by the Petitioners, but that they could be published.

11. Petitioner maintains that a stay is warranted. Oliveira v. State, 765 So. 2d 90 (Fla. 2000). First, as discussed herein, this case raises issues of Constitutional and statutory construction effecting both Privacy and First Amendment rights, making appropriate acceptance of jurisdiction by this Court. The Second District's Order expressly reflects that, absent immediate action by this Court, the previously non-disclosed photographs of the victim will be made available to the Media, notwithstanding any rehearing motion filed by Petitioners and in contravention of this Court's ability to effectively review these important questions.

Based on the authorities cited herein, Petitioner maintains that there is a substantial likelihood of success on the merits. Absent a stay, the harm sought to be prevented by the

authorities relied upon herein will have occurred and the images exposed to the Media, rendering subsequent review meaningless.

12. In contravention to direct statutory language, the Second District declared that sections 119.071 and 406.135 were inapplicable to analysis of the public's right of access to court records. Instead, this Court determined that, because the photographs were entered into evidence against the defendant, the trial judge's only authority to restrict public access derived from Rule of Judicial Procedure 2.051. However, that Rule, by its express language, is subservient to section 119.071, Florida Statutes.

13. Rule 2.051(c)(7) creates an exemption for all records made confidential under Florida law. In addition, Rule 2.051(c)(9) exempts "any court record determined to be confidential . . . on the grounds that confidentiality is required to prevent a serious and imminent threat to the . . . administration of justice" or to "avoid substantial injury to innocent third parties." Rule 2.051(c)(9)(A)(i) and (v). Section 119.071's plain language renders "confidential and exempt" images of a sexual battery victim, notwithstanding the admission of such evidence in court proceedings. Thus, the public's access to such records is exempted under Rule 2.051(c)(7) and (c)(9)(i)& (v). Rule 406.135 also renders "confidential and exempt" autopsy photos and recognizes that

such evidence can be restricted in a criminal proceeding for good cause shown. §436.135(1) & (3)(c).

14. In evaluating these authorities, the trial court made a direct finding that public access to the photographs effected the administration of justice. He also relied on the privacy interests of the victims which provided the basis for the Legislative enactments in section 119.071 and 436.135. In addition, he specifically found that his ruling reflects the least restrictive means of protecting these compelling interests.

The Legislature could not have been more clear that its enactment of these provisions was made in an attempt to elevate the privacy rights of victims who, from crime or accident, are forced to have "graphic and disturbing [], frequently nude, bruised or bloodied" pictures placed on view as a means of determining the cause of their deaths (with autopsy photos) or as a means of prosecuting the criminals who brought about their suffering. See Ch. 2003-157, § 3, at 2, Laws of Fla.; Ch. 2001-1, § 2, at 2, Laws of Fla. (exempting from public record access to images of the deceased which often "depict the deceased broken, with bullet or other wounds, cut open, dismembered, or decapitated."). Despite this clear mandate, the Second District eschewed application of these laws in deference to Rule of Judicial Procedure 2.051, elevating judicially created

procedures over the substantive rights created by the Legislature.

15. "Both the Florida Constitution and the Public Records Act specifically allow for the creation of exemptions [to the Public Records law]." Campus Communication v. Earnhardt, 821 So. 2d 388 (5th DCA 2002), rev. denied, 848 So. 2d 1153 (Fla. 2002), cert. denied, 2003 U.S. LEXIS 8622 (Dec. 1, 2003). As the Fifth District recently noted:

Article I, section 24(c) of the Florida Constitution provides in pertinent part that 'the legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a).' Section 119.15(4)(b), Florida Statutes (2001), similarly provides in pertinent part that "an exemption may be created or maintained." Thus both the Florida Constitution and the Public Records Act declare that the right to inspect and copy public records is a right subject to divestment by legislative enactment.

Earnhardt, 821 So. 2d at 398-399.

16. The Fifth District's decision in Earnhardt applied the public record exemption for autopsy photographs to exclude the media's access to those images. In affirming application of the exemption, the Court stated that "[b]oth the Florida Constitution and the Public Records Act allow for the creation of exemptions to the Act by the Legislature, provided the newly enacted exemption 1) serves an identifiable public purpose and 2) is no broader than necessary to meet that public purpose.

