IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

GEORGE ZIMMERMAN,

Petitioner,

v. CASE NO. 5D13-1233

STATE OF FLORIDA,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

COMES NOW, Respondent, State of Florida, through the undersigned assistant attorney general, pursuant to Florida Rule of Appellate Procedure 9.100(h) and this Court's April 8, 2013, order, and responds to Petitioner's Petition for Writ of Certiorari. Respondent requests this Court deny the petition.

STANDARD OF REVIEW

Certiorari is an extraordinary remedy that is available only in limited circumstances. Certiorari is not a substitute for an appeal. See Cotton States Mut. Ins. v. D'Alto, 879 So. 2d 67 (Fla. 1st DCA 2004). As the Florida Supreme Court has explained, "'certiorari is an extraordinary remedy and [it] should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders.'" Belair v. Drew, 770 So. 2d 1164, 1166 (Fla. 2000)(quoting Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1098 (Fla. 1987)).

In granting writs of common-law certiorari, "the district courts of appeal should not be as concerned with the mere existence

of legal error as much as with the seriousness of the error." State v. Steele, 921 So. 2d 538, 541 (Fla. 2005)(quoting from Combs v. State, 436 So. 2d 93, 95 (Fla. 1983)). "Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually." Combs v. State, 436 So. 2d at 96.

A petition for writ of certiorari is appropriate to review a discovery order when the order departs from the essential requirements of law, causing material injury throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal. Allstate Ins. Co. v. Langston, 655 So. 2d 91 (Fla. 1995). The latter requirement is jurisdictional. Montanez v. State, 24 So. 3d 799, 801 (Fla. 2d DCA 2010). It is well established that, "orders having the effect of denying discovery are almost invariably not reviewable by certiorari because of the absence of irreparable harm." Boyd v. Pheo, Inc., 664 So. 2d 294, 295 (Fla. 1st DCA 1995). Unlike situations where a trial court erroneously compels the exchange of information (the proverbial "cat out of the bag" orders), the harm done by the failure to provide information can be corrected on appeal in most cases. Jennings v. Elections Canvassing Comm'n of State of Fla., 958 So. 2d 1083, 1084 (Fla. 1st DCA 2007); see also Bill Kasper Const. Co., Inc. v. Morrison, 93 So. 3d 1061, 1063 (Fla. 5th DCA 2012)(*en banc*)(Torpy, J., concurring)("In the vast majority of

cases, a successful appeal and new trial provide a cure for the error. Were this not the rule, certiorari review of pretrial and trial rulings would be unlimited."). "It is also clear that an erroneous discovery order will not typically create certiorari jurisdiction unless it causes irreparable harm and is the type of order that could provide an opponent with 'material that could be used by an unscrupulous litigant to injure another person.'" Banco Latino (S.A.C.A.) v. Kimberly, 979 So. 2d 1169, 1171 (Fla. 3d DCA 2008)(quoting from Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 999 (Fla. 1999)).

When considering whether a particular type of harm may be remedied by appeal, an appellate court must bear in mind that, ordinarily, the time, trouble, and expense of an unnecessary trial are not considered "irreparable injury" for these purposes. Cont'l Equities, Inc. v. Jacksonville Transp. Auth., 558 So. 2d 154, 155 (Fla. 1st DCA 1990); see also Morrison, 93 So. 3d at 1063 (Torpy, J., concurring)("Here, even assuming that the excluded testimony is critical to the Petitioner's defense, the availability of a direct appeal is not legally impeded. Assuming error, a new trial provides a complete cure."). The "irreparable injury" test must be satisfied in a certiorari proceeding that arises from a criminal case, as well. See, e.g., Mingle v. State, 429 So. 2d 850 (Fla. 4th DCA 1983)(denying a petition for writ of certiorari challenging the denial of a motion to compel disclosure of the name of a confidential informant due to the defendant's "full, adequate and complete remedy on plenary appeal").

Finally, given the narrow scope of certiorari review, this Court may not reach a different result simply because it is dissatisfied with the result reached by the circuit court. See Ivey v. Allstate Ins. Co., 774 So. 2d 679 (Fla. 2000); Dep't. of Highway Safety & Motor Vehicles v. Roberts, 938 So. 2d 513 (Fla. 5th DCA 2006); Sylvis v. State, 916 So. 2d 915 (Fla. 5th DCA 2005). See also Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 526 n. 4, 530 (Fla. 1995)("There are societal interests in ending litigation within a reasonable length of time and eliminating the amount of judicial labors involved in multiple appeals.... As a case travels up the judicial ladder, review should consistently become narrower, not broader.").

PROCEDURAL AND FACTUAL STATEMENT

BACKGROUND INFORMATION: Petitioner is charged by information with one count of second degree murder for the shooting death of Trayvon Martin on February 26, 2012. (Pet. Appx. Page 1). In the April 11, 2012, probable cause affidavit for an arrest warrant, some of the pertinent facts were set out as follows:

> On Sunday 2/26/12, Trayvon Martin was temporarily living at the Retreat at Twin Lakes, a gated community in Sanford, Seminole County, Florida. That evening Martin walked to a nearby 7-[Eleven] store where he purchased a can of iced tea and a bag of skittles. Martin then walked back to and entered the gated community and was on his way back to the townhouse where he was living when he was profiled by George Zimmerman. Martin was unarmed and was not committing a crime.
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> Zimmerman, who also lived in the gated community, and was driving his vehicle observed Martin and assumed Martin was a criminal. Zimmerman felt Martin did not belong

in the gated community and called the police. Zimmerman spoke to the dispatcher and asked for an officer to respond because Zimmerman perceived that Martin was acting suspicious. The police dispatcher informed Zimmerman that an officer was on the way and to wait for the officer.

During the recorded call Zimmerman made reference to people he felt had committed and gotten away with break-ins in his neighborhood. Later, while talking about Martin, Zimmerman stated "these a[**]holes, they always get away" and also said "these f[***]ing punks."

During this time, Martin was on the phone with a friend and described to her what was happening. The witness advised that Martin was scared because he was being followed through the complex by an unknown male and didn't know why. Martin attempted to run home but was followed by Zimmerman who didn't want the person he falsely assumed was going to commit a crime to get away before the police arrived. Zimmerman got out of his vehicle and followed Martin. When the police dispatcher realized Zimmerman was pursuing Martin, he instructed Zimmerman not to do that and that the responding officer would meet him. Zimmerman disregarded the police dispatcher and continued to follow Martin who was trying to return to his home.

Zimmerman confronted Martin and a struggle ensured. Witnesses heard people arguing and what sounded like a struggle. During this time period witnesses heard numerous calls for help and some of these were recorded in 911 calls to police. Trayvon Martin's mother has reviewed the 911 calls and identified the voice crying for help as Trayvon Martin's voice.

Zimmerman shot Martin in the chest. When police arrived Zimmerman admitted shooting Martin. Officers recovered a gun from a holster inside Zimmerman's waistband. A fired casing that was recovered at the scene was determined to have been fired from the firearm.

