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

CASE NO: 3D20-1461
L.T. CASE NO: F90-354C

JERMAINE CLARINGTON
Appellant / Petitioner

and

STATE OF FLORIDA
Appellee /Respondent
_____/

MOTION TO CERTIFY QUESTION OF GREAT PUBLIC IMPORTANCE AND MOTION TO STAY PROCEEDINGS IN LOWER TRIBUNAL PENDING FLORIDA SUPREME COURT DECISION ON WHETHER TO EXERCISE JURISDICTION

On December 2, 2020, this Court issued its decision denying a petition for writ of prohibition filed on October 9, 2020. The issue presented was whether, during the ongoing COVID-19 pandemic which has resulted in the physical closure, either complete or limited, of courts in Miami-Dade County and more broadly across the State of Florida and the nation, the Constitution (both federal and state) permits a probation violation hearing to proceed over the Zoom videoconferencing platform, with the defendant appearing by video from the county jail and defense counsel, the prosecutor, the witnesses, and the judge all also appearing by video from separate

locations. In such proceedings, all agree, the defendant, who faces the loss of his liberty based on a finding that he has violated his probation, will not be in the physical courtroom, nor will the defendant be in the same physical location as his lawyer or any of the other aforementioned participants in the probation violation hearing. Indeed, in this case because Mr. Clarington was taken into custody during the COVID-19 pandemic, which has eliminated both in-person court appearances and in-person attorney jail visits, he has *never* been in the same physical location, and never met in person, either the judge who will preside over his probation violation hearing or the lawyer who will represent him at that hearing.

Two judges on a three-judge panel (selected from this ten-judge court), Judge Emas and Judge Hendon, joined the majority opinion holding that a probation violation hearing held over Zoom in this manner does not violate a defendant's constitutional rights to due process or confrontation. As to due process, the majority opinion noted that the Florida Supreme Court in *Doe v. State*, 217 So. 3d 1020 (Fla. 2017), had found that an involuntary civil commitment hearing (Baker Act hearing) could not be held, absent waiver, with the defendant physically separate from the judge. *Doe* was distinguishable, the majority opinion held, because *Doe* dealt with a contemplated permanent transition of Baker Act hearings to videoconference

rather than in-person, whereas the instant case contemplated a temporary transition of probation violation hearings to videoconference rather than in-person for reasons motivated by the "current necessities of a public health emergency."[1] The majority opinion also noted that *Doe* dealt with a distinct group of vulnerable individuals, those who would potentially be subject to involuntary civil commitment.[2]

Ultimately, the majority opinion holds that, "under the circumstances presented"[3] and "weighed and analyzed in light of the Coronavirus pandemic and the Florida Supreme Court's current administrative orders regulating the conduct of criminal proceedings in the midst of that public health emergency"[4] a probation violation hearing held over the Zoom videoconferencing platform would not violate Mr. Clarington's rights to confrontation and due process. The majority opinion found that due process

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[1] Opinion p. 24.

[2] Of course, the ultimate result of Baker Act judicial review hearing may be involuntary civil commitment in a mental health treatment facility for a period of up to 90 days, after which continued commitment would require another hearing, again allowing a maximum 90-day commitment (Fla. Stat. § 394.467(6)(b), (7)(d)). The ultimate result in Jermaine Clarington's probation violation hearing may be involuntary criminal commitment in a prison for the rest of Mr. Clarington's natural life. Seen in this light, it is not necessarily intuitively obvious whether the prospective Baker Act committee or the alleged probation violator is in a more "vulnerable" position as they await their respective hearings.

[3] Court Opinion p. 24.

[4] Court Opinion p. 28.

is a "flexible and dynamic"[5] concept and that when the countervailing interests change (here "ensuring the effective and expeditious administration of justice"[6] during a time of undeniable upheaval of the normal mechanisms of the criminal justice system due to the Coronavirus pandemic) then so does the appropriate balance. It appears that the majority panel would not countenance a probation violation hearing over the Zoom videoconference platform during "normal" times, as it takes care to emphasize the temporary nature and "narrow scope"[7] of its decision.

The third member of the panel, Judge Gordo, concurred in result only, finding that the requirements for a writ of prohibition were not met (thus, denial was appropriate) but clearly disagreeing with the constitutional conclusion that "negates a defendant's constitutional rights by balancing them with the competing interests of the temporary pandemic."[8]

Motion to Certify as Question of Great Public Importance.

