IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

JEFFREY EPSTEIN,

Petitioner,

-vs- CASE NO. 4D18-0787

SCOTT ROTHSTEIN, BRADLEY J. EDWARDS, and [redacted]., [redacted]., and JANE DOE, Intervenors,[1]

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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[1] Petitioner did not include [redacted]., [redacted]. or Jane Doe in the caption of the Petition, however, they have been granted leave to appear in the trial court as Intervenors.

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STATEMENT OF THE CASE AND FACTS

Petitioner Jeffrey Epstein seeks the issuance of a writ of common law certiorari arguing that the trial court has departed from the essential requirements of the law in granting the severance of conflicting claims against different parties. This challenge comes after expressly telling the trial court "it is clearly within this Court's discretion to sever this case" (App.19, p.226).[2]

Epstein claims that this case arises from the "implosion of the Fort Lauderdale law firm Rothstein, Rosenfeldt & Adler" (Pet., p.3). This statement is far from true. This case arises from billionaire Epstein's efforts to escape responsibility for his serial sexual abuse of at least a dozen children as young as 12 years old.

In 2008, Epstein pled guilty to two state felony charges involving the solicitation of prostitution and the procurement of minors to engage in prostitution and further agreed to be registered as a sex offender (App.13, p.133). Bradley Edwards ("Edwards") is a civil attorney who represented multiple victims of Epstein's serial abuse of children (App.13, p.134). Edwards filed three civil actions against Epstein in state court alleging sexual assault and battery (App.13, p.134). Edwards also filed a federal action on his client's behalf under the Federal Crime

[2] This is a citation to document 19, page 226, of the Appendix to Petition for Writ of Certiorari.

Victim's Rights Act challenging the extraordinary non-prosecution agreement Epstein entered into with the federal government. *See Jane Doe No. 1, et al. v. United States*, 749 F.3d 999 (11th Cir. 2014).[3] Edwards has continued a 10 years long pro bono effort to prosecute that action in which the only relief sought is to set aside Epstein's secretly negotiated plea deal so that Epstein's victims can have a voice in the disposition of federal criminal charges against him. Those charges could result in Epstein being imprisoned for the rest of his life. Epstein is an Intervenor in that action.

Edwards's representation of Epstein's victims in the civil claims and his pro bono challenge to the non-prosecution agreement triggered Epstein's enmity against him. This manifested itself in many ways, including Epstein's filing a baseless, but high-profile, lawsuit against Edwards.

[3] Epstein agreed to plead guilty to two state charges and serve 18 months in county jail in exchange for immunity from federal prosecution on felony charges arising out of the molestation of approximately 40 identified child victims as young as 13 years of age (Resp.App.1, pp.5-18). Incredibly, the plea bargain also immunized all of Epstein's unnamed co-conspirators for all of their unidentified crimes. *Id.* Evidence implicates multiple high-profile associates of Epstein as beneficiaries of this immunity. *Id.*

Epstein Attempts to Intimidate His Victims by Filing Suit Against One of Them and their Lawyer

On December 7, 2009, while Edwards was pursuing the sexual abuse cases on behalf of his clients who had been sexually abused by Epstein, Epstein filed the original Complaint here against Edwards, Scott Rothstein ("Rothstein"), and one of Edwards's clients, designated as "[redacted]." (App.1). Nearly a year after Edwards had filed the sexual abuse cases against Epstein, he briefly joined the law firm of Rothstein, Rosenfeldt & Adler, [redacted]. ("RRA") (App.1). Approximately six months later, Rothstein was charged with (and later pled guilty to), operating a Ponzi scheme which involved, *inter alia*, the assignment of rights to fabricated settlement agreements in civil actions (App.1). The gravamen of Epstein's Complaint was that Edwards had been Rothstein's principal co-conspirator in the Ponzi scheme and had engaged in numerous felonies, including forging federal judges' signatures. Epstein further alleged that Rothstein, Edwards, and [redacted]. defrauded him and engaged in racketeering and civil theft, as well as abuse of process, by engaging in litigation conduct designed to enhance the settlement value of the three sexual abuse claims against him (App.1). While reciting in detail the misconduct of Rothstein which had become public knowledge, Epstein's Complaint alleged in a conclusory manner that Edwards and [redacted]. were knowing participants in the criminal racketeering activity that supported the Ponzi scheme (App.1). Epstein's Complaint did not deny his own extensive criminal culpability, although he falsely alleged the sexual abuse claims

against him were "weak" (App.1, p.23). These are the same three claims that he settled for $5.5 million after the disclosure of the Ponzi scheme and after suing Edwards for "ginning up" the value of the claims.