> Assistant Medical Examiner Dr. Bao performed an autopsy and determined that Martin died from the gunshot wound.

(Pet. Appx. Pages 2-3).

MOTION TO COMPEL: A motion to compel discovery was filed by Petitioner on October 12, 2012, directing the State to provide, *inter alia*,

> 4. Access to and a true copy of the original recorded interview of Witness 8 made by the Martin Family attorney, Benjamin Crump, including a list of people present during the interview; the chain of custody of the recording, including the circumstances of its release to the media (ABC News); and any reports by state or federal agencies that had possession of the recording.FN1
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> FN1 During a discovery meeting with the state prosecutors on August 24, 2012, we were told by T.C. O'Steen, investigator for the State Attorney's Office, 4th Judicial Circuit, that the state received this recording from the FBI and not from Mr. Crump, but no additional information has since been provided, notwithstanding a written follow-up request.

(Pet. Appx. Page 79). A hearing was held on several motions, including the motion to compel, on October 19, 2012. (Pet. Appx. Pages 65-77).

OCTOBER 19, 2012, HEARING: At the hearing, Petitioner explained that Witness 8, whose identity was unknown by law enforcement and the State for several weeks after the shooting, was interviewed in late March. (Pet. Appx. Page 67). In listening to the recorded interview of Witness 8, Petitioner asserted that Mr. Crump, the Martin family's attorney, was involved and that there were others in the room. Id. According to Petitioner, after the interview, ABC News claimed to have exclusive access to the

interview. (Pet. Appx. Page 68). Petitioner inquired about the interview and, after an August 24th hearing, the State had advised Petitioner that the State's copy of the recording was received from the F.B.I. or DOJ, and not Mr. Crump. Id.

Petitioner requested more information about the recording and had complained to the State that it was "largely unintelligible." (Pet. Appx. Page 68). The defense did not receive a response from the State. Id. The judge asked if Petitioner was requesting a clearer copy of the interview including the names of the persons present and the chain of custody of the recording. (Pet. Appx. Pages 68-69). When defense counsel voiced frustration about "several failed attempts to get here," the trial judge advised both sides to "stop" "the disparaging remarks going on on both sides." (Pet. Appx. Page 69). The court explained that it was simply asking for the basis of the motion. Id. Defense counsel apologized arguing that he was only providing context, but the judge explained that it was not unusual for parties to seek assistance from the court regarding disputed issues. Id.

The State explained that the recording was actually made by phone, but that Mr. Crump was not actually present with Witness 8 during the interview. (Pet. Appx. Page 70). The State had provided the defense with an exact copy of the copy received by the State[1]. Id. As far as any others present during the interview, the

[1]A copy of the State's 11th supplemental discovery dated December 13, 2012, reflects that a CD copy of the recording was provided by hand delivery to the defense and that a previous copy had been provided on May 14, 2012. (Pet. Appx. Page 259).

prosecutor indicated he would have to ask Mr. Crump. Id. Moreover, Mr. Crump was, in fact, the source of the copy of the recording in the State's possession. Id. After a pause in the proceedings to allow the prosecutor to speak with Mr. Crump, Mr. Crump approached the court to answer questions. (Pet. Appx. Page 71).

The court inquired about the process or means used to record the interview and whether the recording was still on his phone. Id. Mr. Crump explained:

> It was recorded by telephone. We got the information to the FBI who had the most sophisticated recording devices, I guess, in the United States, and that recording was then preserved by them and given to the State of Florida. It was very hard to hear because it was on the telephone. We were trying to hear clearly the recording on the telephone, but it was difficult to hear, and there were people in the room. And I have told the State of Florida anything that they will require of us, of Trayvon's family we would absolutely cooperate in any way, fashion or form. I understand we're going to be asked questions in deposition about the issue. We're ready to go at great length to give the Court and officers of the court anything at all they want.

(Pet. Appx. Pages 71-72). The judge asked if it had been on speaker phone and Mr. Crump indicated that it had. (Pet. Appx. Page 72). The judge advised Mr. Crump that a list of the names of those present and who could hear both sides of the conversation should be provided to both the State and the defense. Id. Mr. Crump indicated he understood. Id. When asked if the recording was still on his phone, Mr. Crump advised the court he would check, that the FBI had it, but he would check. (Pet. Appx. Pages 72-73).

The court directed Mr. Crump to provide the list of names

within ten days to both the State and the defense and, if the recording had not been erased, to bring it with him to the deposition so both sides could hear it. (Pet. Appx. Page 73). Mr. Crump indicated he would be happy to cooperate. Id. Before he was allowed to leave, Petitioner asked if the FBI was involved in making the recording. Id. Mr. Crump advised Petitioner they were not. (Pet. Appx. Page 74). When defense counsel asked about what Mr. Crump had meant by the FBI's sophisticated recording equipment, the court advised Petitioner that was a question that could be asked at a deposition. Id. Petitioner explained that Mr. Crump was not on the State's witness list, so the court made Mr. Crump a witness so that his deposition could be taken by the defense. Id. The defense indicated it would schedule that soon and the judge urged Mr. Crump to bring his phone so the attorneys could hear the recording at the deposition. Id.

Defense counsel began asking more questions about the circumstances of the recording's release to the media, when the court advised counsel that such issues could be raised during the deposition. (Pet. Appx. Page 75). Petitioner wanted to know where the State obtained the recording and the prosecutor advised the court he had already told counsel but repeated that FDLE had obtained the tape from the FBI, who had obtained the tape from Mr. Crump. (Pet. Appx. Pages 11-12). A notice of taking Mr. Crump's deposition on February 5, 2013, was filed on February 4, 2013. (Pet. Appx. Page 81).

MR. CRUMP'S AFFIDAVIT: A fifteen-page affidavit executed by

Benjamin Crump was filed on February 5, 2013. (Pet. Appx. Pages 83-97). In it, Mr. Crump explained how, in furtherance of his representation of the parents of Trayvon Martin, he became involved in investigating the circumstances of the shooting which resulted in the death of Trayvon Martin. (Pet. Appx. Pages 83-88). This led Mr. Crump to Witness 8 and his telephonic interview of her on March 19, 2012. (Pet. Appx. Pages 88-97). During Mr. Crump's preliminary discussion with Witness 8, the witness confirmed that she was on the phone with Trayvon Martin in the minutes leading up to his death. (Pet. Appx. Page 89). Mr. Crump advised her that, until the interview began, she was not to reveal anything of substance about her conversations with Trayvon Martin. Id. He further sought permission to interview Witness 8 while others were present including Trayvon Martin's parents, other family members, and two media-affiliated individuals. Id. Witness 8 and her parents gave consent. (Pet. Appx. Pages 89-90). Mr. Crump also explained to Witness 8 that she could be deposed or called as a witness and, while this interview was not a deposition given under oath, she should tell the whole truth regardless of whether it would hurt or help Trayvon Martin's parents. Id. After finishing with these preliminary matters, the interview began. (Pet. Appx. Page 90).

