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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-458

STATE OF FLORIDA,
Petitioner,

v.

ZACHARY JOSEPH PENNA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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

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STATEMENT OF THE ISSUES

Should this Court accept review, these additional issues may be raised:

1. Whether the State forfeited the *Edwards v. Arizona*, 451 U.S. 477 (1981), re-initiation exception when the detectives did not scrupulously honor Penna's invocation of the right to counsel and right to remain silent? *See Collazo v. Estelle*, 940 F. 2d 411, 427 (9th Cir. 1991) (Kozinski, J., concurring) ("Because *Edwards* is designed to prevent police from badgering suspects into giving up their right to counsel, the narrow exception to *Edwards* cannot apply in a case where the police actually engaged in badgering.").

2. Whether the *Miranda* warnings (which were given by detectives who did not scrupulously honor Penna's invocation of rights) became stale after twenty-nine days and questioning by a different officer?

3. Whether a seated juror concealed a relevant fact in voir dire?

4. Whether the State violated the discovery rules when it failed to disclose that it intended to use a 17-slide PowerPoint presentation by its blood-stain analyst?

5. Whether the trial court erred in allowing the State to use its mental health expert as a conduit for inadmissible hearsay?

6. Whether the trial court erred in allowing the State to tell the jury about the story of Enoch and Gabriel during its cross-examination of one of Penna's mental health experts?

STATEMENT OF THE CASE AND FACTS

Respondent Penna was arrested for serious crimes. App. 6. He was mentally ill and grievously wounded (he had been shot four times). App. 6, 14-15. At the hospital in Brevard County, the lead Palm Beach County detective *Mirandized* Penna and attempted to question him, but Penna invoked his right to counsel. App. 6.

Once a suspect invokes the right to counsel or the right to remain silent, interrogation must cease. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). Police must "scrupulously honor" these rights. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

The detectives did not scrupulously honor these rights. The lead detective left the room, but "[d]espite the defendant having requested a lawyer, a second detective entered the defendant's room and attempted to question him. The defendant again requested a lawyer. The detectives then ceased their attempts to question the defendant." App. 6.

Almost a month later, a jail deputy assigned to guard Penna at the hospital decided he would give it a try. App. 6. He "called the local police to ask whether the defendant had been read his *Miranda* warnings and whether they wanted him to obtain

statements from the defendant." App. 6. The local police referred the deputy to the Palm Beach County detectives. App. 6-7.

The deputy spoke to one of the detectives and was told that Penna "had refused to speak to them and that he had requested counsel." App. 7.

"Despite that notification, when the defendant initiated a conversation with the deputy later that day, and on other days in the weeks which followed, the deputy did not specifically give the defendant his *Miranda* rights again, even though the deputy directed questions to the defendant during those conversations." App. 7.

The Fourth District held that some of the statements Penna made to the deputy should have been suppressed because the deputy did not *Mirandize* Penna or specifically remind Penna of the *Miranda* rights. App. 24. "Moreover," the court noted, "after the defendant was read his *Miranda* rights, twenty-nine days passed, during which the defendant was being treated for his gunshot wounds…." App. 24.

In sum, Penna was *Mirandized* and he invoked his right to counsel and he refused to speak to the detectives. The police did

not scrupulously honor Penna's invocation of rights. Approximately a month later, during which Penna was being treated for his gunshot wounds, a deputy successfully questioned Penna without *Mirandizing* him or reminding him of his previously invoked rights. The Fourth District held that some of the statements Penna made to the deputy should have been suppressed.

The Fourth District certified the question proposed by the State as one of great public importance (App. 33):

> WHETHER A DEFENDANT'S FIFTH AMENDMENT *MIRANDA* RIGHTS ARE AUTOMATICALLY VIOLATED WHEN AN OFFICER FAILS TO RE-READ A *MIRANDA* WARNING FOLLOWING A DEFENDANT'S VOLUNTARY RE-INITIATION OF CONTACT.

