IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No. 5D13-1233

GEORGE ZIMMERMAN,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

On Petition for Writ of Certiorari from the Circuit Court
for the Eighteenth Judicial Circuit, in and for Seminole County, Florida

L.T. Case No. 2012-CF-001083-A

PROPOSED RESPONDENT BENJAMIN L. CRUMP, ESQ.'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Bruce B. Blackwell
Florida Bar No.: 0190808
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, Florida 32802-1631

- and -

Shayan H. Modarres
Florida Bar No.: 0092493
THE MODARRES LAW FIRM
155 S. Court Avenue, Suite #2106
Orlando, Florida 32801

Counsel for Proposed-Respondent
Benjamin L. Crump, Esq.

Proposed Respondent Benjamin L. Crump, Esq. ("Attorney Crump"),[1] pursuant to the Court's April 8, 2013 Order and Rule 9.100(j), Florida Rules of Appellate Procedure, offers his response in opposition to the Petition for Writ of Certiorari filed by Petitioner George Zimmerman ("Petitioner") and would show cause as follows as to why the Petition should be denied.

OVERVIEW

This is the second instance in which Petitioner has sought interlocutory relief from this Court.[2] Petitioner now seeks to reverse an order denying his motion to compel Attorney Crump – counsel for the victim's family – to sit for a deposition in advance of taking further discovery from Attorney Crump's clients and an "ear"

---

[1]While the Petition does not name Attorney Crump as a respondent, the orders on which Petitioner seeks review concern the denial of his motion to depose Attorney Crump, a non-party who appeared and successfully opposed Petitioner's motion below. *See*, *e.g.*, (App. at 104-122) (Attorney Crump's response in opposition to Petitioner's motion to compel); (App. at 174-179) (Order denying Petitioner's motion to compel). Accordingly, by separate motion Attorney Crump has contemporaneously sought leave to file the instant response and, notwithstanding the definition of "parties" in FLA. R. APP. P. 9.020(g), respectfully submits that as the individual from whom Petitioner seeks to compel discovery he should be permitted to respond. *See*, *e.g.*, *Towers v. City of Longwood*, 960 So. 2d 845 (Fla. 5th DCA 2007) (certiorari proceeding involving protective order that precluded discovery from a non-party in which non-party filed response in opposition to petition).

[2]*See Zimmerman v. State*, - - - So. 3d - - -, No. 5D12-3198, 2012 WL 3758666 (Fla. 5th DCA Aug. 29, 2012) (granting writ of prohibition and directing prior trial judge to enter order of disqualification).

witness whom Attorney Crump interviewed in anticipation of civil litigation before Petitioner was ever arrested or charged with a crime. (Pet. at 1 and 42); (App. at 1, 86-88 and 99). Two weeks before he filed his instant Petition, however, Petitioner filed a supplemental witness list in which he elected to list Attorney Crump as a witness, thereby relinquishing whatever right he may have had to depose Attorney Crump as a previously "unlisted witness" under FLA. R. CRIM. P. 3.220(h)(1)(A) and mooting his Petition. (Supp. App. at 71).[3]

BACKGROUND & PROCEDURAL POSTURE

A. Retention of Attorney Crump and Scope of His Representation

On February 26, 2012, Petitioner shot and killed Trayvon Benjamin Martin ("Trayvon"). (App. at 11). After local authorities refused to arrest Petitioner, Trayvon's parents retained Attorney Crump to protect their rights as the next of kin of a homicide victim and to pursue any wrongful death and other civil claims that they or Trayvon's estate may have. (App. at 84).

From the outset of his representation, Attorney Crump began gathering factual information and performing research from which he formed – and continues to form – his own legal opinions, conclusions, mental impressions and theories of liability in regard to the rights and claims of his clients (including

[3] Petitioner omitted his witness lists and other discovery-related documents from his appendix. Accordingly, Attorney Crump has prepared and filed a supplemental appendix, which is cited to herein as "Supp. App. at ____."

statutory, common law and constitutional claims against Petitioner and others arising out of Trayvon's death, access to public records, and the criminal investigation and prosecution of Petitioner). (*Id*.).

The information Attorney Crump has gathered and the research he has performed bear upon not only Petitioner's claim of self-defense and Florida's so-called "Stand Your Ground Law"[4] – which would potentially apply in a civil proceeding, *see*, *e.g.*, FLA. STAT. §§ 776.013(3), 776.032 – but also includes a host of other overlapping legal issues that are at issue in this criminal proceeding and anticipated to be at issue in parallel or future litigation, including civil claims against Petitioner that comprised of substantially the same – if not identical – elements as those comprising the criminal charges in this proceeding.[5]

The broad scope of Attorney Crump's engagement has remained the same at all times material to this case and, since February 2012, his representation has been continuous and remains ongoing. (*Id*.).

---

[4] Chapter 2005-27, Laws of Florida, as codified at FLA. STAT. §§ 776.012, .013, .031, .032 [hereinafter, "Florida's Stand Your Ground Law"].