Edwards answered the Complaint, denying its material allegations (App.2). Edwards initially included a counterclaim against Epstein alleging abuse of process (App.2, pp.53-56).

Epstein amended his complaint twice (App.6, 7). In the Second Amended Complaint, he abandoned virtually all his claims (App.7). He alleged just one claim for abuse of process against Edwards (App.7, pp.93-97) and a claim of conspiracy to commit abuse of process against Rothstein (App.7, pp.97-98). Although Edwards had not been implicated in any way in Rothstein's Ponzi scheme, Epstein continued to falsely and maliciously allege that Edwards was a principal co-conspirator in Rothstein's criminal activities. In his claim against Rothstein, Epstein alleged that Rothstein conspired with Edwards to bring suit against Epstein as part of a plan to defraud investors and further the Ponzi scheme (App.7, pp.97-98). Rothstein never answered the Amended Complaint nor the Second Amended Complaint, but Epstein did not move for a default against him until over six years later, and only six business days before trial.

Edwards moved for summary judgment as to Epstein's claim against him (Res.App.2, pp.19-42). He argued, in relevant part, that there were no facts to support Epstein's claim and that Edwards's conduct in the prosecution of his claims against Epstein was protected by the litigation privilege (Res.App.2, pp.19-42). On the eve of a hearing on Edwards's meticulously detailed **and entirely unopposed motion** for summary judgment, Epstein dismissed his claims against Edwards (App.9, pp.116-17). Thus, his only remaining claim is his conspiracy to commit abuse of process claim against Rothstein.

Edwards then amended his counterclaim, which included a malicious prosecution claim against Epstein (App.3). Essentially, that count alleged that Epstein had initiated his suit knowing that it had no reasonable factual basis, that Epstein intended to and did frustrate all discovery into the basis of his claims against Edwards by asserting his Fifth Amendment right to remain silent, that Epstein suffered no damage from a Ponzi scheme he knew nothing about, and that Edwards's actions in furtherance of his clients' interests were both entirely proper and absolutely protected by the litigation privilege (App.3, pp.64-68). The counterclaim further alleged that the suit against Edwards was initiated for the sole purpose of harming and intimidating Edwards, and interfering with his ability to represent his clients in both the ongoing civil actions against Epstein and the pro bono Crime Victim's case that posed a serious threat to Epstein's sweetheart immunity deal

(App.3, pp.64-68). Edwards alleged that the lawsuit was a vehicle for Epstein to make false statements harmful to Edwards' reputation, professional standing, and his ability to effectively represent his clients (App.3, p.68).

The following is a timeline of subsequent relevant proceedings:

June 2014-May 2017	Trial court proceedings are stayed pending the disposition of appellate proceedings that eventually confirm the viability of Edwards's claim for malicious prosecution.
May 24, 2017	Edwards notices the case for trial (App. 10, p.118).
July 20, 2017	The trial court set the case on the trial docket for the period beginning December 5, 2017 (App. 11, pp.122-27). Epstein did not object and, in fact, participated in all pre-trial proceedings.

On November 1, 2017, with the December trial date rapidly approaching, despite being represented by four separate law firms, Epstein obtained new/additional counsel, Link & Rockenbach (Res.App.3, pp.43-45). New counsel for Epstein almost immediately sought a continuance of the upcoming trial date, despite the fact that it had been set for more than five months (Res.App.4, pp.46-58). On November 14, the trial court granted the motion, based in part on Link & Rockenbach's representations that they would seek no further continuances, and the trial court reset the case for March 13, 2018 (App.12, pp.128-30).

From November 2017 through early March 2018, the case was litigated heavily by Edwards and Epstein. Pre-trial issues, including motions in limine, were filed and responded to, jury instructions were drafted, witness and exhibit lists were exchanged and updated, and outstanding discovery matters were addressed.

