IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC19-1784

Nikolas Cruz,
Petitioner,
v.

State of Florida,
Respondent.

On Discretionary Review from the District Court of Appeal

Fourth District

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Petitioner was arrested on February 14, 2018 and indicted for 17 counts of first-degree murder and 17 counts of attempted first-degree murder for the school shooting at Marjorie Stoneman Douglas High School.

Petitioner was denied certiorari relief in the Fourth District Court of Appeal on August 14, 2019 after seeking review of the denial of his Motion for Protective Order Enjoining Disclosure of Defense-Retained Experts. (A 5)[1] The motion alleged that defense-retained experts would be meeting with the Petitioner at the Broward County Jail at the request and direction of defense counsel and that the experts' identities are protected by both the attorney-client and work-product privileges. (A 5-6) The motion sought a protective order because the names of defense-retained experts would be disclosed upon the filing of a public records request for jail visitation logs. (A 5) Petitioner alleged, in part, that the public's right to disclosure pursuant to public records laws[2] is outweighed by the Petitioner's right to a fair trial because disclosure would adversely affect his fair trial right. (A 5-6)[3]

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[1] The Fourth District Court of Appeal's decision is attached as an appendix to this brief and referenced by the symbol "A" and page number. The decision is found at 44 Fla. L.Weekly D2076 (Fla. 4th DCA August 14, 2019).

[2] §119.011, *et. seq*. Fla. Stat. (2018)

[3] Petitioner also alleged that the information would only be revealed because of Petitioner's custody status, while out-of-custody defendants' confidential attorney-

Both the state and the news media argued that the jail visitation logs and any correspondence between defense counsel and jail personnel to secure the entry of defense-retained experts were non-exempt public records. (A 6) The news media argued that Petitioner did not establish that his fair trial rights were impacted. (A 6)

The district court issued a written opinion denying certiorari relief. *Cruz v. State*, 44 Fla. L. Weekly D2076 (Fla. 4th DCA August 14, 2019). The district court noted the trial court's finding that Petitioner did not show that disclosing expert witness' names would prevent a fair trial, but concluded that Petitioner met his burden of establishing irreparable harm because disclosure of potential expert witnesses is "classic 'cat out of the bag.'" (A 6) The district court held that "the jail's visitor logs are public records with no statutory exemption for the experts' names within those logs." (A 5) The district court also found that this Court's opinion in *Andrews v. State*, 243 So. 2d 899 (Fla. 2018) did not apply. (A 8) Relying on *Wait v. Florida Power and Light Co*., 372 So. 2d 420, 424 (Fla. 1979), the court noted that "[T]he Constitution allows for the legislature, not the courts, to provide for exemptions to the public records act." (A 7) The opinion concluded by finding that the "constitution and the Public Records Act do not authorize redacting the names of the experts visiting petitioner in the jail. If public policy

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client communications and attorney work-product information remain inviolate. This argument was not addressed in the district court's opinion.

demands that these be kept confidential, it is for the Legislature to provide an exemption by statute." (A 8)

Petitioner's Motion for Rehearing and Request for Certification of Question of Great Public Importance was denied September 23, 2019. A Notice to Invoke Discretionary Jurisdiction was filed on October 16, 2019.

SUMMARY OF ARGUMENT

The decision below expressly and directly conflicts with this Court's holding in *Florida Freedom Newspaper, Inc. v. McClary*, 520 So. 2d 32 (Fla. 1988) and misapplies *Andrews v. State*, 243 So. 3d 899 (Fla. 2018).

Contrary to *McClary*, the district court held that temporary withholding of public records was a public policy issue that could only be authorized through legislation. In *McClary*, this Court held that courts can and must temporarily limit public records disclosure to protect fair trial rights. The Court held that temporary denial of public access to discovery information does not constitute the creation of a judicial exemption to public records laws. *McClary,* 520 So. 2d at 34. "If, as the press urges, chapter 119 was read and applied so as to violate the constitutional separation of powers doctrine or the right to a fair trial, we would be obliged to declare the statute unconstitutional." *Id*. at 34.

The district court's opinion, holding that only the legislature can determine whether access to a public record can be temporarily limited, directly and expressly

conflicts with the *McClary* opinion. *McClary* involved the same question of law but held that there are situations where the public disclosure of non-exempt public records must temporarily yield to a defendant's fair trial rights.

Equally important is the district court's misapplication of this Court's holding in *Andrews*. The district court held that the attorney-client privileged information, protected from disclosure in *Andrews,* can be disclosed pursuant to a public records request when the defendant is incarcerated. *Andrews* recognized the impact of disclosure of such information on fair trial rights. Although not a public records case, Mr. Andrews requested both an *in camera* hearing and leave to file a sealed motion for defense funding. The method of disclosure was not important, but the information at issue and the impact on fair trial rights was dispositive. The district court improperly limited *Andrews'* application and misapplied it in this case.

The district court's holding that only the legislature can limit disclosure of public record information that impacts fair trial rights and its misapplication of *Andrews* creates an express and direct conflict of decisions that warrants this Court's review.