[5] *See*, *e.g.*, (App. at 84-85); *compare also*, *e.g.*, FLA. STAT. §§ 782.04, 782.07 and Florida's Standard Jury Instructions for Criminal Cases, 7.4 and 7.7 (setting forth the elements of second degree murder and manslaughter), *with* FLA. STAT. § 768.19 (providing a right of action to the estate and survivors of a person killed by a "wrongful act" or negligence) and FLA. STAT. § 95.11 (eliminating certain statute of limitations and providing, in part, that a wrongful death action may be predicated on second degree murder or manslaughter, as well as other acts described in FLA. STAT. §§ 782.04, 782.07).

B. Local Authorities Refuse to Arrest Petitioner

In the weeks after Petitioner shot and killed Trayvon, the Sanford Police Department (SPD) informed Attorney Crump and the public that, despite his admitted act of homicide, Petitioner could not be arrested due to his claim of self-defense and Florida's Stand Your Ground Law. (App. at 86).

On March 8, 2012, in particular, the Chief of SPD informed Attorney Crump that despite being able to hear the struggle and fatal gunshot that killed Trayvon on a recorded 911 call, there was evidence corroborating Petitioner's claim of self-defense. (*Id*.). SPD, however, refused to release that recording or any other calls – including a non-emergency call placed by Petitioner – that might have cast doubt on Petitioner's self-defense claim or otherwise been potentially relevant to the rights and claims of Attorney Crump's clients. (*Id*.).

On March 9, 2012, Attorney Crump brought suit on behalf of his clients, seeking injunctive and other relief requiring the Chief of SPD to release the recording of Petitioner's call and other public records relating to Petitioner's shooting of Trayvon. (*Id*.).[6] In the meantime, however, SPD still refused to arrest Petitioner, claiming in a March 12, 2012 press conference that it still did not have "anything to dispute his claim of self-defense." (App. at 86-87).

[6] *See Martin v. Lee*, No. 2012-CA-OOI276 (Fla. 18th Cir. Ct. 2012)

Less than a week after bringing the public records suit, however, the recordings of Petitioner's call to SPD and certain 911 calls were finally made available to Trayvon's family and released to the public. (App. at 87). Petitioner's recorded call to SPD suggested that he not only pursued Trayvon but, consistent with what the State would later include in its Affidavit of Probable Cause, (App. at 2-4), that Petitioner first "profiled" Trayvon – as being, at a minimum, one of those "assholes" who "always get away" (if not also one of those "****ing punks") – before killing him. (App. at 87).[7]

Notwithstanding this significance evidence, SPD still refused to arrest Petitioner, having informed Attorney Crump and others that it had concluded its investigation and was turning the case over to former State Attorney Norman Wolfinger. (*Id*.).

C. Discovery of Witness 8 and Charging of Petitioner

Faced with the prospect that the admitted killer of his clients' son would never be arrested – much less subject to a criminal jury trial – Attorney Crump and his clients redoubled their efforts to gather any additional information in anticipation of civil litigation, including any evidence that might cast further doubt

[7] In yet another recorded call, a male voice – later identified by Attorney Crump's clients as belonging to Trayvon – could be heard repeatedly screaming out for help before being silenced by the loud report of a gunshot, casting significant doubt in Attorney Crump's mind, at least, as to the reasonableness of SPD's claim that there was evidence corroborating Petitioner's self-defense claim (much less that there was not "anything" with which to dispute it). (App. at 87).

on Petitioner's claim of self-defense. (App. at 87). On March 18, 2012, their continued vigilance paid off and Attorney Crump learned for the first time that, based on phone records only then recently made available, Trayvon had been speaking to a young lady – "Witness 8" – on his cell phone in the crucial minutes before he was shot and killed by Petitioner. (App. at 88).

On March 19, 2012, Attorney Crump conducted a telephonic interview of Witness 8 via cell phone and made a contemporaneous audio recording of the interview on a separate digital recording device. (*Id*.).[8] Later that evening, the Civil Rights Division of the U.S. Department of Justice announced that, along with the FBI and U.S. Attorney's Office for the Middle District of Florida, it had opened an investigation into Trayvon's killing. (App. at 107).

On April 2, 2012, the State interviewed Witness 8 under oath and recorded her statement. (Pet. at 15) (citing App. at 248).[9] Thereafter, on April 11, 2012, it charged Petitioner with second degree murder. (App. at 1).

[8] The circumstances and particulars of this interview were described and addressed at length in Attorney Crump's detailed fifteen-page affidavit. *See* (App. at 83-97).

[9] While the complete transcript of the State's April 2, 2012 interview of Witness 8 confirms that her testimony is, in all material respects, consistent with the unsworn statements she gave to Attorney Crump on March 19, 2012, Petitioner failed to include the complete transcript in his appendix, choosing instead to include only a single page of an "unofficial" transcript. *See* (App. at 248).

D. Trial Court Proceedings

At the outset of this case, Petitioner elected to participate in discovery, thereby binding himself and the State to the discovery provisions of Florida Rule of Criminal Procedure 3.220. (Supp. App. at 2); FLA. R. CRIM. P. 3.220(a).