On December 22, 2017, Edwards and Epstein filed a Joint Pretrial Stipulation (Res.App.5, pp.59-303).[4] In the Joint Pretrial Stipulation, the parties identified the issues of fact to be determined at trial (Res.App.5, pp.61-67). Those included facts relevant to the "case against Rothstein" and the "malicious prosecution counterclaim" (Res.App.5, pp.68-70). As to Epstein's claim against Rothstein, the stipulation provided:

> What, if any damages were sustained by Epstein and proximately caused by Rothstein? (Edwards does not agree with this language for the reason that the issue as stated fails to tie causation to Rothstein's operation of the Ponzi scheme. It is Edwards's position that failure to limit the issue in this way as to Rothstein has the potential of confusing the jury in determining whether Epstein had any probable cause to claim damages against Edwards arising out of the same circumstances.).

(Res.App.5, p.68). Thus, Edwards recognized in the Joint Pretrial Stipulation that there was a possibility of prejudice to Edwards or confusion of the jury resulting

[4] Epstein included the Joint Pretrial Stipulation in his Appendix to the Petition for Writ of Certiorari; however, he did not include the exhibits to the stipulation. Edwards has included the Joint Pretrial Stipulation in the Appendix to this Response with the exhibits included.

from the cases being tried together. Notably, neither Rothstein nor his counsel signed the pretrial stipulation and there is no evidence in the record below that Epstein made any attempt to draft the pretrial stipulation with Rothstein.

The Joint Pretrial Stipulation also included a lengthy list of motions and other issues then pending that needed resolution by the trial court before trial (Res.App.5, pp.59-60). Many more issues arose after the filing of the Joint Pretrial Stipulation. The pretrial stipulation also highlighted serious discrepancies between the parties as to the language of the jury instructions and even the issues to be decided by the jury on the malicious prosecution claim (Res.App.5, pp.68-70, 73-303). Thus, the pretrial stipulation, filed several months before the case was set to be tried, was far from a final statement of the matters to be decided by the jury.

On March 1, 2018, Edwards moved to sever the trials of Edwards's claim against Epstein from the trial of Epstein's claim against Rothstein (App.14, pp.145-50). Edwards noted that while Rothstein has been represented by counsel in this action, he had not been actively defending the case (App.14, pp.145-46). Edwards explained that Rothstein is currently serving a substantial federal prison sentence and has no collectible assets (App.14, p.146). Edwards also noted the risk of substantial jury confusion if the same fact finders were obliged because of a default to accept as true allegations against Rothstein while those same allegations were

vigorously contested by Edwards (App.14, pp.147-48). Also, the witnesses Epstein identified to testify in his case against Rothstein had no testimony which could be relevant to Epstein's claimed damages (App.14, p.146). Edwards contended that Epstein sought to prosecute the claim against Rothstein only so that he could admit evidence at the trial (without Rothstein's opposition) which would be inadmissible against Edwards, would prejudice Edwards, and would further confuse the jury (App.14, pp.146-48). Edwards later supplemented his motion for separate trials and notified the court of the previously overlooked fact that Epstein had never obtained a default against Rothstein as to the sole remaining claim of the Second Amended Complaint (App.15).

On March 5, 2018, ten months after Edwards noticed the case for trial and more than seven months after the trial court first set the case for trial, Epstein claimed for the first time that the case was not at issue because he failed to obtain a default against Rothstein in the six and half years since he filed the Second Amended Complaint[5] (App.16).

[5] The trial court's ruling as to this issue is the subject of a Petition for Writ of Mandamus filed by Epstein on March 8, 2018. *See* Case No. 4D18-0762, which has been consolidated with this case for panel purposes only. The propriety of the trial court's decision as to this issue is addressed in Edwards's response to that Petition.

A hearing was held on the motion for separate trials (App.19). The trial court engaged in an extensive analysis of the posture of the case and the nature of the remaining claims. The court began by inquiring as to whether this action involved a counterclaim at all given that Epstein had dismissed his claim against Edwards (App.19, p.210). The court noted that while Edwards's claim began as a counterclaim, "the only connection that is even arguable, is that, in fact, the Edwards case had its genesis in the fact that Epstein originally brought the claims against Rothstein, Edwards and [redacted]., and then voluntarily dismissed the case at the eve of summary judgment" (App.19, p.211). The court expressed that Edwards's case against Epstein and Epstein's damages-only case against Rothstein had "nothing shared at this juncture, either technically or legally, other than a case number" (App.19, p.212).

