IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1784
District Court Case No: 4D19-1321

NIKOLAS CRUZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

SUN-SENTINEL'S BRIEF IN OPPOSITION TO JURISDICTION

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PRELIMINARY STATEMENT

Petitioner Nikolas Cruz asks this Court to review the Fourth District Court of Appeal's decision denying his petition for certiorari because of direct and express conflict with two prior Florida Supreme Court decisions. Sun-Sentinel Company, LLC ("Sun-Sentinel"), publisher of the *South Florida Sun-Sentinel* newspaper, was an intervenor in the trial court and on appeal. Sun-Sentinel therefore files this brief in opposition because, as detailed below, there is no conflict, and the District Court properly applied relevant case law.

STATEMENT OF THE CASE AND FACTS

Cruz has been charged with seventeen counts of first-degree murder and seventeen counts of attempted first-degree murder. *See Cruz v. State*, 279 So. 3d 154 (Fla. 4th DCA 2019) (a copy of which is attached as Petitioner's Appendix) (the "decision"). Cruz is in jail awaiting trial in the custody of the Broward County Sheriff's Office ("BSO"). (A 5)

Jail logs containing the names of all inmate visitors are public records pursuant to Art. I, § 24 of the Florida Constitution and Chapter 119, Florida Statutes (the Public Records Act). (A 7) In recognition of their status as such, Cruz moved in the trial court for a protective order to prevent disclosure of portions of jail logs that would reveal the names of mental health experts who may visit him in the future. (A 5) In support of his motion, Cruz argued to the trial court that (1) experts' names

contained in the log should not be considered public records; (2) disclosing experts' names would violate the attorney-client and work-product privileges; and (3) disclosure would damage his right to a fair trial. (A 5-6)

The trial court denied Cruz's motion, finding that there was no applicable exemption in Chapter 119 to prevent disclosure. (A 6) The trial court also held, after applying the three-part test in *Miami Herald Publ'g v. Lewis*, 426 So. 2d 1 (Fla. 1982), that Cruz's fair trial right would not be compromised by public access to the names of jail visitors. (*Id.*) Specifically, the trial court found:

> The defense may have a myriad of experts from different specialty backgrounds visit Defendant 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 Defendant 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 Defendant's right to a fair trial.

(*Id.*)

Cruz then filed a petition for certiorari review by the Fourth District, asserting the same arguments. (*Id.*) The Fourth District found that Cruz's allegations that his fair trial rights would be damaged "satisfied the jurisdictional threshold of a showing of irreparable harm" based upon this Court's decision in *Andrews v. State*, 243 So. 3d 899 (Fla. 2018). (*Id.*) As to the merits of Cruz's petition, however, the Fourth District held that Cruz had not shown that the trial court departed from a "clearly

established principle of law resulting in a miscarriage of justice" by denying his motion for protective order. (A 7)

In so doing, the Fourth District held that jail visitation logs are public records subject to disclosure under Art. I, § 24, Fla. Const., and Fla. Stat. § 119.011(12) (2018), to which no statutory exemption applies. (*Id.*) The Fourth District, citing this Court's decision in *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979), explained that only the Florida Legislature may create exemptions to the Public Records Act, not courts. (*Id.*) Contrary to Cruz's suggestion in his jurisdictional brief, the District Court did not hold that "correspondence between defense counsel and jail personnel to secure the entry of defense-retained experts" were non-exempt public records. *See* Juris. Br. at 2 (citing A 6).

Having found that jail visitor logs are public records, the Fourth District disagreed that *Andrews* required the trial court to find that disclosure of expert names on the logs violated Cruz's fair trial right or revealed privileged information. (A 8) First, *Andrews* "involved a potential violation of attorney-client privilege and work product, not a public records request, which is controlled by statute." *Id.* Second, *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.*)

SUMMARY OF THE ARGUMENT

The Fourth District's decision does not expressly and directly conflict with *Fla. Freedom Newspapers, Inc. v. McCrary,* 520 So. 2d 32 (Fla. 1988), or *Andrews v. State,* 243 So. 3d 899 (Fla. 2018).