Review by the Florida Supreme Court of district court decisions is limited and proscribed by both the Florida Constitution and the Rules of

[5] Court Opinion p. 10.
[6] Court Opinion p. 24.
[7] Opinion p. 28.
[8] Opinion p. 29.

Appellate Procedure. Article V, Section 3(b)(4) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), permit the Florida Supreme Court to exercise its discretionary jurisdiction to review those decisions certified by the district court to be of great public importance. Petitioner therefore moves this Court to certify the question of whether, given the ongoing reality of the COVID-19 pandemic, probation violation hearings can proceed over the Zoom videoconference platform with the defendant appearing by video link from the jail and not being physically present in the courtroom or physically together with his or her attorney. Certifying this question will facilitate prompt Florida Supreme Court review of this question which will significantly affect the business of all circuit and county courts (those courts with original jurisdiction over probation violation cases) in the State of Florida in the coming days, weeks, and months.

This Court is the first appellate Court in the State of Florida to weigh in on this issue, and in doing so the panel was divided on the central constitutional issue. It appears this this Court is also the first appellate court in the United States to weigh in on this specific issue—at least, undersigned counsel found no other such cases specifically addressing Zoom probation violation hearings during the COVID-19 pandemic as he researched and

briefed the case, and this Court does not cite any other such cases in its opinion.

Administrative Order 20-23, which amends or suspends rules of procedure due to the COVID-19 pandemic, was authored by the Florida Supreme Court, and they are in the best position to rule on its application and whether, as this Court holds, it suspends Florida Rule of Criminal Procedure 3.180 in this context. Furthermore, AO 20-23, as this Court recognized, has a specific carveout for remote court hearings that would violate the Florida or United States Constitutions, and of course the main argument Petitioner advanced, and that this Court addressed in the opinion, is that a Zoom probation violation hearing is unconstitutional. The Florida Supreme Court is the final arbiter within the Florida state court system of the meaning of the state and federal constitutions.

Petitioner recognizes that this Court gave a good-faith answer to a difficult and in many ways unprecedented question as all stakeholders confront the desire to continue to have a functioning court system amidst a global pandemic of growing scope and unknown end date, while maintaining adherence to the constitution. Two judges of this Court found that applying a balancing test (the defendant's constitutional rights versus the need to continue to administer justice) was the appropriate solution to the question

presented here, and found that balancing test came out on the side of holding the Zoom probation violation hearing. It is clear that other reasonable jurists presented with the same question could hold that the state and federal Constitution does not give way in times of national crisis or strain, and that if they prohibited probation violation hearings over Zoom before the onset of the COVID-19 pandemic, then they continue to do so now. This was the main argument presented in the Petition, and it is the view of one of the judges of the Third District Court of Appeals assigned to this panel, as expressed in the concurrence in result only.[9]

[9] Although Judge Gordo would not have reached the merits, being of the view that a writ of prohibition was not the appropriate remedy, the fact that a recent panel of the Florida Supreme Court in *Doe v. State*, 217 So. 3d 1020 (Fla. 2017), decided the merits of a very similar claim brought prospectively, via a writ, and that four of the judges (a majority of the seven-member Court) who either were in the majority or concurred in the result in *Doe* are still on the Court, and that no judge found in *Doe* that a writ was inappropriate to prospectively test the legality of a court hearing being contemplated to be held over videoconference, strongly suggests that the Florida Supreme Court would not see a procedural bar here. To the extent that Judge Gordo is correct that a writ **of prohibition** is not the appropriate remedy, as discussed in the Reply before this Court both the Florida Constitution and Fla. R. App. P. 9.040 direct Courts to treat a request for an improper remedy as if a proper one was sought, which here would be another species of writ. *Doe* did not address what procedural avenue it used to deliver the prospective relief sought of barring a Baker Act hearing held over videoconference.