Also according to the affidavit, Mr. Crump had complied with the trial court's directive to reveal the identities of the persons present with him during the interview. Id. However, he was unaware of who may have been present with Witness 8. Id. Mr. Crump also noted that the defense had been given access to the recorder at the

offices of the FDLE. (Pet. Appx. Page 91). Moreover, he was unaware whether the media-affiliated individuals had also successfully recorded the interview. Id. Mr. Crump had simply placed Witness 8 on speaker phone and positioned the recorder near the speaker. Id.

Mr. Crump advised that he had saved the recording as multiple messages within a single folder on the recorder for several listed reasons. (Pet. Appx. Pages 92-93). Moreover, that the recorder does not allow only a part of a message to be erased; instead, the entire message must be erased. (Pet. Appx. Page 93). Thus, in order to erase part of a message, the message must be divided into two separate messages and then the undesired message erased. Id. Mr. Crump further averred that:

> At no time did I - or, for that matter, anyone else to my knowledge - ever use the Recorder's erase function in connection with the Recording, or, more generally, otherwise delete, remove, edit, alter or spoliate any portion of the Recording. For better or worse, the Recording on the Recorder is the true and correct original and unedited recording that I made of the Interview.

(Pet. Appx. Page 93).

Mr. Crump admitted that the recording does not contain the preliminary discussion, but it did include "every substantive statement that Witness 8 ever made to me in regard to her conversations with Trayvon on February 26, 2012[.]" (Pet. Appx. Pages 93-94). Mr. Crump further asserted that:

> I am aware of Defendant's contention that one or more call records apparently show that the Interview lasted for approximately 26 minutes, but that the Recording is only approximately 14 minutes long, FN9, suggesting that some 12 minutes of the Interview were not included in

> the Recording. As set forth, supra, Defendant's supposition is mistaken. In addition to the Preliminary Inquiry (which was not recorded), the Recording itself makes plain that due to my need for breaks and to sometimes place Witness 8 on hold, audio problems and other issues, much of the call(s) comprising the Interview were filled with silence that I deliberately did not record.
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> FN9. In point of fact, one of Defendant's own Redacted and Converted Copies of the Recording - comprised of FDLE "Part I through Part 7" - is actually 14 minutes and 57 seconds long.

(Pet. Appx. Page 94). Mr. Crump had not conducted any other interviews with Witness 8. Id.

Mr. Crump explained that he had played approximately one minute and three seconds of the recording at a press conference held on March 20, 2012, and "that portion of the Recording corresponds precisely with both copies of the Recording that were provided to the Defense." (Pet. Appx. Page 95). The recorder remained in Mr. Crump's possession up to the point in time when Mr. Crump handed the recorder over to the FBI in Tallahassee. Id. Mr. Crump observed the FBI technician copy the recording. (Pet. Appx. Pages 95-96). After verifying the accuracy of the recording, Mr. Crump again took possession of the recorder. (Pet. Appx. Page 96). Pursuant to court order, Mr. Crump delivered the recorder to FDLE as reflected by a property receipt form provided to Petitioner by the State on December 11, 2012. Id. The recorder remained in the possession of FDLE. Id. In closing, Mr. Crump advised: "To the best of my knowledge and belief, absent redactions and potential loss of fidelity from being converted and re-converted into MP3 files, Defendant's Redacted and Converted Copies of the Recording appear

to be true and correct copies of the original Recording." (Pet. Appx. Pages 96-97).

MOTION TO COMPEL APPEARANCE AT DEPOSITION: Petitioner filed a motion regarding the deposition of Mr. Crump requesting the court direct Mr. Crump to appear for deposition. (Pet. Appx. Pages 98-101). Petitioner complained that at the February 5th hearing, the court allowed the deposition to be postponed. (Pet. Appx. Page 99). Petitioner reminded the court that, at the hearing, the court had advised counsel it needed additional time to review the affidavit filed in lieu of a deposition. (Pet. Appx. Page 99; App. H, Clip 4). Petitioner argued in his motion that Mr. Crump did not meet the standard of opposing counsel and has information relevant to this case which is not necessarily related to his interview of Witness 8. (Pet. Appx. Pages 100-101). Moreover, that this information is not privileged. (Pet. Appx. Page 101).

Mr. Crump, through his attorney, filed a response in opposition to the motion to compel. (Pet. Appx. Pages 104-121). Mr. Crump explained that during his representation of Trayvon Martin's parents, he has "gathered factual information and performed research from which he has formed - and continues to form - his own legal opinions, conclusions, mental impressions and theories of liability in regard to the litigation." (Pet. Appx. page 105). Such information includes Petitioner's claim of self defense and the Stand Your Ground Law, which could potentially apply in the civil arena, also. (Pet. Appx. Pages 105-106). Mr. Crump alleged this information he has collected "is coextensive with a host of other

overlapping legal issues, claims and defenses that are at issue in the instant criminal proceeding and clearly anticipated to be at issue in parallel or future litigation." (Pet. Appx. Page 106).

After it appeared Petitioner would not be charged, Mr. Crump and his clients "redoubled their efforts to gather any additional information that they could in anticipation of a wrongful death suit and the rest of the Litigation, including any evidence that might cast further doubt on Defendant's claim of self-defense and the putative presumptions provided in Florida's Stand Your Ground Law." (Pet. Appx. Page 107). Mr. Crump noted that the State recorded an interview with Witness 8, and Petitioner did not allege any material contradictions or inconsistencies between the prior interview with Mr. Crump. (Pet. Appx. Page 107). Further, that the State had disclosed the interview with Witness 8 by Mr. Crump in its original discovery exhibit. (Pet. Appx. Page 108). However, Mr. Crump pointed out, neither the State nor Petitioner has ever listed Mr. Crump as a witness; this despite Petitioner being advised of Mr. Crump's interview. (Pet. Appx. Pages 108-109).

Mr. Crump asserted in his response that at the October 19, 2012, hearing the court had agreed that Mr. Crump could be deposed, but only as to the interview of Witness 8. (Pet. Appx. Pages 109-110). Mr. Crump provided all of the information requested of him by the court; however, now Petitioner seeks to depose Mr. Crump on "unspecified issues well beyond the scope of those for which the Court made Attorney Crump its witness." (Pet. Appx. Page 110).

Mr. Crump affirmatively invoked the attorney-client privilege

along with work product privilege as counsel for the next of kin of homicide victims. (Pet. Appx. Pages 110-116). In his response, Mr. Crump also noted that there is no constitutional, common law, or statutory right for a criminal defendant to take discovery depositions. (Pet. Appx. Page 116). Furthermore, Florida Rule of Criminal Procedure 3.220 contains significant limitations on a criminal defendant's use of discovery depositions, such as the classification of potential witnesses, as a means to curtail abuse. (Pet. Appx. Pages 116-118).

Assuming Mr. Crump is considered to be an unlisted witness within the meaning of Rule 3.220, Mr. Crump asserted that Petitioner failed to make even a threshold showing of his need to depose counsel for the victim's parents or to discover Mr. Trump's work product. (Pet. Appx. Page 119). Mr. Crump complained that the act of deposing counsel is a "demoralizing and extraordinary practice," and Petitioner failed to demonstrate that he has exhausted less intrusive means, that the information is relevant and not privileged, and that the information is crucial to his preparation of this case. Id.