On May 14, 2012, the State served Petitioner with its initial discovery exhibit, in which it identified Witness 8 as a "Category A" witness and disclosed that, in addition to her April 2, 2012 sworn statement to prosecutors, Witness 8 had given an audio-recorded statement to Attorney Crump. (Supp. App. at 4 and 6). The State attached a CD containing a copy of the audio recording to its initial discovery exhibit and provided the CD to Petitioner. (Supp. App. at 6).

On June 14, 2012, Petitioner filed his initial witness list pursuant to Rule 3.220(d)(1)(A), Florida Rules of Criminal Procedure.[10] (Supp. App. at 11). Despite having known for more than a month that Attorney Crump had interviewed Witness 8 and having received a CD containing an audio recording of that interview, Petitioner chose not to list Attorney Crump as a witness at this time. (*Id*.).

On October 12, 2012, Petitioner filed a motion to compel – directed to the State – requesting:

[10] Under Rule 3.220, a defendant who elects to participate in discovery must provide the State with a written list of "all witnesses" whom the defendant expects to call at trial or a hearing. FLA. R. CRIM. P. 3.220(d)(1)(A).

> 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[].

(App. at 79) [hereinafter, the "First Motion to Compel"].

On October 19, 2012, the trial court held a hearing on the First Motion to Compel. (App. at 65-78). At the hearing, Attorney Crump – who happened to be present in the courtroom – was summoned to the bar and engaged in a colloquy with the court and Petitioner's counsel. (App. at 71). After the court asked Attorney Crump how his recording of Witness 8 came about, what process he used to make the recording and who was present with him at the time of the interview, the court directed Attorney Crump to provide certain written information to the parties concerning the circumstances of the interview within ten days and further decided, *sua sponte*, to make Attorney Crump its witness on the foregoing limited issues. (App. at 71-72 and 74).

On October 23, 2012, Petitioner filed a supplemental witness list. (Supp. App. at 12).[11] Petitioner once again, at this time, chose not to list Attorney Crump as a witness. (*Id*.).

[11] Under Rule 3.220, a criminal defendant who elects to participate in discovery has a continuing duty to supplement discovery and timely disclose witnesses. FLA. R. CRIM. P. 3.220(j).

By November 2, 2012, Attorney Crump timely complied with the trial court's directive to provide certain information to the parties concerning his interview of Witness 8. (Supp. App. at 33). Thereafter, however, on November 30, 2012, Petitioner filed another motion to compel, seeking production of Attorney Crump's recording device used during the interview and another copy of the recording. (Supp. App. at 14-23) [hereinafter, the "Second Motion to Compel"]. The State opposed the Second Motion to Compel, noting the motion was moot since the State had already arranged for the recording device to be turned over to FDLE and would be available for Petitioner's counsel to inspect. (Supp. App. at 27). Petitioner nevertheless filed a reply, indicating the motion would only be moot once the State provided appropriate chain of custody documentation. (Supp. App. at 31).

On December 11, 2012, the trial court held a hearing on the Second Motion to Compel. (Supp. App. at 42).[12] After hearing argument from counsel and representations from the State concerning the authenticity of the recording and chain of custody of the recorder, the court ordered the State to provide Petitioner's counsel with another copy of the recording within three days. (*Id*.). The State

[12] Petitioner did not include a transcript of the trial court's December 11, 2012 hearing in his appendix. While unofficial videos of this hearing may be available online – *see*, *e.g.*, http://www.youtube.com/ – Attorney Crump does not have access to a transcript and has been unable to include one in his supplemental appendix.

timely did so and, on December 13, 2012, served a supplemental discovery exhibit attaching a signed FDLE chain of custody form regarding the recorder. (Supp. App. at 44-45).

On January 25, 2013, counsel for Attorney Crump conferred with Petitioner's counsel as to whether there was any need to depose Attorney Crump in light of events subsequent to the trial court's October 19, 2012 hearing and, if so, counsel indicated that Attorney Crump might offer an affidavit in lieu of such a deposition and seek appropriate relief from the trial court. (Supp. App. at 46).

Five days later, Petitioner moved to continue trial, arguing, in part, that he required "expert assistance" to understand the recording of Attorney Crump's conversation with Witness 8 and suggesting that additional litigation would be necessary to resolve issues regarding Attorney Crump's deposition. (Supp. App. at 62-63 and 65).

On February 1, 2013, counsel for Attorney Crump and Petitioner again conferred and discussed that – if need be – Attorney Crump would make himself available for a limited deposition concerning the recording of his interview with Witness 8. (Supp. App. at 46). In doing so, however, Attorney Crump emphasized that he would not waive any privilege and reserved any other rights and protections that he may have had, including, in particular, the ability to offer an affidavit in lieu of any deposition. (*Id*.).

On February 5, 2013, the trial court held a hearing on Petitioner's motion to continue trial. (Supp. App. at 67). At the conclusion of that hearing, counsel for Attorney Crump made a limited appearance, filed a detailed fifteen-page affidavit in open court regarding his interview of Witness 8 and requested that the trial court accept the affidavit in lieu of a deposition or alternatively postpone Attorney Crump's deposition. (Pet. at 8-9) (citing App. H: Clip 4);[13] *see also* (Supp. App. at 67). The court postponed the deposition and directed Petitioner's counsel to file a motion if the affidavit was not sufficient. (Pet. at 9-10) (citing App. H: Clip 4); *see also* (Supp. App. at 68).