The majority panel noted that the arguments Petitioner and amici curiae raised were "substantial and compelling".[10] This is a situation where the entire Florida court system would benefit from the clarity that would be occasioned by an authoritative decision of the highest court in Florida, rather than a divided panel of one of five of Florida's intermediate appellate courts. Thus, this Court should certify the question presented as one of great public importance, thereby facilitating rapid Florida Supreme Court review. If this Court does so, Petitioner will commit to filing a Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court within one week (seven days) of this Court certifying the question and finalizing their opinion.[11] It is not Petitioner's wish to delay, but only to get this matter before the Florida Supreme Court, which Petitioner suggests given the practicalities is in everybody's interest. If the Florida Supreme Court agrees with this Court, then every circuit and county judge in Florida can feel confident that the result of a Zoom probation violation hearing will stand. If the Florida Supreme Court agrees with Petitioner, then having that known

[10] Opinion at 26.

[11] When the District Court certifies a question of great public importance, no briefs on jurisdiction are authorized and the Florida Supreme Court proceeds immediately to determining whether to exercise their discretionary jurisdiction, which means that granting this motion to certify should either expedite Florida Supreme Court review on the merits, or alternatively advance the date upon which it is clear that such review will not occur.

sooner rather than later will save a tremendous amount of wasted energy and effort by judges, lawyers, and witnesses, and will avoid both victims and defendants feeling like the sands of justice are shifting under their feet as they see what they thought were final results reversed.[12]

What is ultimately at stake here is what both the United States Supreme Court and the Florida Supreme Court have called "one of a criminal defendant's most basic rights", the "right to be present in the courtroom at every critical stage of the proceeding". *Jackson v. State*, 767 So.2d 1156, 1159 (Fla. 2000), *citing Illinois v. Allen*, 397 U.S. 337 (1970). This Court's current decision holds, for the first time in Florida law, that a critical stage proceeding, at which the defendant's liberty is directly at stake, can be held without the defendant's physical presence despite the defendant having done nothing to voluntarily absent themself. It is hard to overstate the importance of getting such a decision right.

[12] There can be no doubt that every competent defense attorney faced with a Zoom probation violation hearing will object to its proceeding on the same constitutional grounds that were brought by Petitioner. If later on direct appeal either another District Court or the Florida Supreme Court disagrees with the reasoning of this Court on the constitutional issue, all of those cases will be in the appellate pipeline and new, in-person probation violation hearings will have to be held, either in some districts or statewide depending on which Court weighs in. This is a result that is in nobody's interest.

District courts regularly certify as questions of great public importance issues which would appear to have less immediate and direct impact on ongoing court proceedings than this one, made at this time. *See, e.g., Dodgen v. Grijalva*, 281 So. 3d 490 (Fla. 4th DCA 2019) (certifying as question of great public importance whether an insurer not a party to litigation must disclose its financial relationship with experts retained for litigation); *State v. Griffin*, 949 So. 2d 309 (Fla. 1st DCA 2007) (certifying as question of great public importance whether narcotic dog alert on vehicle constitutes probable cause to search driver and sole occupant of vehicle); *Wright v. City of Miami Gardens*, 199 So. 3d 381 (Fla. 3rd DCA 2016) (certifying as question of great public importance whether candidate for public office must be disqualified if fee check is returned by bank due to error over which candidate has no control); *Weisenberg v. Costa Crociere, S.P.A.*, 35 So.3d 910 (Fla. 3rd DCA 2010) (certifying a question of great public importance whether particular forum selection clause is enforceable).

Cases which are before the District Court on writs, rather than post-judgment appeals, also can be, and regularly are, certified to the Florida Supreme Court as questions of great public importance. *See, e.g., State Farm Fla. Ins. Co. v. Sanders,* 45 Fla. L. Weekly D. 870 (Fla. 3rd DCA Apr. 15, 2020) (denying writ of certiorari but certifying question based on great

public importance); *Pollard v. State*, 287 So.3d 649 (Fla. 1st DCA 2019) (certifying question based on great public importance based on writ of prohibition, treated as writ of certiorari, brought by defendant and granted by district court regarding compelling defendant to provide cellphone password); *Kilgore v. State*, 933 So. 2d 1192 (Fla. 2d DCA 2006) (granting writ of certiorari as to order below disqualifying counsel from representing defendant on collateral attack, and certifying question of great public importance); *Haridopolos v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465 (Fla. 1st DCA 2011) (denying writ of prohibition but certifying question of great public importance); *State v. Owen*, 654 So. 2d 200 (Fla. 4th DCA 1995) (denying state's petition for writ of certiorari after lower court found confession inadmissible, but certifying question of great public importance).