Further, that it appears Petitioner is asserting the need to depose Mr. Crump prior to deposing Mr. Crump's clients, i.e., the victim's family for reasons unknown. (Pet. Appx. Pages 119-120). Finally, Petitioner's allegation that counsel has learned Mr. Crump has some unspecified yet relevant and unprivileged information concerning the offenses faced by Petitioner "fall[s] woefully short of justif[ying] any deposition of Attorney Crump." Id.

FEBRUARY 22, 2013, HEARING: Petitioner asserted at the hearing that Mr. Crump "made himself a witness, someone with relevant information to this case, by virtue of his participation in that interview....[including] [t]he circumstances leading up to it, the events surrounding it, and, to some degree, the events following it." (Pet. Appx. Page 130). Petitioner contended that statements made by Mr. Crump to the press suggested he has relevant information about this offense. (Pet. Appx. page 131). The judge noted that every attorney in this case had made statements to the press and inquired whether this meant they all were subject to being deposed. (Pet. Appx. Pages 132-133). Petitioner argued that Mr. Crump may have made disclosures to the press which would constitute a waiver of any attorney-client privilege. (Pet. Appx. Page 133). Moreover, Mr. Crump interviewed Witness 8 and Petitioner was hoping to fill in the unintelligible gaps from the recording. (Pet. Appx. Page 134). The trial court inquired about the relevant information in Mr. Crump's possession. (Pet. Appx. Page 135). After a request for some guidance by Petitioner, the judge referenced court cases involving when a party may depose opposing counsel. (Pet. Appx. Pages 135-136).

Petitioner disputed that Mr. Crump qualified as opposing counsel, but the trial court pointed out that Mr. Crump would be attending Petitioner's depositions of the Martin family as their attorney. (Pet. Appx. Pages 136-137). The court again asked about the relevance of any information the defense was seeking to learn from Mr. Crump. (Pet. Appx. Page 137). After counsel referenced

Rule 3.220, in that it allows an unlisted witness to be deposed if they have relevant information, the court interrupted and pointed out "[t]hat's the word relevant again." (Pet. Appx. page 138). Petitioner indicated it had to do with the representations made at the beginning of the hearing. Id. The trial court recalled that had to do with the gaps in the tape and any portions that were not intelligible. Id. Petitioner denied that such questioning would include the personal impressions of the attorney and the court asked whether the best evidence would be gleaned from Witness 8 herself. Id. Petitioner agreed it would be best regarding her testimony, but that Mr. Crump had identified her as the most important witness[2] and has firsthand information. (Pet. Appx. Pages 138-139). Petitioner was also curious as to why Witness 8 was "cloaked in secrecy," and what led to her interview by the State on April 2, 2012. (Pet. Appx. Page 139).

Petitioner argued there was no work-product privilege as to Witness 8 because Mr. Crump does not represent her and counsel may have waived it. (Pet. Appx. Page 140). While recognizing the court's hesitancy in forcing an attorney to submit to being deposed, Petitioner noted that Mr. Crump had originally agreed to it. Id. Moreover, Mr. Crump had made some pretty bold allegations at his press conferences, including the accusation that the Sanford Police Department and the State Attorney's Office conspired to cover up the homicide and the police department was corrupt and

[2]Yet, during another television appearance, Mr. Crump asserted that Petitioner was the most important witness in this case. (Pet. Appx. H, Clip 6).

falsified records[3]. (Pet. Appx. Pages 142-144,146-147). If that is true, Petitioner would be very interested in investigating any evidence of these allegations since he is being prosecuted as part of those efforts. Id.

Bruce Blackwell, counsel for Mr. Crump, advised the court that, in fact, Mr. Crump was the individual who found Witness 8 and there would be no question of work product had he kept that fact to himself. (Pet. Appx. Page 150). Mr. Blackwell argued that case law holds that taking the deposition of an attorney is only done as a last resort after all other avenues have been exhausted. (Pet. Appx. Page 150). It was pointed out that Petitioner has still not listed Mr. Crump as a witness and, at best, he would qualify as a category "C witness." (Pet. Appx. Page 151). Mr. Blackwell noted that in Mr. Crump's affidavit, Mr. Crump admitted that the recording is largely unintelligible, identified seven significant gaps and why, including that the preliminary discussion was not recorded. Id.

Mr. Blackwell argued that Mr. Crump's decision to include the FBI was protected by the work-product privilege; although Mr. Crump did provide chain of custody information which was important to

[3]These allegations apparently were made after the videotape of Petitioner's arrival at the jail was made public since Petitioner did not appear bloody contrasting with police reports describing Petitioner's broken nose and bloody appearance at the scene. (Pet. Appx. H, Clip 7). When later confronted with a photograph of Petitioner which appeared to reflect a broken nose and blood, Mr. Crump argued Petitioner's wounds were superficial compared to the victim's as they did not require a visit to the hospital. (Pet. Appx. H, Clip 8).

this case. (Pet. Appx. Page 152). Mr. Blackwell also pointed out that Petitioner had yet to depose Witness 8 and her knowledge is most important. Id.

Mr. Blackwell acknowledged it would be very beneficial for Petitioner to be allowed to depose the attorney for the Martin's, the same people who are planning to file a civil suit against Petitioner. (Pet. Appx. Page 153). Furthermore, many of the same issues will be present in the civil suit because of the immunity provision under the Stand Your Ground Law. Id. Mr. Blackwell explained that there is no statute of limitations for wrongful death and asserted Mr. Crump is an opposing attorney. Id. Moreover, as the trial court pointed out, all of the attorneys in this case have made statements to the press, including Mr. Blackwell, who was interviewed to explain the law in Florida that attorneys cannot be deposed without good cause. (Pet. Appx. Page 153). Further, simply because Mr. Crump made allegations he personally believed about the investigation in this case, Mr. Blackwell argued that was not evidence or even relevant. (Pet. Appx. Pages 153-154).

Citing to this Court's Horning-Keating opinion[4], Mr. Blackwell noted that the defense admitted they intended on deposing the victim's parents and, if the defense was seeking information about whether the father initially denied the voice on the 9-1-1 tape was the victim's, they should not be allowed to do so through the parents' counsel. (Pet. Appx. Pages 154-155). Mr. Blackwell argued

[4]Horning-Keating v. State, 777 So. 2d 438 (Fla. 5th DCA 2001).

that under Horning-Keating, the defense had to show a substantial need with more than an attorney's representations to the court at a hearing. (Pet. Appx. Page 155). The best the defense could present was their representations in court at this hearing since the motion was unclear regarding why Mr. Crump's deposition was necessary. Id. Mr. Blackwell reminded the court that Mr. Crump's knowledge regarding this case was based on derivative information. Id. Mr. Crump was not present at the shooting, he is not the victim's parent, and he has no idea whether a fight took place. Id. What Mr. Crump does know is that he has clients who intend on pursuing "a number of actions," and Mr. Crump has plenty of time in which to pursue any such actions. (Pet. Appx. Pages 155-156). Mr. Blackwell asserted that this was a sideshow and had nothing to do with the evidence that would be presented at trial in June. (Pet. Appx. 156). In closing, Mr. Blackwell argued it was all work product and Petitioner had failed to meet his burden to penetrate the work-product privilege either in his motion or at the hearing. (Pet. Appx. Page 158).