In *McCrary*, this Court held that a trial court must apply the three-prong *Lewis* test to determine whether a movant has proffered evidence sufficient to seal materials that had been transformed into public records by the state's disclosure of them to a criminal defendant in discovery. *McCrary*, 520 So. 2d at 35. Here, by contrast, the Fourth District interpreted Chapter 119 and relevant case law to determine that jail visitor logs are public records generated by BSO and that no exemption prohibiting disclosure by BSO exists. Because the decision acknowledges the trial court's application of *Lewis*, and expressly holds that Cruz's fair trial right is not impacted, there is no conflict with *McCrary.* Rather, Cruz apparently disagrees with Fourth District's conclusion -- on the merits -- that the trial court was not required to grant his motion for protective order to ensure a fair trial.

The Fourth District's decision similarly does not expressly and directly conflict with, or misapply, this Court's holding in *Andrews*. In *Andrews*, this Court ruled that indigent defendants may file motions concerning the appointment and costs of experts *ex parte* and under seal, and are entitled to hearings on such motions *ex parte*. *Andrews*, 243 So. 2d at 902. Contrary to Cruz's argument, the *Andrews*

decision does not require a finding that disclosure only of the *names* of a criminal defendant's potential experts necessarily denies fair trial rights. The Fourth District's decision, therefore, correctly analyzes *Andrews* and rejects its application to BSO's obligations under Chapter 119 and Cruz's motion for a protective order.

ARGUMENT

Cruz seeks to invoke this Court's jurisdiction pursuant to Art. V, § 3(b)(3) of the Florida Constitution, which allows review of "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." *See also* Fla. R. App. P. 9.030(a)(2)(iv). Discretionary jurisdiction applies only to a "narrow" class of cases. *Wells v. State*, 132 So. 3d 1110, 1112 (Fla. 2014) (citation omitted). Significantly, conflict jurisdiction is not permitted unless this Court finds a "real, live and vital conflict" arising from a district court's pronouncement of a rule of law. *Nielsen v. City of Sarasota*, 117 So. 2d 731, 735 (Fla. 1960). Additionally, the express and direct conflict must appear within the four corners of the decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Nothing of the sort is present here.

I. No Conflict with *McCrary*.

Cruz argues that the District Court's decision held that courts "cannot temporarily limit access to public information" and therefore directly conflicts with

McCrary. (Juris. Br. at 5) A review of both decisions, however, reveals that Cruz is wrong.

In *McCrary*, this Court considered whether the trial court in a criminal case properly prevented public disclosure of information that had achieved the status of a public record because prosecutors provided it to the defendants in discovery pursuant to Fla. R. Crim. P. 3.220. *McCrary*, 520 So. 2d at 33. The pretrial discovery material at issue was exempt from disclosure under Chapter 119 as "active criminal investigative" information. *Id.* at 34; *see also* Fla. Stat. § 119.071(2)(c)(1) (2018). Chapter 119 provides, however, that once information is turned over by the state to a defendant in a criminal case, the information is no longer exempt from disclosure. *McCrary*, 520 So. 2d at 33; *see also* Fla. Stat. § 119.011(3)(c)(5) (active criminal investigative information does not include "[d]ocuments given or required by law or agency rule to be given to the person arrested").

Recognizing that the judiciary "should not create public policy exemptions" pursuant to *Wait*, this Court held that a trial court *may* temporarily seal pretrial discovery material and/or information in court files to protect a defendant's fair trial right. *McCrary*, 520 So. 2d at 34. In order to do so, the Court held that a trial court must apply the three-prong *Lewis* test, which requires a movant make an evidentiary showing that:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. No alternatives are available, other than a change of venue, which would protect a defendant's right to a fair trial; and

3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Id. at 35; *Lewis*, 426 So. 2d at 6.

The Fourth District's decision here in no way conflicts with, or misapplies, this holding. Instead, the decision holds that jail visitation logs are public records subject to disclosure under Chapter 119 *and* that the trial court properly denied Cruz's motion for protective order after applying the *Lewis* test. (A 6, 8) In this regard, the Fourth District considered Cruz's *argument* that revealing the names of experts "who may consult or interview him" would provide insight into the defense strategy and prevent "him from receiving a fair trial." (A 6) The Fourth District then rejected that argument by finding that the "mere revelation" of an expert's name does not constitute the denial of a fair trial. (A 8)

In so doing, the decision does not hold -- as Cruz asserts -- that a trial court may never seal a public record to ensure a defendant's fair trial right. Rather, the decision holds that Cruz's right to a fair trial *here* would not in fact be compromised by disclosure of the names of experts who visit him in jail. (*Id.*) Accordingly, the decision correctly applies *McCrary*.