Petitioner therefore moves this Court to certify to the Florida Supreme Court as a question of great public importance the following question, or some version thereof: DO THE UNITED STATES AND FLORIDA CONSTITUTIONS PERMIT TRIAL COURTS TO CONDUCT PROBATION VIOLATION HEARINGS OVER VIDEOCONFERENCE, WITH THE DEFENDANT APPEARING OVER VIDEO LINK AND NOT PHYSICALLY PRESENT IN THE COURTROOM OR IN THE SAME PHYSICAL SPACE AS HIS ATTORNEY, WHERE NORMAL

COURTROOM ACCESS IS NOT POSSIBLE DUE TO THE COVID-19 PANDEMIC AND THE DEFENDANT OBJECTS AND IS WILLING TO WAIT IN CUSTODY FOR AN IN-PERSON HEARING?

Motion to Stay Proceedings Below Until Florida Supreme Court Weighs in On Review.

This Court issued its decision five days ago (December 2, 2020). To date, and to undersigned counsel's knowledge, no probation violation hearings in the Eleventh Circuit have proceeded over Zoom except with the consent of the defendant and his or her lawyer. However, given the Court's decision Eleventh Circuit judges are planning to immediately begin such hearings over defense objection. Most notably, in the instant case against Jermaine Clarington, Judge De La O has stated that he will hold the probation violation hearing over Zoom next Monday, December 14, 2020, as stated in the below email sent to the parties the day of the Courts decision.

From: De la O, Miguel M <mdelao@jud11.flcourts.org>
Sent: Wednesday, December 2, 2020 1:13 PM
To: Sonali N. Desai <SonaliDesai@MiamiSAO.com>; Aubrey Webb <aubrey@aqwattorney.com>
Cc: Christine Zahralban <ChristineZahralban@MiamiSAO.com>; Garbalosa, Patsy <pgarbalosa@jud11.flcourts.org>
Subject: State v. Clarington

Now that the Third DCA has cleared the way for Mr. Clarington's PVH, I am confirming it will start at 11 am on Monday, December 14, 2020, in Pod 1 (https://zoom.us/j/99604785521).

Please email all exhibits you plan on introducing, to F005@jud11.flcourts.org, at the same time you file your Exhibit List with the Clerk (which must be done by close of business Friday, December 11, 2020).

Miguel M. de la O, Circuit Judge
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Div. 5 Courtzoom©: https://zoom.us/j/93125832924
POD 1 Courtzoom©: https://zoom.us/j/99604785521
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Division Policies and Information: https://www.jud11.flcourts.org/Judge-Details?judgeid=1052&sectionid=118

Furthermore, Judge Jose Fernandez, who presides over the Eleventh Circuit's Repeat Offender Court, which has more than its share of serious probation violation cases, sent the following email last week:

Please circulate intraoffice and share with private attorneys and PCAC attorneys.

The recent 3rd DCA decision in *Clarington* leaves no question whether PVHs can proceed. With that in mind, you should be prepared to proceed to PVH in your cases.

The argument, frequently made, that a PVH in a particular situation is "a waste of time" or doesn't resolve all of a defendant's cases will receive little weight. If mitigation is being prepared by the defense or considered by the state, that process should be completed. Cases will also likely not be reset because the parties are "close" to a resolution.

If a continuance is going to be requested, you should be prepared to give detailed and specific answers to questions about the status of the case including the names of witnesses, their involvement in the case, their availability, etc. Just as you are responsible for subpoenaing your witnesses to appear and testify under normal circumstances, you are responsible for making sure they can testify if your witness does not have the technological capability to testify.

The cases set for trial/PVH next week (December 7) were not sounded last week because of the Thanksgiving holiday. So there may still be be some leeway through the end of the year.

Beginning with the first trial week of 2021 (January 11) continuances of PVHs will be limited and any PVH that is continued may very well receive a new hearing date sooner than "in the normal course".

The cases set for January 11, 2021, will not have been sounded either. You must bring any outstanding issues to my attention, by motion, before then. You can call my office and you will receive a hearing on your motion. I am available through December 18th and beginning January 4th. I am always available for real emergencies.

Joe Fernandez

Undersigned counsel is aware of, and has previously informed this Court of, probation violation cases before multiple other Eleventh Circuit judges who have previously postponed Zoom probation violation hearings pending this Court's decision in this case, but now are preparing to proceed to those hearings in the immediate future.