When given the opportunity for input from the State, the prosecutor reminded the court that neither side had listed Mr. Crump as a witness and the State had no intention on calling Mr. Crump as a witness at trial. (Pet. Appx. Page 159). Furthermore, that the victim's parents have cooperated with the prosecution. Id.

Petitioner responded that Mr. Crump should not be allowed to provide information at a press conference and then claim work-product privilege. (Pet. Appx. Page 161). Further, that if Witness

8 made a statement that was inconsistent with the statement made to Mr. Crump, Mr. Crump could be called as a witness. (Pet. Appx. Page 161). The trial court suggested that if Mr. Crump had been on the phone with Witness 8 while she was talking to the victim, then Mr. Crump would be a relevant witness. (Pet. Appx. Page 165). However, the judge noted, Mr. Crump interviewed a witness - he was not an eyewitness to the crime and has no relevant information. Id.

TRIAL COURT'S HOLDINGS: At the close of the hearing, the court found as follows:

> The seminal case on this issue...is Hickman v. Taylor, and that's at 329 U.S. 495, Supreme Court of the United States in 1947.
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> In that case...the Supreme Court felt that they were dealing with an attempt to secure the production of written statements and mental impressions in the files and the mind of the attorney without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice.
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> They went on to say the essence of what petitioner seeks either has been revealed to him already or is readily available to him direct from the witness. The Supreme Court went on to say not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.
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> They went on, and still with the Hickman opinion, the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.
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> In the Hickman case, as in this case, there is

only a naked, general demand which is insufficient to justify Mr. Crump's deposition. The Hickman court recognized that the petitioner's counsel wanted the oral statements only to help to prepare himself to examine witnesses and make sure that he has not overlooked anything.

And...that was found to be insufficient to permit an exception to the policy underlying the privacy of counsel's professional activities.

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[In] Upjohn Company versus U.S., 447 U.S. 381, 1981, Supreme Court of the United States, [t]hat court in the case had stated that the notes and memoranda sought by the government in that case were the work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent that they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications.

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The Court is going to order that to depose opposing counsel...the party must show, so that means the Defense must show, the three-point test that I had stated in the Shelton case and that discovery of a deposition from an opponent's counsel is improper where the criteria are not met.

And the Court had previously cited the Boughten case. The need and hardship test set forth in Hickman and reiterated in several cases thereafter must be alleged in the motion to compel.

Defendant's motion fails to allege a claim that the information sought is needed for any relevant purpose or the information cannot be obtained from any other source without undue hardship. The required showing of need and undue hardship must include specific explanations and reasons. Unsworn assertions of counsel are insufficient.

And inasmuch as the Defendant's motion is void of these requirements, the motion is facially insufficient and is denied.

However, even if the Defendant met the prong test that the Court stated, his motion to take the deposition also fails as the notes and memoranda sought are work product based on oral statements. And, again, if they reveal communications that are protected by the attorney-client privilege to the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communication.

Having made that determination, the Court also finds, because it was brought up regarding Rule 3.220(b), that rule requires the State to list all persons known to have information that may be relevant to any offense charged or any defense thereto.

The rule further provides that a defendant may take the deposition of any unlisted witness who has information relevant to the offenses charged.

Again, Defendant has failed to make a threshold showing as to his need to depose Mr. Crump or to discover any part of his work product, nor has...the Defense...exhausted less intrusive means of obtaining discovery.

Witness Eight has been known to the Defense for at least ten months, and that deposition has not yet been taken.

Rule 3.220(b)(1)(B) provides the discovery of written or recorded statements. The clear implication of the rule is that such statements, if not written or recorded, are not discoverable. In the event such written or taped statements are discovered pretrial by the defense, it is the preserved statement itself and not the personal recollection of the attorney present at the time that may be used for purposes of impeachment. That's Olsen versus State, 705 So. 2d 687, Fifth DCA, 1998).

The Defendant's motion is also denied for these reasons.

(Pet. Appx. Pages 166-172)(citations omitted).

The trial court entered a written order on March 4, 2013, further elaborating on its ruling. (Pet. Appx. Pages 174-178). The court found Mr. Crump's notes and documents constitute work product entitled to the protections of the law because he was retained to explore the possibility of seeking civil damages from Petitioner. (Pet. Appx. Page 175). The trial judge also noted that Petitioner's primary argument is the need to depose Mr. Crump regarding his involvement and recollection of his recorded statement with Witness 8. (Pet. Appx. Page 176). However, based on authority cited by the court, any information gained by Mr. Crump in that interview is absolutely privileged as protected work product. Id. The judge noted that Petitioner additionally contended that he should be allowed to depose Mr. Crump in order to prepare for his future deposition of Witness 8. (Pet. Appx. Page 177). As Petitioner failed to present any reasonable basis for this position, the trial court found Petitioner's argument similar to that of the attorney in the Hickman opinion. Id. Finally, the trial court found Petitioner had also failed to adequately establish the need to depose Mr. Crump for any other matters beyond the Witness 8 interview. Id. The judge pointed out that Petitioner failed to allege that the information sought is needed for any relevant purposes or the information cannot be obtained from any other source without undue hardship. Id. The trial court found Petitioner had failed to allege any facts to support his claim or specific explanations and reasons and that unsworn assertions of counsel are

insufficient. Id. As such, the trial court found Petitioner's motion facially insufficient. Id.

MOTION FOR RECONSIDERATION: On March 15, 2013, Petitioner moved for reconsideration and clarification of the court's March 4th order. (Pet. Appx. Pages 180-197). In it, he argued that new information regarding Witness 8's false claim she missed the victim's funeral because she was in the hospital[5] provided further support for the need to depose Mr. Crumb[6]. (Pet. Appx. Pages 181-183). Petitioner also asserted that the media affiliates who had been present at the interview recorded Mr. Crump engaged in a "substantive conversation" with Witness 8 while the recorder was not activated. (Pet. Appx. Pages 183-186). Petitioner had applied for a subpoena to obtain any recordings made by the media during the interview with Witness 8. (Pet. Appx. Page 184).

Petitioner further argued that because no lawsuit had been filed, Mr. Crumb was not opposing counsel for purposes of this case. (Pet. Appx. Pages 186-188). Also, that Mr. Crumb waived any privilege by allowing other persons to be present during the interview as well as his admission in his affidavit that he provided the audiotape to law enforcement, thereby risking

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[5]According to the excerpt of the State's interview with Witness 8, she was asked why she did not attend the funeral. (Pet. Appx. Page 212). She explained that she did not feel good. Id. The prosecutor asked "[d]id you end up going to the hospital or?" She responded, "Yeah, I had like, um, high blood pressure." Id.