The trial court asked Edwards's counsel to explain the prejudice Edwards would suffer if the cases were tried together. Counsel explained that Epstein's claim against Rothstein was "virtually identical" to the claim Epstein dismissed against Edwards (App.19, p.216). He explained that the jury would be told as to Rothstein that all of the factual allegations must be accepted as true, with the only issues to be determined involving causation and damages (App.19, p.216). On the other hand, Edwards was contesting the same underlying claim brought against him and he would be asking the jury to conclude that there had been no basis for Epstein's claims

against him (App.19, pp.216-17). Along those lines, Edwards's counsel explained that he intended to argue that the litigation privilege barred Epstein's claim against Edwards (App.19, p.217). Edwards also intended to argue that no damages were incurred by Epstein as a result of anything that went on with regard to a Ponzi scheme in which Epstein was not an investor and about which he knew nothing while it was in progress (App.19, p.217).

Edwards explained that if the cases were tried together as Epstein wished, the case would begin with Epstein putting on proof that he was damaged based upon conduct that Edwards believed was protected by the litigation privilege (App.19, p.217). Edwards would essentially be put in the position of trying to defend Rothstein, a criminal serving a 50-year federal prison sentence for perpetrating one of the largest Ponzi schemes in history (App.19, p.218). Edwards argued that this would obviously greatly prejudice the jury against Edwards and confuse the jury (App.19, p.218).

The trial court then noted that by the time Edwards filed the operative "counterclaim" Epstein's claim against Edwards had already been dismissed, so it was not even technically a counterclaim at that point (App.19, p.220-21). The court stated that there is "no longer any relationship" between the two remaining claims, other than a common case number (App.19, p.222). Epstein versus Rothstein is

separate and apart from Edwards versus Epstein and "has absolutely no connection at this stage of the game" (App.19, p.222).

The trial court asked Epstein's counsel how severing the cases for the purposes of trial would affect their preparation or presentation at trial (App.19, p.240). Epstein's counsel admitted it would not change their trial preparation (App.19, p.240) and that the only change would be that Epstein would not get to present evidence first at trial (App.19, pp.240-43).

Edwards's counsel responded that based upon Epstein's argument, prejudice against Epstein from bifurcating the two claims would arise only if Epstein used his opportunity to present his case against Rothstein first to improperly influence the jury regarding Edwards's claims against Epstein (App.19, p.245).

After further argument, the trial court concluded:

> Now, again, I will grant you that factually there may be some overlap. I'm not suggesting that. But from a purely legal standpoint, this separate action, **there is nothing that I can think of that would necessitate these two matters to be tried together**.
>
> **And the fact that substantial confusion could be operable here** – as argued by counsel and as written down by the court, even before the mention of the word – the prejudice that would be done here, may even create a better forum for each of the parties to get their justice that they are seeking, i.e., Mr. Epstein's damages against Rothstein. I am not sure whether causation becomes an issue or not. I think its simply a matter of damages, but that Rothstein has the opportunity to defend himself against.

> **But Edwards, on a totally separate legal theory, and in a case that now bears no semblance to a counterclaim, has his right to seek justice in a timely fashion as well.**

(App.19, pp.224-25). The trial court reiterated many times during the hearing that this case was a counterclaim in name only (App.19, pp.210, 220-21, 222, 225, 226, 228, 235, 236, 239-40, 259, 260-61).

The court explained that the only connection between the two cases was that Edwards's case had its genesis in the fact that "Epstein originally brought the claim against Edwards, Rothstein, and [redacted]., and then voluntarily dismissed the case [against Edwards] at the eve of summary judgment" (App.19, p.211). Indeed, the trial court explained: "I have no recollection whatsoever of anything coming up during the approximate four years that I have presided over this case in division AG of anything whatsoever having to do with Mr. Epstein's prosecution of that one-count complaint against Rothstein from that September 2011 [Second] amended complaint" (App.19, pp.258-59).

The court reasoned that there is no longer any legal relationship between Edwards's case against Epstein and the damages-only claim by Epstein against Rothstein (App.19, p.261). The court held that there would be no prejudice to Epstein in severing the cases (App.19, p.265). Finally, the court explained that there would be an "absolute danger of confusion relative to a jury's consideration of

Edwards's case versus Epstein's case against Rothstein solely" if the cases were to be tried together (App.19, p.266).

Thus, the trial court granted Edwards's motion for separate trials and held it would try *Edwards v. Epstein* as scheduled on March 13, 2018. The trial court later entered a written order codifying its *ore tenus* ruling at the hearing (Resp.App., pp.304-05). The court granted the motion for separate trials and severed the malicious prosecution action.