ARGUMENT

THE DECISION BELOW DIRECLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW.

This Court has jurisdiction to review district court decisions that directly and expressly conflict with decisions of the Court and other district courts of appeal on the same question of law. Art. V, § 3 (b) (3), Fla. Const. Such a conflict occurs when a district court opinion is contrary to a rule established by this Court's case law or misapplies a decision of this Court. *Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009) (conflict jurisdiction exists when a district court announces a rule of law that conflicts with a supreme court decision or misapplies a supreme court decision); *Jaimes v. State*, 51 So. 3d 445, 446 (Fla. 2010).

The decision below directly and expressly conflicts with this Court's decision in *Florida Freedom Newspapers, Inc. v. McClary*, on the same question of law.

The decision below expressly and directly conflicts with this Court's decision holding that courts can and must temporarily limit public access to information if public disclosure affects the right to a fair trial. The district court wrongly held that courts cannot temporarily limit access to public information, and thus conflicts with *Florida Freedom Newspapers, Inc. v, McClary*, 520 So. 2d 32 (Fla. 1988). *McClary* recognized that courts must balance the public's right to know with a defendant's right to a fair trial. In balancing those rights, the right to a fair trial in certain instances

can and must prevail and courts may temporarily limit public access to ensure a fair trial. *Id*. at 34. The Court acknowledged *Wait v. Florida Power and Light Co*., 372 So. 2d 420, 424 (Fla. 1979), relied upon by the district court, and held that temporary limitations do not create judicial exemptions to public records laws. *McClary*, 520 So. 2d at 34.

The absence of any reference to *McClary* in the district court's opinion does not defeat conflict jurisdiction. It is not necessary for a district court to identify explicitly conflicting district court or supreme court decisions for a direct conflict to exist with a rule of law announced by this Court. *Ford Motor Company v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981) (discussion of legal principles which court applied supplies sufficient basis for conflict review). The district court announced rule of law that only the legislature can limit the disclosure of public information expressly and directly conflicts with this Court's ruling that courts can and should temporarily limit public access to protect the right to a fair trial.

The decision below is a misapplication of this Court's decision in *Andrews v. State*, 243 So. 3d 899 (Fla. 2018) and is in direct and express conflict with *Andrews* on the same question of law.

Conflict jurisdiction also lies because the district court misapplied this Court's decision in *Andrews v. State*, 243 So. 3d 899 (Fla. 2018), by limiting its holding to non-public record cases. In *Andrews*, this Court held that an indigent defendant is entitled to file motions requesting funds for defense experts *ex parte* and **under seal**

and further required *ex parte* hearings on any such motion. *Id*. at 901. This Court based its decision on the controlling fact that the motions reveal attorney-client and work-product privileged information:

> Requiring a defendant to reveal to the prosecutor the name of an expert witness whom the defendant may wish to consider calling, along with the reasons why this witness may be of value to the defense, is contrary to the work-product doctrine because it would serve to highlight the thought processes and legal analysis of the attorneys involved… *Even if the defendant is only required to disclose the expert's name and area of expertise*, that is information that the State would otherwise not be entitled to know at that stage. In fact, the State's presence at the hearing puts the defendant in the difficult situation of having to choose between fully supporting the motion for the appointment of an expert and not revealing information to the State that it would not otherwise be privy to.

Id. at 901-2 (internal citations and quotations omitted; emphasis added)

This Court recognized that the choice of experts by the defense reveals information gathered in attorney–client privileged communications and is privileged work-product. Here, the controlling issue is identical: the state will learn the names of defense-retained experts, thus revealing privileged information. The district court misapplied *Andrews*. *See Nielson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960) (conflict jurisdiction lies where conflicting conclusion reached in case involving substantially same controlling facts). Regardless of the means of disclosure, the names of defense-retained experts is protected under *Andrews.*

CONCLUSION

The lower court's decision directly and expressly conflicts with rulings issued by this Court on the same question of law. Accordingly, this Court should exercise its discretionary jurisdiction and accept review of this case.

Respectfully submitted,
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/s/ Diane M. Cuddihy

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was delivered by eservice to Assistant State Attorney Jeff Marcus and Assistant State Attorney Steven Klinger, Office of the State Attorney, Broward County Courthouse at courtdocs@sao17.state.fl.us and to Department of Legal Affairs, 1515 North Flagler Drive, suite 900, West Palm Beach, Florida, 33401 at crimappwpb@myfloridalegal.com, Dana J. McElroy, counsel for news media, at dmcelroy@tlolawfirm.com, Christian Tsoubanos, counsel for Broward Sheriff's Office at Christian_tsoubanos@sheriff.org and to the Honorable Elizabeth Scherer at divfj@17th.flcourts.org this 22nd day of October, 2019.

/s/ Diane M. Cuddihy

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this Petition, Times New Roman 14-point, complies with Rule 9.210, Fla. R. App. P.

/s/ Diane M. Cuddihy

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