On February 12, 2013, Petitioner filed a five-page motion, requesting that the trial court enter an order directing Attorney Crump to appear for a deposition as an "unlisted" witness pursuant to FLA. R. CRIM. P. 3.220(h)(1)(A). (App. at 98-103) [hereinafter, the "Third Motion to Compel"].[14] Attorney Crump filed a nineteen-page response in opposition to the motion. (App. at 104-122).

[13] While Petitioner apparently filed a DVD containing video clips – of hearings and certain other matters – as part of his appendix, (App. H), he did not serve or otherwise provide Attorney Crump's counsel with a copy of the DVD. To the extent necessary, Attorney Crump therefore relies on Petitioner's citations and references to these video clips in his Petition.

[14] The only basis that Petitioner cited in his Third Motion to Compel for deposing Attorney Crump was the fact that he was an "unlisted witness" under FLA. R. CRIM. P. 3.220(h)(1)(A). (App. at 99-100).

On February 22, 2013, the trial court held a hearing on the Third Motion to Compel. (App. at 124-173). Petitioner's counsel argued, *inter alia*, that Attorney Crump was an "unlisted" witness who could therefore be deposed under Rule 3.220. (App. at 131, 138 and 171). After hearing argument from counsel, the trial court announced its ruling the bench and denied the motion, (App. at 166-172); thereafter, the court issued a written order on March 4, 2013. (App. at 174-179).

On March 15, 2013, Petitioner moved the trial court to reconsider and clarify its March 4, 2013 order. (App. at 180-197). In his motion for reconsideration – as in his instant Petition – Petitioner suggested that the presence of ABC news during Attorney Crump's interview of Witness helped "secure[] an additional 25-minute audio recording which was of significantly better quality than that recorded by Mr. Crump. . . ." (App. at 185); (Pet. at 21). Petitioner therefore argued that, if "Mr. Crump [had] only taken the extra step of securing a copy of the entire ABC audio, which was readily available to him . . . most of the concerns regarding the audiotaping would have dissipated." (*Id*.). This was the first time that Attorney Crump ever learned that ABC had been able to create a recording of the interview.[15]

[15] Contrary to Petitioner's assertion that a copy of ABC's audio recording was readily available to Attorney Crump – an assertion made without citation to the record – the only record evidence on this issue is that Attorney Crump had "no knowledge as to whether [ABC's recording] device was ever successfully used to record any portion of the Interview." (App. at 91).

While Petitioner continued to predicate his motion for reconsideration on Rule 3.220(h)(1)(A) and the fact that Attorney Crump was an "unlisted" witness, (App. at 186), before the trial court could rule on the motion, on March 21, 2013, Petitioner filed a second supplemental witness list in which he elected to list Attorney Crump as a witness. (Supp. App. at 71).[16]

On March 28, 2013, the trial court denied Petitioner's motion for reconsideration, (App. at 247); and, on April 4, 2013, Petitioner filed his Petition seeking certiorari. Less than two weeks later, however, on April 17, 2013, Petitioner filed with the trial court an amended witness list in which he again listed Attorney Crump as a witness. (Supp. App. at 76).

SUMMARY OF ARGUMENT

The trial court correctly found that: Attorney Crump should not be compelled to disclose additional information regarding his interview of Witness 8 as such information is protected work-product, (App. at 176); Petitioner's motion to compel failed to specify why the information sought would be relevant for any purpose and could not be obtained from any other source without undue hardship, (App. at 177); Attorney Crump has "no other information relevant to the offense

[16] The certificate of service in Petitioner's second supplemental witness list omitted Attorney Crump's counsel, (Supp. App. at 73), and counsel never received a copy of this list. Indeed, Attorney Crump's counsel did not even become aware of the existence of this second supplemental witness list until after the trial court denied Petitioner's motion for reconsideration and Petitioner filed his instant Petition.

charged. He was not present during the shooting, he did not know the Martin family or the victim before the shooting, and he cannot be considered a fact witness in any other way." (App. at 177-178); Petitioner failed to exhaust less-intrusive means of obtaining the discovery, (App. at 178); and, under FLA. R. CRIM. P. 3.220(b)(1)(B), "when written or taped statements are included in discovery, it is the preserved statement itself, and not the personal recollection of the attorney present at the time, that should be used for purposes of impeachment." (*Id.*).

The trial court's well-reasoned order should not be disturbed for at least four reasons:

(I) The Petition is now moot inasmuch as Attorney Crump is no longer an "unlisted" witness and otherwise fails to establish certiorari jurisdiction;

(II) The Petition fails to demonstrate a departure from any clearly established requirement of law based on the trial court's decision to treat Attorney Crump as "opposing counsel;"

(III) The Petition fails to demonstrate, contrary to this Court's 2001 decision in *Horning-Keating*,[17] that the additional information sought from Attorney Crump is not be privileged or that there has been a waiver as to such information; and

(IV) The Petition fails to establish that Attorney Crump is a material witness who has information relevant to the offense charged.