Given that as is discussed above this issue is, in Petitioner's opinion, one that should be resolved by the Florida Supreme Court prior to these proceedings occurring, and that the above makes clear that Eleventh Circuit judges plan to proceed with these Zoom probation violation hearings forthwith and thus prior to any possible resolution in the Florida Supreme Court, Petitioner moves that this Court to stay application of its decision, in this case and in related cases, and issue an order staying the circuit and county courts under its jurisdiction from holding probation violation hearings over Zoom until the Florida Supreme Court weighs in on this issue.

For his part, undersigned counsel will commit to filing a Notice to Invoke Discretionary Jurisdiction of Supreme Court and, if necessary,

Jurisdictional Brief[13] within one week of this Court ruling on the above Motion to Certify Question of Great Public Importance and otherwise rendering a final decision in this case. Petitioner waives the normal fifteen-day period for seeking post-opinion relief pursuant to Florida Rule of Appellate Procedure 9.330 and will not be moving for any other relief (for instance rehearing or rehearing en banc) other than certification as a matter of great public importance. Petitioner requests that this Court issue a final opinion granting certification of a question of great public importance forthwith. Alternatively, even if the Court does not grant certification, Petitioner requests that this Court issue a final opinion forthwith as doing so will still permit Petitioner to seek discretionary review in the Florida Supreme Court as this Court's opinion expressly construes a provision of the state and federal constitution. *See* Fla. R. App. P. 9.030(a)(2)(A)(ii); Fla. Const. Art. V, Sect. 3(b)(3).

Because Petitioner will file the necessary pleadings to institute review in the Florida Supreme Court review within one week of this Court making its decision final, and will alert the Florida Supreme Court to the time-sensitive nature of this matter (which will likely already be apparent),

[13] Again, jurisdictional briefing will only be necessary if this Court denies the motion to certify a question of great public importance. Fla. R. App. P. 9.120(d).

Petitioner believes we should have a decision on whether the Florida Supreme Court will exercise its discretionary jurisdiction in a short time. Petitioner requests a stay directing the lower tribunal not to hold a Zoom probation violation hearing until the Florida Supreme Court makes that decision. This will allow the status quo to remain in place for the time being and facilitate Supreme Court review. If the probation violation hearing in this case occurs before the Supreme Court rules on jurisdiction the issue as presented in this case will likely be mooted. Furthermore, in the absence of a stay, since the lower court has already made it abundantly clear that it will move forward, the Petitioner will suffer substantial prejudice as he (along with many other participants in the criminal justice system) will have to spend significant time and other resources on a probation violation hearing that, if Petitioner is correct on the legal issue, should not be going forward. *See, e.g., State v. Miyasoto*, 805 So.2d 818, 825 (Fla. 2d DCA 2001) (in context of motion seeking to stay mandate, court considers: "1) the likelihood that jurisdiction will be accepted by the supreme court; 2) the likelihood that movant will prevail on the merits in the supreme court; 3) the likelihood of harm if the stay is not granted; and 4) the likelihood that the harm would be irreparable in the absence of the stay").

Given the unique situation presented, this Court should issue the mandate to permit review in the Supreme Court, but should contemporaneously order a stay to permit Petitioner to seek that review in the expeditious fashion described herein. If the Court seeks the State's input before deciding on either form of relief, it should order that a response be served expeditiously and issue a temporary stay so that the status quo is maintained pending such a response and this Court's ruling.

Conclusion

Petitioner moves this Court to grant certification of a question of great public importance, issue the mandate including such certification forthwith, and issue an order staying the lower tribunal from holding a probation violation hearing over Zoom until the Florida Supreme Court has announced whether it will accept discretionary review in this matter.

I CERTIFY that a copy of this Motion has been efiled with the Clerk of Courts of the Third District Court of Appeals and served by email service on the Attorney General's Office at crimappmia@myfloridalegal.com, on Assistant Attorney General David Llanes at David.Llanes@myfloridalegal.com, on the State Attorneys Office at

felonyservice@miamisao.com, on ASA Sonali Desai at SonaliDesai@miamisao.com, and on the Honorable Miguel De La O at mdelao@jud11.flcourts.org, this 7th day of December, 2020.

Respectfully submitted,

_/s/ Daniel Tibbitt_____
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