Art. I, . . . §24(c), Fla. Const.; §119.15(4)(b), Fla. Stat. (2001).” Earnhardt, 821 So. 2d at 392.

The Court observed:

. . .the Legislature perceived the public necessity to correct the problems associated with public dissemination of autopsy photographs, especially over the Internet. Finding that this sort of public display of a decedent's remains is not only injurious to the family members of the decedent, but morally reprehensible and anathema to the citizens of Florida, the Legislature enacted section 406.135 to mitigate the harsh provisions of the Act that would allow public disclosure of such records.. . .While the Public Records Act grants to Florida citizens the right to inspect and copy public records, ‘the legislature also has the prerogative to place reasonable restrictions on that right.’

. . .  
It is also a declared constitutional principle that every individual has a right of privacy, and while our constitution does not catalogue every matter that one can hold as private, autopsy photographs which display the remains of a deceased human being is certainly one of them.”

Earnhardt, 821 So. 2d at 402-403 (emphasis added).

17. Florida’s Legislature has made the direct determination that the privacy right inherent in our Constitution provides a basis for exemption of images like the ones herein from the public record. Despite the balance of interests, privacy and First Amendment, inherent in the exemption, this expression of Legislative intent has been affirmed at the district court level and review declined by both the Florida and United States Supreme Courts. Earnhardt, 821 So. 2d at 402-403.

18. The Second District has issued an opinion that purports to declare an absolute right whose enjoyment thereof it purports to restrict to a privileged few. The State submits that this provision, rather than having a limiting effect, will provide a basis for other media outlets, as well as prurient observers, to gain access to the horrible images of this child victim's last terrifying moments of life and the appalling aftermath of her death. Hence, the instant case presents an issue of great importance.

19. The present decision impacts the rights of those citizens who have or will become victims of any crime, and their families, if the crime is one that would lead to photographs of their bodies being admitted as evidence of their injuries, or those who deaths, whether by accident or criminal act, would subject them to examination by the medical examiner. Thus, the class of effected citizens include those who become victimized by homicide, assault and battery, sexual abuse, child abuse, elder abuse, domestic violence, the attempted commissions of these crimes and any crime whose severity is enhanced by the presence of great bodily harm or permanent disfigurement.

Further, the present decision may impact the State's ability to prosecute crimes who victims object to the entry into evidence of images which would loose any privileged status and

whose potential final destination might be the pages of the daily news or as the subject of unsavory internet websites.

20. Accordingly, Petitioner asks that this Court issue a stay of the Second District's November 22, 2005, Opinion to allow Petitioner to seek review in this Court.

**WHEREFORE, based on the foregoing,** Petitioner respectfully requests that this Court immediately enter a stay of the Second District Court of Appeal's November 22, 2005, Order permitting the Media to view the photographs and videotape entered into evidence in State of Florida v. Joseph Smith pending further proceedings in this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing EMERGENCY MOTION TO STAY THE EFFECT OF THIS COURT'S NOVEMBER 17, 2005, ORDER has been furnished by U.S. mail to The Honorable James Birkhold, Clerk of the Court, Second District Court of Appeal, P.O. Box P.O. Box 327, Lakeland, Florida 33802; The Honorable Andrew D. Owens, Jr., Circuit Court Judge, Sarasota County Judicial Center, 2002 Ringling Blvd., 5th Floor, Sarasota, Florida 34237; The Honorable Elliott C. Metcalfe, Jr., Public Defender and Adam Tebrugge, Assistant Public Defenders, Twelfth Judicial Circuit, 2071 Ringling Blvd., Sarasota, Florida 34237; The Honorable James Marion Moorman, Public Defender, Paul Valcore and Robert A. Young, Assistant Public Defenders, Tenth Judicial Circuit, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000; The Honorable Earl Moreland, State Attorney and Debra Johnes Riva, Assistant State Attorney, 2071 Ringling Blvd., Sarasota, Florida 34237; James J. McGuire, Esq., Gregg D. Thomas, Esq. and Rachel E. Fugate, Esq., Holland & Knight LLP, P. O. Box 1288, Tampa, Florida 33601-1288, this 23rd day of November, 2005.

CERTIFICATION OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this motion is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR PETITIONER