[17] *Horning-Keating v. State*, 777 So. 2d 438, 443 (Fla. 5th DCA 2001).

ARGUMENT

I. THE PETITION IS NOW MOOT AND FAILS TO ESTABLISH CERTIORARI JURISDICTION

In Florida, there is no constitutional, common law or statutory right for a criminal defendant take discovery depositions. *See*, *e.g.*, *State v. Lampp*, 155 So. 2d 10, 12-13 (Fla. 2d DCA 1963); *cf. Weatherford v. Bursey*, 429 U.S. 545 (1977) ("There is no general constitutional right to discovery in a criminal case...."). Accordingly, the only basis for such depositions is Rule 3.220. FLA. R. CRIM. P. 3.220(h)(1) (providing for discovery depositions but limiting potential deponents to only persons "authorized" by rule). While Florida is one of only a handful of states that permit criminal defendants to take discovery depositions, Rule 3.220 contains significant limitations designed to curtail abuse of the deposition process. *See*, *e.g.*, *In re Amendment to Fla. Rule of Criminal Procedure 3.220(h) & Fla. Rule of Juvenile Procedure 8.060(d)*, 681 So. 2d 666, 667 (Fla. 1996) (adopting framework for criminal depositions and noting: "[W]e adopt the attached amendments to rule 3.220 . . . in the hope of further curtailing abuse of the deposition process."); *cf. State v. Lopez*, 974 So. 2d 340 (Fla. 2008).

One such limitation in Rule 3.220 is the requirement that certain witnesses must be listed (and, with respect to the State, classified into designated

categories).[18] While the rule does not require the defendant to designate witnesses into particular categories, the defendant still must list "**all witnesses** whom the defendant expects to call at the trial or hearing." FLA. R. CRIM. P. 3.220(d)(1)(A) (emphasis added).

Depending on how – and whether – a witness has been listed, Rule 3.220, in pertinent part, limits the ability of a defendant to take depositions as follows:

> (A) The defendant may, without leave of court, take the deposition of any witness listed by the prosecutor as a Category A witness. . . . After receipt by the defendant of the Discovery Exhibit, the defendant may, without leave of court, take the deposition of any **unlisted** witness who may have information relevant to the offense charged. The prosecutor may, without leave of court, take the deposition of any witness listed by the defendant to be called at a trial or hearing.
>
> (B) No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown. . . .
>
> (C) A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category.

FLA. R. CRIM. P. 3.220(h)(1)(A), (B), (C) (emphasis added).

---

[18] *See* Committee Note to 1996 Amendment. Specifically, the State must list "all persons known to have information that may be relevant to any offense charged or any defense thereto," FLA. R. CRIM. P. 3.220(b)(1)(A), and designate each person listed as being either a "Category A," "B" or "C" witness. FLA. R. CRIM. P. 3.220 (b)(1)(A)(i), (ii), (iii).

Here, Petitioner predicated his right to depose Attorney Crump on only subsection (A), contending that Attorney Crump was an "unlisted" witness whom Petitioner could depose without seeking prior leave of court. *See*, *e.g.*, (App. at 99-100). During the pendency of his motion for reconsideration, however (and again after filing his instant Petition), Petitioner elected to list Attorney Crump as witness. (Supp. App. at 71 and 76). Under the clear and unambiguous text of Rule 3.220, then, Attorney Crump is no longer an "unlisted" witness who may be deposed and, by Petitioner's own election, he has mooted his Petition.

At minimum, a party seeking review of a pretrial discovery order must show that the trial court's order departed from an essential requirement of law and that the ruling causes irreparable harm for which there is no adequate remedy on plenary appeal. *See*, *e.g.*, *State v. Smith,* 951 So. 2d 954, 957 (Fla. 1st DCA 2007); *S.Y. v. McMillan*, 563 So. 2d 807, 809 (Fla. 1st DCA 1990) (denying petition for writ of certiorari where petitioner failed to show that trial court's order departed from a "clearly established" requirement of law). The "irreparable harm" requirement is a jurisdictional requirement and, unless the petitioner can demonstrate that he is faced with the rare type of harm that will proceed throughout the remainder of the trial court proceedings, certiorari jurisdiction will be lacking. *See*, *e.g.*, *Montanez v. State*, 24 So. 3d 799, 801 (Fla. 2d DCA 2010); *cf. Martin-Johnson, Inc. v. Savage,* 509 So. 2d 1097, 1099 (Fla.1987), *superseded*

by statute on other grounds, *Williams v. Oken*, 62 So.3d 1129, 1134 (Fla. 2011). Clearly, Petitioner cannot suffer irreparable harm from being unable to depose a witness he no longer has any right to depose.

Furthermore, as the State's Response makes plain, certiorari review will rarely be available to review an order denying discovery because in most cases – as in this one – any harm can be remedied on plenary appeal:

> 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"). . . .
>
> 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) . . . and *Briggs v. Salcines*, 392 So. 2d 263, 266 (Fla. 2d DCA 1980) . . . *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.