[6]Mr. Crumb represented in his affidavit that Witness 8 had been unable to attend the victim's funeral "because she had to go to the hospital." (Pet. Appx. Page 89).

"potentially making a limited waiver of what, in my opinion, was privileged and otherwise protected confidential material." (Pet. Appx. Pages 95, 190-191). Petitioner additionally argued that Mr. Crumb waived any work product privilege on national television. (Pet. Appx. Page 191; H, Clip 6).

Petitioner contended that Mr. Crump had relevant information because: Witness 8 lied about going to the hospital; Mr. Crump's affidavit was inaccurate regarding the gaps in the recording so that the affidavit was "insufficient on its own;" the defense believed Mr. Crump had knowledge regarding how the State became aware of the existence of Witness 8; the defense needs to know in preparing for the defense case whether Witness 8 was influenced by the interview with Mr. Crump; and Mr. Crump made allegations about a cover up of the shooting of Trayvon Martin about which the defense was interested. (Pet. Appx. Pages 192-195). Furthermore, that Mr. Crumb, during a television interview, indicated he had knowledge regarding the route Trayvon Martin traveled into the subdivision that night.[7] (Pet. Appx. Page 195).

Mr. Crump filed a response in opposition to the motion for reconsideration dated March 26, 2013. (Pet. Appx. Pages 238-245). In it, Mr. Crump argued that a motion for reconsideration is not a proper vehicle for rearguing the whole case, but to simply provide the court with the opportunity to consider matters it failed to

[7]According to the excerpt of Witness 8's interview provided herein, she explained Trayvon Martin went around the back of the gated community and hurried toward home trying to evade Petitioner. (Pet. Appx. H, Clip 5).

consider or overlooked. (Pet. Appx. Page 238-239). Pointing out that Witness 8 had recently been deposed[8], but only partially in nature, Mr. Crump asserted Petitioner could not establish any possible inconsistencies that were relevant or otherwise material to any deposition of Mr. Crump. (Pet. Appx. Page 240). Mr. Crump argued that Petitioner cannot demonstrate there are no other means to obtain the discovery sought from deposing Mr. Crump as no other means were suggested or have been pursued by the defense. (Pet. Appx. Page 240). Furthermore, given Petitioner's allegation of the need to depose Mr. Crumb in order to impeach Witness 8 about the hospital visit, Mr. Crumb reiterated that Petitioner cannot rely upon Mr. Crumb's recollection; only the statement itself. Id.

Petitioner filed a reply to Mr. Crump's response on March 27, 2013. (Pet. Appx. Pages 243-245). In it, Petitioner asserted that a motion for reconsideration was the proper vehicle and that any assertion regarding the fact work-product privilege must be addressed during the deposition, rather than by court order preemptively prohibiting any inquiry. (Pet. Appx. Pages 244-245). The trial court issued an order on March 28, 2013, denying the motion for reconsideration and clarification. (Pet. Appx. Page 247).

On April 4, 2013, Petitioner filed a petition for writ of certiorari seeking review of the order denying the motion to compel Mr. Crump's attendance at a deposition. On April 8, 2013, this

[8]Petitioner filed notice dated March 19, 2013, of taking the deposition of Witness 8 on March 13, 2013. (Pet. Appx. Page 260).

Court issued its order to respond to the Petition for Writ of Certiorari.

MERITS

Petitioner has failed to satisfy his burden for establishing this Court has jurisdiction or demonstrating entitlement to certiorari relief. Unlike Mr. Crump, who is not a party to this prosecution, Petitioner does have an adequate remedy by appeal. Compare Nussbaumer v. State, 882 So. 2d 1067, 1072 (Fla. 2d DCA 2004)("Pastor Nussbaumer does not have an adequate remedy by appeal because he is not a party to the circuit court proceedings.") and Briggs v. Salcines, 392 So. 2d 263, 266 (Fla. 2d DCA 1980)("we believe that in this case [the attorney] does not have an adequate remedy by appeal; if for no other reason, he is not a party to any proceedings in which a final judgment will be entered."), with Morrison, 93 So. 3d at 1063 (Torpy, J., concurring)("Here, even assuming that the excluded testimony is critical to the Petitioner's defense, the availability of a direct appeal is not legally impeded. Assuming error, a new trial provides a complete cure."). Petitioner has preserved his arguments in his motions and pre-trial hearings and the substance of Mr. Crump's potential testimony is known through his fifteen-page affidavit. As such, Petitioner cannot demonstrate irreparable injury entitling him to certiorari relief.

Moreover, the facts in this case are unique involving a civil attorney hired by the parents of a shooting victim for the dual purposes of pursuing civil remedies as well as to promote the

filing of criminal charges - an attorney who locates and interviews a material witness and then turns over the recorded interview to law enforcement. Because it is unique, there is no authority on point such that Petitioner cannot establish a departure from the essential requirements of law. Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000)(absent controlling precedent, court cannot conclude that lower court violated "clearly established principle of law"). Furthermore, even considering the law relied upon by the parties and the court, the trial court's ruling is not a departure from the essential requirements of law.

Generally, trial courts have broad discretion over discovery matters, and discovery orders will only be overturned if there is an abuse of discretion constituting "fatal error." Am. S. Co. v. Tinter, Inc., 565 So. 2d 891, 892 (Fla. 3d DCA 1990); see also Tanchel v. Shoemaker, 928 So. 2d 440, 441-42 (Fla. 5th DCA 2006). Here, Petitioner must demonstrate the trial court departed from the essential requirements of law, an even more difficult burden.

At the conclusion of the hearing on Petitioner's motion to compel Mr. Crump to appear for deposition, the trial court made the following findings:

> The seminal case on this issue...is Hickman v. Taylor, and that's at 329 U.S. 495, Supreme Court of the United States in 1947.
>
> In that case...the Supreme Court felt that they were dealing with an attempt to secure the production of written statements and mental impressions in the files and the mind of the attorney without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case

or cause him any hardship or injustice.

They went on to say the essence of what petitioner seeks either has been revealed to him already or is readily available to him direct from the witness. The Supreme Court went on to say not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

They went on, and still with the Hickman opinion, the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

In the Hickman case, as in this case, there is only a naked, general demand which is insufficient to justify Mr. Crump's deposition. The Hickman court recognized that the petitioner's counsel wanted the oral statements only to help to prepare himself to examine witnesses and make sure that he has not overlooked anything.

And...that was found to be insufficient to permit an exception to the policy underlying the privacy of counsel's professional activities.

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[In] Upjohn Company versus U.S., 447 U.S. 381, 1981, Supreme Court of the United States, [t]hat court in the case had stated that the notes and memoranda sought by the government in that case were the work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent that they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications.

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opposing counsel...the party must show, so that means the Defense must show, the three-point test that I had stated in the Shelton case and that discovery of a deposition from an opponent's counsel is improper where the criteria are not met.

