IN THE SUPREME COURT OF THE STATE OF FLORIDA

NIKOLAS CRUZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC19-1784

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The respondent, State of Florida, is the prosecution in the trial court and was the Appellee before the Fourth District Court of Appeal. The respondent will be referred to herein as "the State." The petitioner, Nikolas Cruz, is the defendant in the trial court and was the Appellant before the Fourth District Court of Appeal. The petitioner will be referred to as "Petitioner."

STATEMENT OF THE CASE AND FACTS

The State charged Petitioner with murdering 17 students and staff members at Marjorie Stoneman Douglas High School and attempting to murder 17 more. *Cruz v. State*, 279 So. 3d 154, 156 (Fla. 4th DCA 2019). While in jail pending trial, Petitioner "moved for a protective order to prevent disclosure of [a] portion of [his] jail visitation logs which would reveal the names of mental health experts who **may visit** him, retained in connection with his defense." *Id.* (emphasis added). "Petitioner acknowledged that the visitation logs were public records," but he argued that "the actual names of visitors on [the logs] were not required to be part of that record or that they were protected from disclosure." *Id.*

Specifically, Petitioner argued that the names of any experts "should not be considered a public record because they do not fit within the purpose of the Public Records Act." *Id.* Second, he argued that "disclosing the experts' names was a matter of attorney client privilege and work product." *Id.* Third, Petitioner argued that

"disclosing the names would damage his right to a fair trial." *Id.* In response, the State and Intervenor Sun-Sentinel argued that the visitation "logs were public records and there was no statutory exemption . . . to shield the names of an inmate's visitors." *Id.* In addition, they argued that Petitioner "failed to satisfy the three-part test of *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), for a trial court to restrict access to records in order to insure a defendant a fair trial." *Id.*

The trial court agreed with the State and denied Petitioner's motion for protective order, explaining:

> The defense may have a myriad of experts from different specialty backgrounds visit [Petitioner] at jail during the course of its pretrial investigation and preparation, some of whom the defense may likely use as witnesses at trial and some whom it may likely not. However, **the actual communications that occur between these experts and [Petitioner] within the jail are not subject to release as public records**[.] It is merely the identities of these visitors that would be subject to public disclosure, and **mere potential speculation about these visitors will not compromise [Petitioner's] right to a fair trial.**

Id. at 156-57 (emphasis added). Petitioner sought review of the trial court's order by filing a petition for writ of certiorari in the Fourth District Court of Appeal ("Fourth District").

The Fourth District initially found that "[P]etitioner ha[d] satisfied the **jurisdictional threshold** of a showing of irreparable harm" *Id.* at 157 (emphasis added). However, the Fourth District also found that Petitioner failed to show a

departure from the essential requirements of law because "[a]ll parties agree[d] that generally, jail visitation logs are public records," and the parties agreed that "there is no statutory exemption which would allow redaction of those records to shield the names of jail visitors from public records disclosure." *Id.* at 158.

In addition, the Fourth District rejected Petitioner's argument that any expert's name contained on the logs would not fall within the purpose of the Public Records Act, stating: "We view jail visitation logs as similar to the mail logs or phone logs which . . . would show the functioning of the public agency" at the jail. *Id.* Finally, the Fourth District rejected Petitioner's claim that this Court's decision in *Andrews v. State*, 243 So. 3d 899 (Fla. 2018), controlled the outcome of this case. *Id.* at 159. The Fourth District explained that *Andrews* "involved a potential violation of attorney-client privilege and work product, not a public records request, which is controlled by statute." *Id.* Moreover, *Andrews* "did not hold that the mere revelation of the name of an expert could constitute a denial of a right to a fair trial." *Id.*

Based on the foregoing, the Fourth District concluded that "[t]he constitution and the Public Records Act do not authorize redacting the names of the experts visiting [P]etitioner in jail," and denied his petition. *Id.* Petitioner now asks this Court to exercise discretionary review of the Fourth District's decision.

