IN THE SUPREME COURT OF FLORIDA

CASE NO: SC19-1118

BRENT A. DODGEN,

Petitioner,

v.

KAITLYN P. GRIJALVA,

Respondent.
_____/

RESPONDENT'S RESPONSE TO
PETITIONER'S MOTION FOR REHEARING

Respondent, Kaitlyn Grijalva, by and through undersigned counsel, responds to Petitioner's Motion for Rehearing and states:

Summary of the Argument

Petitioner suggests that this Court "overlooked or misapprehended its own jurisdiction, its standard of review, and its prior precedent in deciding this case." Petitioner states this Court "in essence reframed this as a certiorari proceeding" by reframing the certified question.

Petitioner's arguments ignore the very basis for this Court's jurisdiction. The Art. V, § 3(b)(4), Fla. Const. grant of jurisdiction is to "review any decision of a district court of appeal" that passes on a certified question of great public importance. The Fourth District decided that the Trial Court did not depart from

the essential requirements of law and certified a question of great public importance. This Court—consistent with its jurisdiction—appropriately reviewed the decision whether there was departure from the essential requirements of law.

Background

Petitioner sought certiorari review of a discovery order. The Fourth District denied the petition. The District Court: (1) found no departure from the essential requirements of law, and (2) certified a question of what it considered great public importance.

This Court exercised its review jurisdiction under Art. V, § 3(b)(4), Fla. Const.. This Court reviewed the District Court's decision as to whether the discovery order was a departure from the essential requirement of law. The Court reframed the question to put it squarely within the Fourth District's own scope of review, approved the decision, and then answered the Fourth District's certified question.

Regardless of whether this Court reframed the question, or the original certified question remained, the outcome would remain the same. *Worley v. Central Florida Young Men's Christian Ass'n*, 228 So. 3d 18 (Fla. 2017) does not apply to the discovery at issue in this case:

> But whether *Worley* was wrongly decided or whether some other factor has caused the purportedly uneven playing field, is not properly before us. The holding of *Worley* should be reexamined only in a case in which it is actually at issue. And here, as the Fourth District

acknowledged, *Worley* is not applicable.

Opinion at 15.

Law and Argument

I. This Court's Jurisdiction Is "Review" Jurisdiction.

Petitioner's understanding of this Court's jurisdiction under Art. V, § 3(b)(4), Fla. Const. is flawed. Appellate jurisdiction is review jurisdiction: "In a broad sense, appellate jurisdiction is the judicial power to review an order of a lower tribunal." Introduction, 2 Fla. Prac., Appellate Practice § 1:1 (2021 ed.); JURISDICTION, Black's Law Dictionary (11th ed. 2019) (defining "appellate jurisdiction" as "[t]he power of a court to review and revise a lower court's decision.")

In this case, the Court's jurisdiction originates in Art. V, §3(b)(4), Fla. Const., which is a "review" jurisdiction, specifically review of a "decision":

> (b) Jurisdiction. The supreme court:
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> * * *
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> (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, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

Emphasis added.

This Court did not overlook or misapprehend its jurisdiction. The Court does not review a certified question, it reviews the decision that passes upon a certified

question. It would be improper to simply answer the certified question without a review. That remedy is unavailable under Art. V, § 3(b)(4), Fla. Const.. What Petitioner seeks is a separate and distinct type of jurisdiction, akin to answering a question of the attorney general by way of advisory opinion without review of an underlying decision, such as Art. V, § 3(b)(10). The narrow issue before this Court was whether the Trial Court's discovery order departed from the essential requirements of law, and whether *Worley* applied.

Petitioner brought this case by filing a petition for writ of certiorari. Petitioner alleged the Trial Court departed from the essential requirements of law by not expanding *Worley* to Petitioner's experts who were retained for litigation. The Fourth District's decision determined the trial court did not depart from the essential requirements of law, holding that "*Worley* was not broadly written to cover discovery sought from the defense side of a case." *Dodgen v. Grijalva*, 281 So. 3d 490 (Fla. 4th DCA 2019).

The District Court's "decision" determined the trial court did not depart from the essential requirements of law. The "decision" was not a certified question. The "decision" is what this Court reviewed *de novo*. Art. V, § 3(b)(4), Fla. Const. This Court cannot approve or disapprove a decision without reviewing the decision itself. It defies logic to think this Court can review a finding that there was no departure from the essential requirements of law without determining whether

there was, in this Court's own analysis, a departure from the essential requirements of law.