(State's Resp. at 1-4 and 28).[19]

[19] *See also*, *e.g.*, *Eutsay v. State*, 103 So. 3d 181 (Fla. 1st DCA 2012); *Power Plant Entm't, LLC v. Trump Hotels & Casino Resorts Dev. Co.,* 958 So. 2d 565, 576

Having subsequently elected to list Attorney Crump as a witness, Petitioner has mooted his Petition and can no longer establish any departure from a clearly established requirement of law that would cause irreparable harm. Accordingly, Petitioner cannot demonstrate that this is an extraordinary case for which certiorari jurisdiction would lie and his Petition must therefore be denied.

II. THE TRIAL COURT DID NOT DEPART FROM A CLEARLY ESTABLISHED REQUIREMENT OF LAW IN FINDING THAT ATTORNEY CRUMP WAS "OPPOSING COUNSEL"

The trial court observed that Attorney Crump was retained to explore the possibility of a civil suit against Petitioner. (App. at 175). As Attorney Crump argued, such a civil suit would clearly be adverse to Petitioner and would entail claims whose elements closely mirror those at issue in this criminal case. (App. at 106). Accordingly, the trial court classified Attorney Crump as "opposing counsel" for purposes of Petitioner's motion to compel. In so doing, the trial court did not depart from any clearly established requirement of law or apply an incorrect legal standard.

Florida courts have not clearly articulated standard for determining when an attorney is opposing counsel. Instead, the rule cited by the trial court, and relied on

---

(Fla. 4th DCA 2007)("[F]ew orders denying discovery will involve information so relevant and crucial to the position of the party seeking discovery, that it will amount to a departure from the essential requirements of law as to warrant certiorari review."); *State Farm Mut. Auto. Ins. Co. v. Peters*, 611 So. 2d 597, 598 (Fla. 2d DCA 1993).

by Petitioner in his Petition, stems from persuasive federal authorities such as *Shelton v. American Motors Corp.,* 805 F.2d 1323, 1326 (8th Cir. 1986).[20] In *Shelton*, the Eighth Court held that depositions of opposing counsel should be limited to circumstances in which the party seeking the deposition has shown that: (1) no other means exist to obtain the information except to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Id*.

While *Shelton* and other federal cases have considered whether in-house counsel may be deemed "opposing" counsel, there is no controlling Florida authority addressing the unique circumstance of an attorney retained by the parents of a homicide victim to protect both their rights as next of kin and to pursue civil claims on their behalf whose elements are coextensive with those at issue in the criminal proceeding. Absent such authority, Petitioner cannot establish a departure from any clearly established requirement of law based on the trial court's finding that Attorney Crump was opposing counsel under the criteria set forth in *Shelton* and its progeny. *See* (State's Resp. at 29) (citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000)).

---

[20] *See also, e.g., Boughton v. Cotter Corp*., 65 F.3d 823 (10th Cir. 1995) (cited by the trial court in its March 4, 2013 order); *Epling v. UCB Films, Inc.*, 204 F.R.D. 691 (D. Kan. 2001); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.,* 164 F.R.D. 245, 249-50 (D. Kan. 1995).

Furthermore, Petitioner's argument that Attorney Crump was somehow under an obligation to preserve evidence of his interview of Witness 8 – as if he were the State or law enforcement, (Pet. at 21 and 29), – while at the same time refusing to accept Attorney Crump as opposing counsel for purposes of seeking to compel his deposition is contradictory and without merit. Attorney Crump chose to conduct the interview under the broad scope of his role as counsel for the family of Trayvon after local authorities had refused to arrest Petitioner and while gathering information relevant to civil claims against Petitioner. This, of course, was not only appropriate,[21] but perfectly consistent with Attorney Crump's role as an advocate for this clients in pursuing their claims and rights against Petitioner.

In sum, both legally and factually, Petitioner cannot demonstrate that the trial court departed from a clearly established requirement of law in finding that Attorney Crump was opposing counsel. Accordingly, his Petition should be denied.

[21] Courts have long held that witnesses in a criminal prosecution are not the property of the State or the defense; both sides have an equal opportunity and right to interview and speak to witnesses – with or without the presence, knowledge or consent of any law enforcement authority or the State Attorney's Office. *See*, *e.g.*, *Penalver v. State*, 926 So. 2d 1118 (Fla. 2006); *Mathews v. State*, 44 So. 2d 664 (Fla. 1950); *cf*. *United States v. Long*, 449 F.2d 288 (8th Cir. 1971).

III. ANY ADDITIONAL INFORMATION SOUGHT FROM ATTORNEY CRUMP IS PRIVILEGED AND THERE HAS BEEN NO WAIVER AS TO SUCH INFORMATION

In Florida, the attorney-client privilege shields a client – or his lawyer when the privilege is invoked on the client's behalf, FLA. STAT. § 90.502(3)(e) – from disclosing confidential communications between the attorney and client that are made in the rendition of legal services provided to the client. FLA. STAT. § 90.502(2). The purpose of the privilege serves not only private interests, but elemental public ends:

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sounds legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. The privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. The privilege's purpose is to encourage clients to make a full disclosure to their attorneys.