SUMMARY OF THE ARGUMENT

This Court should not accept jurisdiction for two reasons. First, the issue is not ripe as no experts have visited Petitioner in jail and no party has made a public records request for the jail visitation logs. Second, the decision of the Fourth District Court of Appeal does not conflict with this Court's decisions in *Florida Freedom Newspapers, Inc. v. McClary*, 520 So. 2d 32 (Fla. 1988), or *Andrews v. State*, 243 So. 3d 899 (Fla. 2018). In this case, the Fourth District simply held that Petitioner failed to establish a departure from the essential requirements of law because the jail logs are public records with no statutory exemption from disclosure.

ARGUMENT

I. THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THE ISSUE IS NOT RIPE FOR REVIEW.

This Court should decline to exercise jurisdiction because the issue is not ripe for review. The Fourth District's opinion and Petitioner's brief make clear that no expert has visited Petitioner in jail. *Cruz*, 279 So. 3d at 156 (noting Petitioner sought a "protective order to prevent disclosure of . . . the names of mental health experts who **may visit** him") (emphasis added); *see* Initial brief at 1 ("The motion alleged that defense-retained experts **would be meeting** with the Petitioner.") (emphasis added). Thus, there are no jail visitation logs that contain the names of any defense experts. Because the documents whose disclosure Petitioner seeks to enjoin do not exist, no public records request for them has been made.

"Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994), *as clarified* (Nov. 30, 1994). In short, a case must be ripe enough so that an actual case or controversy exists. *See Gosciminski v. State*, 262 So. 3d 47, 58 (Fla. 2018) (declining to address issue that was "not ripe for review"); *see also Kuhnlein*, 646 So. 2d at 721 ("Put another way, the parties must not be requesting an advisory opinion . . . except in those rare instances in which [one] [is] authorized.").

This Court should reject Petitioner's invitation to resolve this anticipatory dispute. Petitioner must wait for an actual public record to be created and then for a public records request to be made, if any, before moving for a protective order and making his objections known. *See Bent v. State*, 46 So. 3d 1047, 1048 (Fla. 4th DCA 2010) (granting relief where a "newspaper sent a public records request to the Broward Sheriff's Office" and the defendant moved for a protective order "[i]n response"); *see also Charles v. State*, 193 So. 3d 31, 32 (Fla. 3d DCA 2016) (dismissing certiorari petition as premature after defendant moved for protective order to prevent disclosure of "anticipated" reports from non-testifying experts).

Because no party has sought disclosure of the jail visitation logs (and the logs do not exist), the issue is not ripe for review. Accordingly, this Court should decline to exercise jurisdiction.

II. THIS COURT LACKS JURISDICTION BECAUSE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that "expressly and directly conflicts with a decision . . . of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.; *see also* Fla. R. App. P. 9.030(a)(2)(iv). "The question of a conflict is of concern to this Court only in those cases where the opinion and judgment of the district court announces a principle or principles of law that are conflict with a principle or principles of law of another district court or this Court." *N&L Auto Parts Co. v. Doman*, 117 So. 2d 410, 412 (Fla. 1960). The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

A. *The Decision Does Not Expressly and Directly Conflict with Florida Freedom Newspapers, Inc. v. McClary, 520 So. 2d 32 (Fla. 1988).*

Petitioner first argues that the Fourth District's decision expressly and directly conflicts with this Court's decision in *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988). According to Petitioner, the Fourth District held that, contrary to *McCrary*, "courts cannot temporarily limit access to public information" when disclosure would affect the defendant's right to a fair trial. (Initial brief at 5). However, the Fourth District neither announced nor applied such a rule

in this case. In addition, the facts of *McCrary* are distinguishable. As discussed below, the State maintains that Petitioner has misinterpreted the Fourth District's holding and no conflict with *McCrary* exists.

In *McCrary*, two jail deputies were charged with mistreating inmates. 520 So. 2d at 33. Both deputies moved to prevent disclosure of "certain pretrial discovery information," which they claimed would result in prejudicial pretrial publicity. *Id.* The trial court reviewed the discovery materials in camera and granted the motion, finding that the discovery was "graphically incriminating" and "no alternative measures were available . . . which would safeguard the defendant's rights to a fair trial by an impartial jury." *Id.* After the press filed a petition for writ of certiorari, the District Court denied the petition and upheld the trial court's order. *Id.* This Court subsequently approved that decision because the trial court properly applied the three-prong test of *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), in "determining whether public access to a **judicial public record** should be restricted or deferred." *Id.* at 35 (emphasis added).