This Court's reframing of the District Court's certified question was not improper and did not wholesale change the basis of the Court's jurisdiction. This Court appropriately exercised a *de novo* appellate review of a decision by the Fourth District Court of Appeal, and concluded the Fourth District reached the correct result:

> We answer the rephrased question in the negative. Because the trial court's order permitting discovery related to the financial relationship between Dodgen's insurer and defense experts was consistent with established law, we agree with the Fourth District that the trial court did not depart from the essential requirements of the law in denying Dodgen's motion for protective order. Accordingly, we approve the result reached by the Fourth District.

Opinion at 15.

II. This Court Conducted an Appellate Review of a District Court's Decision Which Found No Departure from the Essential Requirements of Law.

Petitioner argues it is improper for this Court to conduct an Art. V, § 3(b)(4), Fla. Const. "review" by looking at the standard of review the District Court applied. Yet, that is how a review occurs. In death penalty reviews, the circuit (trial) court is the lower tribunal. This Court reviews the trial court's decision. When reviewing whether a trial court correctly denied a motion for a judgment of acquittal, this Court applies the same standards that the trial court

must apply on such motions: giving every reasonable inference in favor of the jury's verdict of guilty.

In a similar vein, when reviewing the Fourth District's decision whether the trial court departed from the essential requirements of law, this Court cannot approve or disapprove the decision without determining whether the trial court departed from the essential requirements of law. Respondent addressed this argument in our Corrected Answer Brief at 12-14.

This Court reviews a case from the viewpoint of the District Court. In *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012), this Court accepted jurisdiction over a certified question of great public importance and certified conflict. In order to answer the certified question, the court had to analyze the lower court's standard of review. The majority opinion answered the certified question under the certiorari standards. *Id*. at 351-56. The concurring opinion by Justice Lewis answered the certified question under the certiorari standards. *Id*. at 357-58 (Lewis, J. concurring). The dissenting opinion in *San Perdido* by Justice Canady also answered the certified question under the certiorari standards, and even reframed the question in certiorari terms. *Id.* at 358 (Canady, J. dissenting). Even though there was a disagreement as to the outcome, there was unanimity that the certiorari standard applied.

In another case from this Court, *Rodriguez v. Miami-Dade County*, 117 So.

3d 400, 409 (Fla. 2013), Justice Canady agreed with the outcome, yet determined "I would quash the Third District's decision simply because there was no basis for the Third District to determine that the circuit court's denial of summary judgment constituted a departure from the essential requirements of law." *Id.* at 409 (Canady, J. concurring in result only). How can a Justice make such a statement if not for review of a departure from the essential requirements of law? Then, Justice Canady's concurrence explained:

> A determination that the circuit court departed from the essential requirements of law in failing to apply the emergency exception is unwarranted because the scope of the emergency exception remains ill-defined in the Florida case law…. Given the state of the case law, the Third District had no basis for determining that the circuit court departed from the essential requirements of law. Such a determination is warranted "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State,* 436 So. 2d 93, 96 (Fla. 1983). There is no "clearly established principle of law" that would require application of the emergency exception to a factual situation like the one presented by this case. *Id.* Accordingly, the decision of the Third District should be quashed.

Id.

No one disputes that the Fourth District was exercising its certiorari jurisdiction in this case. Thus, when this Court reviews the decision which gave rise to the certified question, the review must encompass whether the District Court exercised its certiorari review powers correctly. This *de novo* review cannot occur without considering the limits placed on District Court's own certiorari

powers. Disregarding these standards would not be an appellate *review* function.

III. The 1980 Amendment Does Not Change the Outcome.

The elimination of this Court's certiorari jurisdiction is not what Petitioner makes it out to be. The removal of this Court's "conflict certiorari" power in 1980 is of no consequence when it reviews a decision involving certiorari review. Before 1980, the Supreme Court would order the District Courts to send the entire appellate record to the Supreme Court. The Supreme Court would then independently review the entire record to determine if a conflict "inhered" between two Districts' decisions. The deletion of the Supreme Court's certiorari power in 1980 was intended to eliminate this practice and diminish the Supreme Court's appellate/review powers. The 1980 amendment was not meant to expand the Supreme Court's appellate/review power so it could review decisions of lower tribunals without regard to the standards that must be applied by the lower tribunals (certiorari, judgment of acquittal, etc.).