ARGUMENT

THIS COURT SHOULD DENY REVIEW BECAUSE THE FOURTH DISTRICT DID NOT PASS UPON THE QUESTION IT CERTIFIED; THE QUESTION IT CERTIFIED IS NOT ONE OF GREAT PUBLIC IMPORTANCE; AND THE STATE DID NOT PRESERVE FOR REVIEW THE ISSUE PRESENTED

Under Article V, Section 3(b)(4) of the Florida Constitution, this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." The threshold issue of whether the district court's decision passed upon the certified question is jurisdictional. *See Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973, 974 (Fla. 2001); *Gee v. Seidman & Seidman*, 653 So. 2d 384, 385 (Fla. 1995).

"In order to have discretionary jurisdiction based on a certified question, there are essentially three prerequisites that must be met. First, it is essential that the district court of appeal pass upon the question certified by it to be of great public importance." *Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007). "Second, there must be a district court 'decision' to review." *Id.* Third, the question must be "'certified'

by a majority decision of the district court." *Id.*; *see also Carpenter v. State*, 228 So. 3d 535, 540 (Fla. 2017).

The first requirement was analyzed in *Salgat v. State*, 652 So. 2d 815 (Fla. 1995). There, the First District found this Court's decision in *Johnson v. State*, 465 So. 2d 499 (Fla. 1985), to be dispositive for deciding a jury instruction argument, but the court noted an "important question about whether Johnson may be reconciled" with this Court's more "recent decision of *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992)." *Salgat v. State*, 630 So. 2d 1143, 1145 (Fla. 1st DCA 1993). Therefore, the First District certified a question of great public importance regarding whether jury instructions previously held proper under *Johnson* constituted an improper comment upon the evidence in light of *Fenelon*. *Id.*

This Court initially accepted review but later "determin[ed] that [it wa]s without jurisdiction." *Salgat*, 652 So. 2d 815. That was because this Court "has no jurisdiction to answer a question certified by a district court when that court has not first passed upon the question certified." *Id.*

In the case at bar, the Fourth District did not hold that a defendant's *Miranda* rights are "automatically" violated when an

officer fails to re-*Mirandize* the defendant following the defendant's re-initiation of contact. To be sure, the court applied *Shelly v. State*, 262 So. 3d 1 (Fla. 2018), and ruled that the deputy should have re-*Mirandized* Penna. But this was after noting in its recitation of the facts that the detectives had tried to question Penna after he invoked his right to counsel, that the deputy who successfully questioned Penna knew that Penna had invoked his rights, and that Penna was questioned nearly a month after he was *Mirandized. See State v. Roberts*, 32 Ohio St. 3d 225, 232, 513 N.E.2d 720, 726 (1987) (passage of time may make initial *Miranda* warnings stale and require that they be read again); *Commonwealth. v. Scott*, 561 Pa. 617, 624-25, 752 A.2d 871, 875-76 (2000) (same); *State v. Ransom*, 288 Kan. 697, 707, 207 P.3d 208, 218 (2009) (interrogation must be conducted within reasonable time after *Miranda* warnings); *United States v. McClain*, 2006 WL 2403926, at *11 (D.N.J. Aug. 18, 2006) (two-week gap made *Miranda* warnings stale); *Commonwealth v. Wideman*, 460 Pa. 699, 708-09, 334 A.2d 594, 599 (1975) (twelve-hour gap, change in location, and change in officers made *Miranda* warnings stale); *Commonwealth v. Riggins,* 451 Pa. 519, 527-28, 304 A.2d 473, 478 (1973) (seventeen-hour

gap, change in location, change in officers made *Miranda* warnings stale).

Nor is the question the Fourth District certified one of great public importance. This case presents a "narrow issue with very unique facts." *Dade Cty. Prop. Appraiser v. Lisboa*, 737 So. 2d 1078 (Mem.) (Fla. 1999). To begin with, not all suspects are *Mirandized* and questioned by police. Of those who are questioned, the available evidence shows that few invoke their *Miranda* rights.[1] Of those suspects who invoke their rights, only a small fraction go on to reinitiate contact with police. And of those few suspects who invoke their rights and then reinitiate contact with police, fewer still will be questioned by an officer who fails to re-*Mirandize* the suspect. And on top of all of that, the statement might not be inculpatory, such that the defense would not move to suppress it (nor the State seek to admit it).