II. No Conflict with *Andrews*.

Cruz's assertion that the Fourth District's decision expressly and directly conflicts with *Andrews* is a misrepresentation of both opinions. No conflict or misapplication exists because *Andrews* involved an entirely different legal question, with different facts, and a different procedural posture. In this regard, the Fourth District thoroughly analyzed and distinguished *Andrews*, finding it did not apply to the facts and legal issues raised by Cruz.

Specifically, the Court in *Andrews* reviewed the following certified question:

> Whether an indigent defendant who is represented by private counsel *pro bono* is entitled to file motions pertaining to the appointment and costs of experts, mitigation specialists, and investigators *ex parte* and under seal, with service to the justice administrative commission and notice to the state attorney's office, and to have any hearing on such motions *ex parte*, with only the defendant and the commission present.

Andrews, 243 So. 3d at 900-01. In *Andrews*, the defendant's pro bono counsel filed a motion for an *ex parte* hearing regarding the appointment of experts for a resentencing hearing. *Id.* at 901. Under such circumstances, defendants requesting public funds are required to make a "particularized showing of need," which may require exposing privileged information or attorney work product. *Id.*

Answering the certified question in the affirmative, this Court explained that a defendant may need to reveal the name of an expert witness "*along with* the reasons why this witness may be of value to the defense." *Id.* at 901-02 (emphasis added). Further, the Court noted that the defendant also may be forced to reveal self-

incriminating information in violation of his or her Fifth Amendment rights. *Id.* at 902. For all of these reasons, the Court held that indigent defendants are entitled to file motions for the "appointment and costs of experts, mitigation specialists, and investigators" *ex parte* and under seal. *Id.*

In so ruling, the Court drew a distinction between indigent defendants with pro bono counsel who must apply to the court, and defendants represented by private counsel or public defenders who -- by contrast -- are not required substantively to justify their need for expert costs. Accordingly, the Court concluded that "ex parte hearings are necessary *in this context* to protect indigent defendants' rights." *Id.* (emphasis added).

Here, Cruz asserts that the decision misapplies *Andrews* to hold that "attorney-client privileged information . . . can be disclosed pursuant to a public records request when the defendant is incarcerated." (Juris. Br. at 4) This is not an accurate description of the decision or its holding. As the Fourth District explained, *Andrews* did not involve or decide whether a public record subject to disclosure *under Chapter 119* can be withheld by a government agency in the absence of an express exemption. (A 8) In this regard, standards governing disclosure of Chapter 119 records and public court records are distinct. *See generally State v. Wooten*, 260 So. 3d 1060, 1069-70 (Fla. 4th DCA 2018) (denying certiorari petition seeking to

prevent release of public records and explaining separation of powers applicable to Chapter 119 versus court records).

Additionally, Cruz erroneously argues that *Andrews* held that the disclosure *only* of expert names without more violates a defendant's right to a fair trial, and that the Fourth District improperly limited this asserted holding. (Juris. Br. at 4) Again, Cruz misreads the decision, which carefully analyzes the holding and facts of *Andrews* and concludes that *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." (A 8) Rather, the decision notes the Court in *Andrews* held that a combination of factors, including publicly-filed motions disclosing the "*reasons* for hiring the expert," must be held *ex parte*. (*Id.*) (emphasis in original). Cruz accordingly has failed to establish a jurisdictional basis for review of the Fourth District's decision by this Court.

CONCLUSION

Petitioner Cruz's jurisdictional brief is nothing more than a disagreement with the Fourth District Court of Appeal's decision. Petitioner does not proffer any actual basis that would give rise to this Court's discretionary jurisdiction. Accordingly, this Court should decline to invoke its discretionary jurisdiction over this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **21st** day of **November, 2019**, I electronically filed the foregoing document with the Clerk of the Florida Supreme Court via the E-Portal and have provided a copy to all counsel of record, either via transmissions of Notices of Electronic Filing generated by the E-portal, or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ Dana J. McElroy
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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14-point font and otherwise meets the requirements of the rule.

/s/ Dana J. McElroy
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