And the Court had previously cited the Boughten case. The need and hardship test set forth in Hickman and reiterated in several cases thereafter must be alleged in the motion to compel.

And that's from State Farm versus LaForet, L-A-F-O-R-E-T. That's found at 591 So. 2d 1143, Fourth DCA, 1992.

Defendant's motion fails to allege a claim that the information sought is needed for any relevant purpose or the information cannot be obtained from any other source without undue hardship. The required showing of need and undue hardship must include specific explanations and reasons. Unsworn assertions of counsel are insufficient.

And that's found in Ash - I'm really not going to pronounce this name correctly, and I apologize, but Ashemimry, A-S-H-E-M-I-M-R-Y, versus Ba Nafa, B-A N-A-F-A, found at 847 So. 2d 603. That's a Fifth DCA case from 2003.

Also citing to Horning-Keating - that's H-O-R-N-I-N-G, hyphen, Keating, K-E-A-T-I-N-G - versus State at 777 So. 2d 438, Fifth DCA, 2001; and North Broward Hospital District versus Button, B-U-T-T-O-N, 583 So. 2d 367, Fourth DCA, 1992.

And inasmuch as the Defendant's motion is void of these requirements, the motion is facially insufficient and is denied.

However, even if the Defendant met the prong test that the Court stated, his motion to take the deposition also fails as the notes and memoranda sought are work product based on oral statements. And, again, if they reveal communications that are protected by the attorney-client privilege to the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the

> communication.
>
> Having made that determination, the Court also finds, because it was brought up regarding Rule 3.220(b), that rule requires the State to list all persons known to have information that may be relevant to any offense charged or any defense thereto.
>
> The rule further provides that a defendant may take the deposition of any unlisted witness who has information relevant to the offenses charged.
>
> Again, Defendant has failed to make a threshold showing as to his need to depose Mr. Crump or to discover any part of his work product, nor has...the Defense...exhausted less intrusive means of obtaining discovery.
>
> Witness Eight has been known to the Defense for at least ten months, and that deposition has not yet been taken. And I will cite to Eagan, E-A-G-A-N, versus DeManio, D-E-M-A-N-I-O, 294 So. 2d 639, 1974.
>
> Rule 3.220(b)(1)(B) provides the discovery of written or recorded statements. The clear implication of the rule is that such statements, if not written or recorded, are not discoverable. In the event such written or taped statements are discovered pretrial by the defense, it is the preserved statement itself and not the personal recollection of the attorney present at the time that may be used for purposes of impeachment. That's Olsen versus State, 705 So. 2d 687, Fifth DCA, 1998).
>
> The Defendant's motion is also denied for these reasons.

(Pet. Appx. Pages 166-172).

The trial court entered a written order on March 4, 2013, further elaborating on its oral ruling. (Pet. Appx. Pages 174-178). The court found Mr. Crump's notes and documents constituted work product entitled to the protections of the law because he was

retained to explore the possibility of seeking civil damages from Petitioner. (Pet. Appx. Page 175). The trial judge also noted that Petitioner's primary argument was the need to depose Mr. Crump regarding his involvement and recollection of his recorded statement with Witness 8. (Pet. Appx. Page 176). However, based on authority cited by the court, any information gained by Mr. Crump in that interview is absolutely privileged as protected work product. Id. The judge noted that Petitioner additionally contended that he should be allowed to depose Mr. Crump in order to prepare for his future deposition of Witness 8. (Pet. Appx. Page 177). As Petitioner failed to present any reasonable basis for this position, the trial court found Petitioner's argument similar to that of the attorney in the Hickman opinion. Id. Finally, the trial court found Petitioner had also failed to adequately establish the need to depose Mr. Crump for any other matters beyond the Witness 8 interview. Id. The judge pointed out that Petitioner failed to allege that the information sought is needed for any relevant purposes or the information cannot be obtained from any other source without undue hardship. Id. The trial court found Petitioner had failed to allege any facts to support his claim or specific explanations and reasons and that unsworn assertions of counsel are insufficient. Id. As such, the trial court found Petitioner's motion facially insufficient. Id. These findings do not constitute a departure from the essential requirements of law.

As the trial court noted in its order, the work product privilege applies even when litigation is neither pending nor

threatened, so long as there is a possibility of a lawsuit. (Pet. Appx. Page 175); Barnett Bank of Polk County v. Dottie-G Development Corp., 645 So. 2d 573, 574 (Fla. 2d DCA 1994). In the instant case, there is clearly the possibility, if not the threat, of a lawsuit against Petitioner for the wrongful death of Trayvon Martin by Mr. Crump's clients, the victim's parents. Accordingly, the work-product privilege applies.

Petitioner argues that Mr. Crump waived this privilege by producing the recording to the press and law enforcement, and based on his comments to the press that he would waive work-product privilege as to the recording. While Mr. Crump has waived the privilege as to the recording itself, Mr. Crump clearly did not intend on waiving his mental impressions, conclusions, opinions, or legal theories about the interview - all of which is quintessential attorney work product. See, e.g., Fla. R. Civ. P. 1.280(b)(3)("In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."). As such, the work-product privilege has not been waived in regard to Mr. Crump's mental impressions, conclusions, opinions, or legal theories regarding the interview, as well as any other matters Petitioner has claimed in support of his assertion of the need to depose Mr. Crump.

The trial court also made the factual finding that Mr. Crump was "opposing counsel" for purposes of the motion because it was

undisputed Mr. Crump had been "retained to explore the possibility of seeking civil damages from" Petitioner. (Pet. Appx. Page 175). As Mr. Crump and his attorney also pointed out, his investigation into a possible civil lawsuit had overlapped with the criminal prosecution in light of the immunity provided by the Stand Your Ground Law. Accordingly, the trial court's factual finding that Mr. Crump is opposing counsel for purposes of Petitioner's attempt to depose him is not a departure from the essential requirements of law and requires Petitioner to meet very strict standards in order to be permitted to depose Mr. Crump.

It is well established that deposing opposing counsel is fraught with concern. See Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc., 813 So. 2d 250, 252 (Fla. 3d DCA 2002) ("[D]eposing opposing counsel in the midst of an ongoing proceeding is generally offensive to our adversarial system and is an extraordinary step which will rarely be justified."). However, there is no absolute prohibition to the practice. Nucci v. Simmons, 20 So. 3d 391 (Fla. 2d DCA 2009). Generally, in order to be permitted to depose opposing counsel, a party must show: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). This is consistent with the United States Supreme Court's holdings that there must be a sufficient showing of the "substantial need" and "without undue hardship" standard to

overcome the work-product privilege. See, e.g., Upjohn Co. v. U.S., 449 U.S. 383, 397-402 (1981), and Hickman v. Taylor, 329 U.S. 495 (1947).