Am. Tobacco Co., 697 So. 2d 1249, 1252 (internal citations and quotations omitted); *accord Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976).

Similarly, the doctrine of work product immunity also protects the confidentiality of information that is crucial to the adversarial administration of justice. As this Court aptly summarized:

> More than fifty years ago, the United State Supreme Court, in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), held that oral statements made by witnesses to an attorney in the course of the litigation process are absolutely privileged and nondisclosable under what has come to be known as work product protection. The court wrote in that case:
>
> > But as to ***oral statements*** made by witnesses to ... [the attorney], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and **to use it for impeachment** or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.
>
> *Id.* at 512-513, 67 S.Ct. 385 (emphasis added.)

As for oral statements taken by attorneys from witnesses, Florida courts have repeatedly and consistently held that the contents of these interviews are nondisclosable work product. *See Eagan v. DeManio,*294 So.2d 639 (Fla.1974) (investigative interviews of witnesses by state prosecutors are work product); *Olson v. State,* 705 So.2d 687, 690 (Fla. 5th DCA 1998) ("[t]he oral and unrecorded statements of witnesses to a state attorney are privileged as work product and not subject to discovery"); *State v. Rabin,* 495 So.2d 257, 260-61 (Fla. 3d DCA 1986) (oral statements in a pretrial interview between criminal defendant's former spouse and his defense counsel "constituted protected work product").

Opinion work product involves a lawyer's impressions, conclusions, opinion and theories of her client's case. Opinion work product is an absolute, or nearly absolute, privilege. *Rabin.* Fact work product concerns what the attorney did and what she learned in her role as attorney. As the name suggests, fact work product is factual information which pertains to this client's case prepared or gathered in connection therewith. *Id.,* 495 So.2d at 262.

The fact work product is discoverable only if the parties seeking this work product show the court: (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. Thus, "need" and "hardship" elements must be alleged in the motion to compel and established to the court's satisfaction at an adversarial hearing.

> This need and hardship must be alleged in the motion to compel. *State Farm Mutual Automobile Ins. Co. v. LaForet,* 591 So.2d 1143, 1144 (Fla. 4th DCA 1992). Because respondents' motion below contains no claim that the factual information in the

> memorandum is needed for the forthcoming evidentiary hearing or that the information cannot be obtained from any other source without undue hardship, the motion was facially insufficient to compel production and should have been summarily denied. *Id.* at 1144....
>
> *Whealton v. Marshall,* 631 So.2d 323, 325 (Fla. 4th DCA 1994). . . .
>
> To compel an attorney to divulge her fact work product absent both allegations and proof of need and hardship would put the diligent attorney in the position of working on behalf of her opponent. It would seriously damage or destroy a relationship of trust, confidence, and respect between the attorney and her clients. There would be no reason for the legal profession to exist as an integral arm of the American justice system.

Horning-Keating, 777 So. 2d 438, 443-45.[22]

The trial court correctly interpreted and applied this Court's ruling in *Horning* in determining that any additional information addressing Attorney Crump's interview with Witness 8 constituted protected work product, (App. at 176), and that – irrespective of whether Attorney Crump should be deemed "opposing counsel" – Petitioner had failed to make a threshold showing in his Third Motion to Compel entitling him to discovery of such information. *See*, *e.g.*,

[22] *Accord Prudential v. Fla. Dep't of Ins.,* 694 So. 2d 772 (Fla. 2d DCA 1997); *Intercontinental Properties v. Samy,* 685 So. 2d 1035 (Fla. 3d DCA 1997); *North Broward Hosp. Dist. v. Button,* 592 So. 2d 367 (Fla. 4th DCA 1992); *Zaban v. McCombs*, 568 So. 2d 87 (Fla. 1st DCA 1990); *Dade County School Bd. v. Soler By and Through Soler,* 534 So. 2d 884 (Fla. 3d DCA 1988).

Horning-Keating, 777 So. 2d 438, 445 (citing, *inter alia*, *Prudential,* 694 So. 2d 772 (Fla. 2d DCA 1997)) (bare assertions of need and undue hardship are insufficient to require the production of work product); *North Broward Hosp. Dist.,* 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)); *see also*, *e.g.*, *LaForet*, 591 So. 2d 1143 (Fla. 4th DCA 1992); *Adventist Health Sys.-Sunbelt, Inc. v. Lake*, 556 So. 2d 819 (Fla. 5th DCA 1990).

To the extent not already addressed in his lengthy affidavit, deposing Attorney Crump for any additional information about "why the interview was held the way it was including [sic] the setting, why law enforcement was not involved, why the 18th Judicial Circuit State Attorney's Office was not advised, why he did not retain a full copy of the audio available to him, what was asked, and what was said," (Pet. at 29), falls quite squarely under the definition of protected fact and opinion work product set forth in the foregoing decisions.