ARGUMENT

EPSTEIN'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HE HAS NOT ESTABLISHED THAT THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW OR THAT HE WILL SUFFER IRREPARABLE HARM IF THE TWO CLAIMS ARE NOT TRIED TOGETHER.

CERTIORARI STANDARDS

Florida Rule of Appellate Procedure 9.030(b)(3) authorizes this Court to issue writs of "common law certiorari." To present a *prima facie* case for certiorari relief, a petitioner must establish that a trial court's order: (1) departs from the essential requirements of the law or was entered without or in excess of the trial court's jurisdiction; (2) resulting in a material injury to the petitioner for the remainder of the case; (3) that cannot be corrected on appeal. *Williams v. Oken*, 62 So.3d 1129, 1132 (Fla. 2011). "The last two elements are jurisdictional and must be analyzed before the court may even consider the first element." *Id.*

Even if the Petitioner demonstrates a *prima facie* case for relief, however, the district court has the discretion to deny a petition for writ of certiorari. *Combs v. State*, 436 So.2d 93, 96 (Fla. 1983). It should exercise its discretion to grant certiorari **"only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice"** and irreparable harm. *Id.* (emphasis added).

Here, Epstein has not met his burden of establishing either the jurisdictional element or that the trial court departed from the essential requirements of law. There has been no "violation of a clearly established principle of law" and certainly no "miscarriage of justice." Thus, the Petition should be dismissed or denied.

I. EPSTEIN WILL NOT SUFFER IRREPARABLE HARM AS THERE IS NO RISK OF INCONSISTENT VERDICTS.

"Although Florida Rule of Civil Procedure 1.270(b) provides courts with the discretion to sever claims 'in furtherance of convenience or to avoid prejudice,' certiorari is an appropriate remedy **for orders severing claims that involve interrelated factual issues because of the risk of inconsistent verdicts."** *Martinique Condominiums, Inc. v. Short*, 230 So.3d 1268, 1270 (Fla. 5th DCA 2017) (emphasis added) (citing *Minty v. Meister Financialgroup, Inc.*, 97 So.3d 926, 931 (Fla. 4th DCA 2012)).

There is no risk of inconsistent verdicts as a result of the severance in this case, as demonstrated by Epstein's meritless attempt in the Petition to imagine one possible inconsistency. Specifically, Epstein contends that "one possibility of an inconsistent verdict" would occur in the event the jury awarded Epstein damages in his claim against Rothstein because "a second jury in Edwards' counterclaim against Epstein will be asked to determine that Epstein did not suffer any damages proximately caused by Rothstein's illegal conduct …" (Pet., p.18). That contention

is meritless, as the jury will not be asked any such question in the trial of Edwards's claim. That is easily demonstrated by the proposed jury instructions and verdict forms submitted **by Epstein himself** for these claims.

While Edwards does not agree with all of Epstein's proposed jury instructions or his verdict form, he will rely on them *arguendo* to demonstrate that even under Epstein's conception of the case there is no possibility of an inconsistent verdict.

The proposed verdict form submitted by Epstein as to his claim against Rothstein has only one question (Res.App.5, p.301):

> On Jeffrey Epstein's claims against Scott Rothstein, what amount of damages did Jeffrey Epstein prove by the greater weight of the evidence that he suffered?

The Petition suggests if the jury awards damages in response to that question, that could be inconsistent with the jury's probable cause determination in Edwards's case (Pet., p.18). However, the probable cause interrogatory on the verdict, as proposed by Epstein, is as follows (Res.App.5, p.302):

> Did Bradley Edwards prove by the greater weight of the evidence that there was **no** probable cause for Jeffrey Epstein to initiate or continue his original civil proceeding against Bradley Edwards? [E.S]

There is no conceivable way that an answer to that question, whether "yes" or "no," could be inconsistent with the one verdict question on damages that the jury would answer as to Rothstein.

In fact, under Epstein's proposed instructions and verdict form, the jury is never asked to determine in Edwards's case any issue regarding Rothstein's conduct or any damages he might have caused. Thus, even assuming *arguendo* the court utilizes Epstein's proposed jury instructions and verdict, there is no possibility of an inconsistent verdict. As a result, certiorari is not an available remedy.