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[1] Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839, 859 (1996) (out of 129 *Mirandized* suspects, 21 invoked their rights); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 653 (1996) (out of 182 *Mirandized* suspects, 46 invoked those rights).

The stars were in alignment in this case because Penna, mentally ill and grievously wounded, invoked his rights and then, nearly a month later, spoke to an over eager jail deputy who was assigned to guard him at the hospital. This rare case does not present a question of great public importance.

Also, the State did not preserve this issue for review. Although the State now argues that *Shelly* was wrongly decided,[2] it did not make that argument in the district court until after the case was decided. *See State v. Fleming*, 61 So. 3d 399, 401 n.3 (Fla. 2011) (the State did not preserve an argument because it failed to make it in the district court). If counsel seeks reversal of existing law, it must preserve that issue like any other. *See Espinosa v. State*, 626 So. 2d 165, 167 (Fla. 1993) (holding that issue was waived notwithstanding there was adverse authority that foreclosed it); *Beltran-Lopez v. State*, 626 So. 2d 163, 164 (Fla. 1993) (same); *see, e.g.*, *Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020), *rev. denied*, 2020 WL 5902598 (Fla. Oct. 5, 2020).

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[2] The State argued in the district court that the Fourth District misinterpreted *Shelly* in *Quarles v. State*, 290 So. 3d 505 (Fla. 4th DCA 2020), *rev. denied*, 2020 WL 2498529 (Fla. May 14, 2020). *Answer Brief at pages 26-28*.

"Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State." *Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993); § 921.051(8), Fla. Stat. (procedural bars should be strictly enforced); *State v. Vesquez*, 755 So. 2d 674, 677 (Fla. 4th DCA 1999) (section 924.051, Florida Statutes, is applicable to both the State and the defense). The State's cited case, *Hunt v. State*, 613 So. 2d 893, 898 n.4 (Fla. 1992), does not stand for the proposition that a party need not preserve for review a challenge to binding precedent.

Finally, this Court decided *Shelly* less than four years ago, and it denied review of *Quarles v. State*, 290 So. 3d 505 (Fla. 4th DCA 2020), *rev. denied*, 2020 WL 2498529 (Fla. May 14, 2020), less than two years ago. And it can't be the case that this Court's prior decisions, even those that were rendered by a closely divided Court, are all up for grabs. As the authors of this treatise explain:

> The authority of precedent derives not from the wisdom or authority of particular judges who render a decision but from the fact that it is a judgment of the court whose jurisdiction hasn't changed. Hence a change in the composition of court personnel is a "type of 'circumstance' that does not rise to the level necessary to overturn the doctrine of stare decisis." This rule is so because "we may be confident in the assumption that a precedent may not properly be overruled simply because

> a majority of the Court believe it to be error," as the Texas Court of Criminal Appeals said in a 1993 case. "If the rule were otherwise," the court wrote, then no precedent would be safe and our law could change after every change in Court personnel." The court cited Cardozo J. for this proposition: "The situation would . . . be intolerable if the [periodic] changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the [time] before, whether we relish them or not."
>
> So a court on which certain judges have come to determine that a prior case was wrongly decided, or a court that has had a change of personnel and can now muster the necessary votes to overrule a prior case, cannot properly overrule the prior case without considering both the doctrine of stare decisis and the factors that it requires: "The concepts of stare decisis and judicial restraint are too vital to our system of jurisprudence to accommodate simple changes of heart or court personnel."

Bryan A. Garner et al., *The Law of Judicial Precedent* 416 (2016) (citations omitted).

This Court should deny review.

CONCLUSION

This Court should deny review.

CERTIFICATE OF SERVICE

I certify that this brief was served to Evan Ezray, Deputy Solicitor General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399 by e-service through the portal at evan.ezray@myfloridalegal.com this 16th day of May, 2022.

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO

CERTIFICATE OF FONT AND WORD COUNT

I certify this brief is submitted in Bookman Old Style 14-point font in compliance with rule 9.210(a)(2)(a) and that the word count is 2500 or less exclusive of the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block.

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