Justice England explained the effects of the 1980 change in detail:

> (2) Deleting "by certiorari"
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> The deletion of the words "by certiorari" from section 3(b)(8) may prove to be another very significant aspect of the 1980 amendment. Under the former provision, the supreme court's discretionary jurisdiction in section 3(b)(3) was exercised "by certiorari," based on common law notions of that term. Certiorari is essentially a common law writ issued by a superior court to an inferior court for the purpose of bringing up the record to determine whether the inferior court exceeded its jurisdiction or failed to proceed according to the essential

> requirements of law. Generally, certiorari is not available to review final judgments and decrees where another remedy exists, and the issuance of a writ of certiorari will always lay in the sound discretion of the superior court. In *DeGroot v.Sheffield,* Justice Thornal emphasized the limited nature of certiorari review, noting that the reviewing court will not undertake to reweigh or reevaluate the evidence presented to the lower tribunal.
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> The implicit incorporation of common law principles in former section 3(b)(3) led to a number of unfortunate consequences. For one, bringing up the lower court's entire record allowed the supreme court to review the full record and address the merits of all points in cases it had accepted for review. For another, a notion developed over the years that finding a decisional conflict required, rather than permitted, acceptance of the case for review. This practice led members of the Appellate Structure Commission to conclude that the court had all but written the word "may" out of section 3(b)(3). Moreover, the certiorari issue contributed to the court's frequent, and often lengthy discussions regarding the acceptance or rejection of jurisdiction.
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> * * *
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> **The deletion of "by certiorari" from section 3(b)(3) was intended to eliminate the common law jurisdictional predicate of bringing up the whole record for scrutiny and therefore signifies the end of full record review of a discretionary case**.... The need for protracted written debates on the existence or nonexistence of a jurisdictional predicate will be obviated, since the supreme court's decisions will themselves deal with the legal issue or issues on which jurisdiction was predicated.

Arthur England, Jr., et. al., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 181-82 (1980), footnotes omitted, emphasis added.

IV. Petitioner's Proffered Case Law.

Petitioner argues, and Respondent agrees, that once this Court accepts

jurisdiction, it can address all issues that may affect the case. But, as this Court's opinion recognized, *Worley* is inapplicable to the discovery sought in this case. The potential for disparate treatment as a result of *Worley* is not an issue affecting *this* case. There is no basis to use this case to fix an entirely unrelated "problem." The existence of a case or controversy is required. Without one, this Court may elect to use its rulemaking authority, but declined to do so here.

Petitioner ultimately summarizes ten cases for the proposition this this Court strayed from precedent by reframing the certified question and conducted an extra-jurisdictional certiorari review. Yet, none of these cases actually stand for that proposition. Petitioner's selected citations were simply silent as to whether the lower court's conduct constituted a departure from the essential requirements of law. The cases do not say this Court exceeded or misunderstood its jurisdiction by reviewing the underlying decision and reframing the certified question in terms the district court was required to apply.

The proffered cases' silence on whether there was a departure from the essential requirements of law doesn't mean this Court deviated from its own precedent:

> Courts sometimes say that answers to questions "merely lurk[ing] in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." For example, courts routinely reject claims that plaintiffs have Article III standing based on the fact that prior similarly situated plaintiffs received a ruling on the merits, even though such a ruling

> must have implicitly held that the prior plaintiff did have standing. The Supreme Court has explained that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."

Bryan A. Garner et al, The Law of Judicial Precedent § 6, footnotes omitted; *See also Florida Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

It is important to note that in every case Petitioner cited, this Court actually "reviewed" the district court's decision and then either approved or disapproved the decision. Moreover, approval or disapproval of the decision after review was independent of the answer to the certified question whether it was reframed or not. Such review is the genesis of Art. V, § 3(b)(4), Fla. Const. jurisdiction. Such review is what occurred in the instant case.

Conclusion

For the foregoing reasons, Petitioner's Motion for Rehearing must be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail this **23rd** day of **November 2021**, to: **KANSAS R.**

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Respectfully submitted,

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