Moreover, a review of the jury instructions submitted by Epstein shows that there is not a single instruction that requires the jury to determine any issue common to both claims. Epstein's proposal for the "Summary of Claims" instruction presents his claim against Rothstein and Edwards's claim against him completely separately, with no overlap (Res.App.5, p.281).[6]

Additionally, Epstein requested the court to give the Florida Standard Jury Instruction 601.4, which he modified as follows (Res.App.5, p.296):

> In your deliberations, you will consider and decide several distinct claims, including claims by Jeffrey Epstein against Scott Rothstein and one claim by Bradley Edwards against Jeffrey Epstein. Although these claims have been tried together, each is separate from the others, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, **in your deliberations, you should**

[6] Epstein's proposed "Summary of Claims" instruction describes his causes of action against Rothstein as including RICO, fraud, and civil theft claims, even though he abandoned those claims against Rothstein 6 ½ years ago (Res.App.5, p.281). It appears that Epstein's counsel believed that the original Complaint was still the operative Complaint. Obviously, that description is completely erroneous and to that extent should be ignored by the Court. However, it does further demonstrate the confusion engendered in trying these claims together.

> **consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.** [E.S.]

Thus, by his own jury instructions, Epstein has conceded in the lower court that the claims are "distinct," "each is separate from the other," and "each party is entitled to have you separately consider each claim as it affects that party." The jury is also instructed to **"consider the evidence as it relates to each claim separately as you would had each claim been tried before you separately."** How can Epstein make those representations as to the applicable law in the trial court, and yet argue the complete opposite principles to this Court? Epstein's attempt to undermine the trial court's severance order by arguing that the claims are interrelated and must be tried together is belied by his own jury instructions and verdict form.

Finally, Epstein argues that the severance of the claims does not make the action "at issue" under Rule 1.440 (Pet., pp.18-21). There has never been any dispute that Edwards's malicious prosecution claim is at issue; that is, whether the pleadings are closed as to that claim. The question whether Epstein's failure to seek a default against Rothstein for 6 ½ years prevents the trial scheduled for March 13, 2018, from proceeding is under review by this Court in the Mandamus proceeding in Case No. 4D18-0762. Edwards will rely upon his argument in his Response to the Petition for Writ of Mandamus to the extent that issue might have any relevance here (which it does not).

II. THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Rule 1.270(b), Florida Rules of Civil Procedure, provides:

> The court **in furtherance of convenience or to avoid prejudice** may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues. [E.S.]

It is well settled that a trial court's decision to bifurcate or sever claims is subject to the abuse of discretion standard. *See Roseman v. Town Square [redacted], Inc.*, 810 So.2d 516, 520 (Fla. 4th DCA 2001). Furthermore, "bifurcation is generally proper absent a specific threat of inconsistent verdicts or prejudice to a party." *Id.* at 520-21 (internal quotations omitted); *see also Johansen v. Vuocolo*, 125 So.3d 197, 200 (Fla. 4th DCA 2013); *Microclimate Sales Co., Inc. v. Doherty*, 731 So.2d 856, 858 (Fla. 5th DCA 1999). As noted above, there is no possibility of an inconsistent verdict.

Here, the trial court made extensive findings at the hearing on the motion for separate trials supporting bifurcation, including:

- there is nothing that would necessitate these two matters being tried together;
- "substantial confusion" would arise if the claims were tried together;
- the two claims are based on totally separate legal theories;
- Edwards's case bears no semblance to Epstein's claim against Rothstein;

- Edwards's claim is not technically a counterclaim since there is no longer a claim against him;

- there would be no prejudice to Epstein in severing the case; and

- there would be an "absolute danger of confusion relative to a jury's consideration of Edwards's case versus Epstein's case against Rothstein solely" if the cases were to be tried together.

Thus, the trial judge, who has presided over this case for the past four years, made significant factual and legal determinations concluding not only that the two claims were not factually intertwined but that trying the cases together would confuse the jury. The court made the reasoned determination that severing the cases would not cause any prejudice to Epstein. While the trial judge correctly relied on all those factors, acceptance of any one of them would demonstrate that there was no abuse of discretion.

Despite the fact that the abuse of discretion standard applies here, Epstein does not address these determinations of the trial court or the court's reasoning. His refusal to acknowledge the trial court's findings highlights the weakness of his position here.