This Court, relying upon Hickman in Horning-Keating v. State, 777 So. 2d 438 (Fla. 5th DCA 2001), noted that the contents of oral statements taken by attorneys from witnesses are nondisclosable work product. Id. at 443. Moreover, there is a difference between "opinion work product" and "fact work product;" the former is absolutely privileged, while the latter can be pierced with a showing: (1) the need for this fact work product to prepare a party's case; and (2) that, without undue hardship, the party is unable to obtain the substantial equivalent of this fact work product by other means." Id. at 444. The "need" and "without undue hardship" must be alleged in the motion. Id. at 444-445. As in Horning-Keating, Petitioner failed to adequately allege both need and undue hardship in his motion relating to the deposition of Mr. Crump. As such, the trial court did not depart from the essential requirements of law by finding his motion was facially insufficient.

What Petitioner did assert at the hearing was that he needed to depose Mr. Crump to fill in the gaps of the recording and as part of his preparation for his deposition with Witness 8. These are not sufficient bases to compel Mr. Crump to appear for deposition as Petitioner has not demonstrated a sufficient need or that he could not discover such matters from another source without undue hardship. Hickman, 329 U.S. at 508-509; see also Rogan v.

Oliver, Case No. 2D12-3935, 2013 WL 1442169 (Fla. 2d DCA April 10, 2013)(attorneys were the only persons who could testify about the information and advice they gave association's president and board of directors, as the testimony of management company employees would be inadmissible hearsay). Similarly, Petitioner failed to allege sufficient facts explaining the need to depose Mr. Crump about any matters relevant to this case which is not necessarily related to his interview of Witness 8. See Prudential Ins. Co. of America v. Florida Dept. of Ins., 694 So. 2d 772 (Fla. 2d DCA 1997)(bare assertions of need and undue hardship are insufficient to require the production of work product); Intercontinental Properties, Inc. v. Samy, 685 So. 2d 1035 (Fla. 3d DCA 1997) (party seeking discovery had ability to obtain information sought through other channels); North Broward Hosp. Dist. v. Button, 592 So. 2d 367 (Fla. 4th DCA 1992) (a showing of need and undue hardship must include specific explanations and reasons; unsworn assertions of counsel are insufficient); Dade County School Bd. v. Soler By and Through Soler, 534 So. 2d 884 (Fla. 3d DCA 1988) (the burden is on party seeking discovery to demonstrate need and undue hardship). As such, the trial court did not depart from the essential requirements of law in finding the grounds alleged in his motion and at the hearing insufficient to permit Petitioner to depose Mr. Crump.

Petitioner also relies upon Florida Rule of Criminal Procedure 3.220(h), which allows a defendant to depose an unlisted witness "who may have information relevant to the offense charged." Fla. R.

Crim. P. 3.220(h)(1)(A). The trial court found Petitioner failed to meet the threshold showing regarding the need to depose Mr. Crump because there is no evidence Mr. Crump has any other information relevant to the offense charged. (Pet. Appx. Page 177). As noted by the trial court, Mr. Crump was not present during the shooting and he did not know the Martin family or the victim prior to the shooting, so the court found Mr. Crump "cannot be considered a fact witness in any other way." (Pet. Appx. Pages 177-178). The trial court also found, relying upon this Court's opinion in Olson v. State, 705 So. 2d 687, 691 (Fla. 5th DCA 1998), that the clear implication of Florida Rule of Criminal Procedure 3.220(b)(1)(B) is that the statement itself is discoverable and not the personal recollections of the attorney present at the interview for purposes of the impeachment of a witness. (Pet. Appx. Page 178).

Finally, the additional two bases argued in the motion for clarification are similarly insufficient to demonstrate both the need and undue hardship required to allow a deposition of Mr. Crump.[9] The first new ground dealt with the allegedly false information about Witness 8's hospital stay - a claim that she also repeated to the prosecutor during his interview of her. Clearly, any questioning regarding any allegedly false statements made by Witness 8 should be directed at her and not the attorney who was present at the unsworn and recorded interview. Olsen, supra; see also State v. Seitz, 973 So. 2d 663, 666 (Fla. 3d DCA 2008)("Seitz

[9]It bears repeating that Mr. Crump's mental impressions, conclusions, opinions, or legal theories relating to the oral interview of Witness 8 are privileged.

does not need [the original prosecutor's] deposition to demonstrate bias. As the victim of these crimes, Unruh undoubtedly will be 'biased' in her own, and thus in the State's, favor."). Furthermore, Petitioner's second basis regarding the allegation that Mr. Crump's affidavit was misleading as to his assertion that no matters of a substantive matter were addressed when the recorder was not activated[10] is also insufficient. Petitioner has not established that a deposition of Mr. Crump is necessary and that such information cannot be obtained without undue hardship through other means; such as the subpoenaed ABC News recording or the other witnesses present during the interview, such as the victim's parents. Petitioner is not entitled to certiorari relief.

In closing, as explained in Morrison:

> Trial courts make numerous rulings on discovery and evidence before and during trial. Pretrial rulings often take place shortly before trial. As a consequence, aggrieved litigants often seek and receive an expedited review of certiorari petitions. Every petitioner necessarily argues that the trial court's ruling eviscerates his or her claim or defense. Respondents often controvert that assertion. Thus, we are asked to assess the gravity of the harm based on a hurried review of an abbreviated record before all of the evidence is presented in a trial. Our appellate system is simply not staffed to handle the burden of piecemeal appeals. Judicial economy mandates that we consider all

[10]According to the recording provided by Petitioner, it appears that during a break Mr. Crump was simply asking Witness 8 to repeat her previously recorded testimony. (Petition, Page 19; Pet. Appx. H, Clip 5). It also does not appear Witness 8 was influenced by Mr. Crump's questioning; for example, when Mr. Crump mentioned that Trayvon Martin had gone to the store to get some snacks for his little brother, Witness 8 did not repeat this information. Id.

> claims of error in one proceeding. The issues we are asked to consider might become moot due to settlement, a verdict in favor of the aggrieved party, or a change in the ruling by the trial court. In the case of excluded evidence, other cumulative evidence might be admitted. Even when we address an issue on the merits, because of the varying standards of review, we may be put to the redundant task of revisiting the same issue on direct appeal. For all of these reasons, appellate courts should jealously guard this narrow rite of passage. When we let these cases slip through as so-called "exceptions," we simply compound the problem by encouraging many more such petitions, thereby increasing the burden on the courts and the litigants.

Morrison, 93 So. 3d at 1065 (Torpy, J., concurring).

WHEREFORE, Respondent respectfully prays this Honorable Court deny Petitioners' petition for writ of certiorari as Petitioner has failed to demonstrate irreparable harm or that the trial court departed from the essential requirements of law.

DESIGNATION OF E-MAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: *Primary E-Mail Address*: crimappdab@myfloridalegal.com; *Secondary E-Mail Address*: pamela.koller@myfloridalegal.com.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Petition for Writ of Certiorari has been furnished by e-mail to counsel for Petitioner, Mark O'Mara, Esquire, at mark@markomaralaw.com and markservice@markomaralaw.com and counsel for Mr. Trump, Bruce Blackwell, Esquire, at

bblackwell@kbzwlaw.com this 24th day of April, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(l).

Respectfully, submitted,

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