While Petitioner contends that Attorney Crump "seems to possess" additional information not disclosed in his affidavit and waived any privilege as to such information by publicly commenting on this case, (Pet. at 37),[23] waiver of attorney-client and work product privileges is not favored in Florida. *See*, *e.g.*,

[23] If the standard for the right to conduct depositions of non-party attorneys was measured by comments made in a public forum, every attorney who has publicly commented on this high-profile case could be susceptible to being deposed – including, as the trial court observed, Petitioner's counsel. (App. at 132).

Liberty Mut. Ins. Co. v. Lease Am., Inc., 735 So. 2d 560, 562 (Fla. 4th DCA 1999) ("The judiciary of this state should protect communications which Floridians recognize as privileged, without being hobbled by less important considerations."). For that reason, partial disclosure of information or material does not necessarily mean that the work-product privilege is waived as to all information. *See*, *e.g.*, *Morgan v. Tracy*, 604 So. 2d 15 (Fla. 4th DCA 1992).

Attorney Crump has been candid and forthcoming about information surrounding his interview of Witness 8 from the outset of this case, going so far as to provide Petitioner with a detailed fifteen-page affidavit after turning over his recording device to FDLE upon request. At the same time, he has carefully balanced the need for such candor against the rights and interests of his clients in protecting confidential and privileged information. Whatever waiver may have resulted from the exigencies of this case, there has been no such waiver as to any additional information that Petitioner seeks to elicit by deposition. Consistent, then, with this Court's decision in *Horning-Keating*, the Petition should be denied.

IV. ATTORNEY CRUMP IS NOT A MATERIAL WITNESS AND HAS NO INFORMATION RELEVANT TO THE OFFENSE CHARGED

The State has charged Petitioner with second degree murder, (App. at 1), an offense consisting of three elements:

(i) The victim is dead;

(ii) The death was caused by the criminal act of the defendant; and

(iii) There was an unlawful killing of the victim by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

Florida's Standard Jury Instructions for Criminal Cases, 7.4; FLA. STAT. § 782.04.

Nowhere in his filings with the lower court or in his instant Petition has Petitioner demonstrated that Attorney Crump is a material witness who has information relevant to any of these elements. Nor could he.

Attorney Crump did not know of Petitioner prior to February 26, 2012; he did not know Trayvon or his family; he was not having a conversation on the phone with Trayvon in the moments before he was shot and killed; he did not live in the gated community where the shooting took place; and he did not see or hear anything that would make it possible for him to otherwise possess information relevant to the offense of second degree murder.

Nor is there any impeachment value in deposing Attorney Crump. Irrespective of the ability to right to take a deposition in a criminal proceeding, such depositions cannot be used as substantive evidence at trial and may instead only be used for the purpose of contradicting or impeaching the testimony of the deponent. FLA. R. CRIM. P.3.220(h)(1); *see also*, *e.g.*, *State v. James*, 402 So. 2d 1169, 1171 (Fla. 1981) (construing identical language in former Rule 3.220(d) and holding "discovery depositions may not be used as substantive evidence in a

criminal trial."); *cf. State v. Lopez*, 974 So. 2d 340 (Fla. 2008). As such, Petitioner clearly could not impeach Witness 8 with Attorney Crump's deposition.

Inasmuch as Petitioner cannot make any showing that Attorney Crump is a material witness who has information relevant to the offense charged – whether for impeachment purposes or otherwise – his Petition must be denied.

CONCLUSION

Based on the argument and authorities presented herein, Proposed-Respondent Benjamin L. Crump respectfully requests that this Honorable Court deny certiorari review or, in the alternative, affirm the trial court's orders.

DESIGNATION OF EMAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for purposes of service pursuant to FLA. R. JUD. ADMIN. 2.516:

Shayan H. Modarres
Primary e-mail address:
shayan@modarreslaw.com

Bruce B. Blackwell
Primary e-mail address:
bblackwell@kbzwlaw.com
Secondary e-mail address:
kking@kbzwlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 29, 2013, I electronically filed the foregoing with the Clerk of the Court by using the eDCA filing system. I FURTHER CERTIFY that on April 29, 2013, I provided a true and correct copy of the foregoing via email (.pdf) to the following:

Mark O'Mara
mark@markomaralaw.com
markservice@markomaralaw.com

Pamela J. Koller
pamela.koller@myfloridalegal.com
crimappdab@myfloridalegal.com

Donald R. West
donwest@donwestlawgroup.com
lpatrick@donwestlawgroup.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and has been submitted in 14-point Times New Roman font.

Respectfully submitted,

/s/ Bruce B. Blackwell
Bruce B. Blackwell
Florida Bar No.: 0190808
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, Florida 32802-1631
Telephone No.: (407) 422-2472
Facsimile No.: (407) 648-0161
bblackwell@kbzwlaw.com (Primary)
kking@kbzwlaw.com (Secondary)

- *and* -

Shayan H. Modarres
Florida Bar No.: 0092493
THE MODARRES LAW FIRM
155 S. Court Avenue, Suite #2106
Orlando, Florida 32801
Telephone No.: (407) 408-0494
shayan@modarreslaw.com (Primary)

Counsel for Proposed-Respondent
Benjamin L. Crump, Esq.