In contrast, the trial court in this case refused to prevent the disclosure of jail visitation logs because they were public records with no statutory exemption. *Cruz*, 279 So. 3d at 156. Unlike the records in *McCrary*, the jail logs at issue here are not discovery materials that became public records when "made part of a court file." *McCrary*, 520 So. 2d at 34. Instead, any jail logs are public records from the outset

as they are generated and maintained by the sheriff's office. *Cruz*, 279 So. 3d at 158. In addition, the trial court in this case found that disclosure of the jail logs would not harm Petitioner's right to a fair trial because the logs would contain only experts' names and "mere potential speculation about these visitors" was not enough to show harm. *Id*. at 157.

When the Fourth District reviewed the issue, it acknowledged this Court's three-prong test from *Lewis*, which was also applied in *McClary*. *Cruz*, 279 So. 3d at 156. Furthermore, the Fourth District agreed with the trial court's conclusion that disclosure of the jail logs would not harm Petitioner's right to a fair trial. *See id.* at 159 (explaining how this Court "did not hold that the mere revelation of the name of an expert could constitute a denial of a right to a fair trial"). Therefore, temporarily limiting access to the jail logs was not necessary. No express and direct conflict with *McCrary* exists.

B. *The Decision Does Not Expressly and Directly Conflict with Andrews v. State, 243 So. 3d 899 (Fla. 2018).*

Petitioner's second argument is that the Fourth District misapplied this Court's decision in *Andrews v. State*, 243 So. 3d 899 (Fla. 2018), by limiting its holding to non-public record cases. Petitioner contends that his experts' names "reveal[] information gathered in attorney-client privileged communications and [are] privileged work-product." (Initial brief at 7). Petitioner is mistaken because *Andrews* does not control this case, and even if it did, *Andrews* does not hold that an

expert's name by itself is protected by attorney-client privilege.

In *Andrews*, the defendant was represented by pro bono private counsel who filed a motion requesting an ex parte hearing to determine whether to appoint an expert at public expense. 243 So. 3d at 901. The trial court denied the motion for ex parte hearing without explanation, and the District Court denied the defendant's petition for writ of certiorari. *Id.* This Court eventually quashed the District Court's decision, noting that indigent defendants must show a need for an expert appointed with public funds and that, "[i]n making a showing of particularized need, a defendant may be required to expose privileged information or attorney work product." *Id.* As a result, the *Andrews* Court held that the State could not be present at the hearing where the defendant was revealing his expert witness's name "**along with the reasons why th[e] witness may be of value to the defense**." *Id.* at 901-02 (emphasis added).

In this case, the Fourth District's decision does not conflict with *Andrews* because *Andrews* "did not hold that the mere revelation of the name of an expert could constitute a denial of a right to a fair trial." *Cruz*, 279 So. 3d at 159. Instead, the holding of *Andrews* was that "motions outlining the reasons for hiring the expert and hearings on those motions before the JAC must be ex parte." *Id.* The Fourth District also distinguished *Andrews* from the instant case, which is a public records case controlled by statute. *Id.* Contrary to Petitioner's suggestion, this is a significant

distinction because "documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product" are not exempt from public records disclosure unless a statute provides for it. *Id.* (quoting *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979)).

The Fourth District's holding that *Andrews* is inapplicable to the different question of law presented in this case does not amount to express and direct conflict. *See* Art. V, §3(b)(3), Fla. Const. Accordingly, there is no basis for this Court's jurisdiction.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that this Honorable Court decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I CERTIFY that (1) this brief has been prepared in Times New Roman font, 14 point, and double spaced, and (2) a true and accurate copy of this brief has been served through the e-filing portal on November 20, 2019, to: Diane, M. Cuddihy, counsel for Petitioner, at appeals@browarddefender.org and dcuddihy@browarddefender.org, Dana J. McElroy, counsel for Sun-Sentinel Company, at dmcelroy@tlolawfirm.com.

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