As to juror confusion, Epstein and Edwards's positions as to the pending claims are polar opposites. Epstein will be trying a damages-only claim against Rothstein alleging that he was damaged by Rothstein's conspiracy **with Edwards**

to commit abuse of process. The jury will be told to assume that for purposes of that claim all of Epstein's allegations against Rothstein are true. However, an element of Edwards's claim against Epstein involves proof not only that the allegations he conspired with Rothstein are untrue but that Epstein sued Edwards without ever having probable cause to believe those allegations were true. As noted by the trial judge, the likelihood of juror confusion is obvious, if they are being asked in the same case to believe and reject the identical factual allegations.

Additionally, Edwards will argue that the litigation privilege absolutely barred Epstein's claim against Edwards from the outset. However, Rothstein has obviously waived this claim, so that creates another likely source of confusion.

Furthermore, as Edwards noted, the witnesses Epstein planned to call at trial in his case against Rothstein, including Edwards and [redacted]., could have no probative evidence as to the **damages** Epstein allegedly suffered as a result of Rothstein's alleged conspiracy to commit abuse of process. It is obvious that the purpose, and most certainly the effect, of calling these witnesses would be to prejudice Edwards in his claim against Epstein before he even has the opportunity to put on his case. This conclusion is supported by the fact that the only prejudice Epstein's counsel could identify that he would suffer if the cases are separated is that he would not get to go first at trial.

The trial court's conclusion that the two cases are legally distinct is also supported by the law. As the trial court noted, while Edwards's claim started out as a counterclaim, its status as such in all aspects other than name was eliminated when Epstein dismissed his claims against Edwards.

Edwards did not Waive the Right to Have the Claims Bifurcated

Epstein relies exclusively on the Joint Pretrial Stipulation to support his argument that Edwards waived the right to have his claim against Epstein tried separately from the Epstein claim against Rothstein. As an initial matter, however, one cannot help but note the hypocrisy of this position. Epstein is relying on a pretrial stipulation that was not signed by Rothstein or Rothstein's counsel to mandate when Epstein v. Rothstein must be tried. Moreover, the pretrial stipulation clearly contemplates a damages-only claim against Rothstein, despite the fact that Epstein did not have a default against Rothstein when his counsel unilaterally entered into the pretrial stipulation as to whatever claim Epstein may have against Rothstein.

Additionally, a pretrial stipulation does not waive any relief necessary to ensure a fair trial. In fact, the Pretrial Stipulation here preserved Edwards's subsequent claim that trying the cases together would confuse the jury and prejudice him.

As noted above, in the pretrial stipulation, Edwards noted that the issue raised in Epstein v. Rothstein could confuse the jury and thus prejudice him. The stipulation also made clear that there were a multitude of issues outstanding. The stipulation listed more than a dozen outstanding motions that needed to be decided and included competing jury instructions and verdict forms submitted by each side. Thus, this was not a case where most, if not all, pretrial issues had been settled before the filing of the stipulation.

Edwards argued in his Motion for Separate Trials that the need for separate trials arose when Epstein's counsel explained that they intended to present their damages-only claim against Rothstein before Edwards presented his claim against Epstein. In alleged support of his claim against Rothstein, Epstein's attorneys notified Edwards's counsel that they intended to call four witnesses to establish Epstein's damages against Rothstein: Rothstein (by deposition), [redacted]., Edwards (by deposition), and William Scherer (an attorney who had represented investors damaged by the Ponzi scheme). Edwards argued that none of these witnesses had any testimony relevant to the alleged damages suffered by Epstein from Rothstein's conduct.

Thus, the pretrial stipulation made clear there were a lot of unanswered issues and it was not until the final preparations for trial that Edwards recognized and raised

the need for trying the cases separately. Epstein has cited no case holding that a pretrial stipulation waives the ability to seek relief based on subsequent events. Thus, it was not an abuse of discretion to permit separate trials under the circumstances of this case.

Epstein relies upon cases discussing the importance of the pretrial stipulation to support his claim that Edwards waived any later request to bifurcate the trial by executing the pretrial stipulation. However, these cases presume two facts which do not exist here: (1) the pretrial stipulation expressed an agreement as to the issues to be decided by the jury, and (2) circumstances did not arise after the execution of the pretrial stipulation but before trial which made it clear that judicial action was necessary to ensure a fair trial.

Epstein relies on *Broche v. Cohn*, 987 So.2d 124 (Fla. 4th DCA 2008), for the claim that pretrial stipulations are to be "strictly enforced" (Pet., pp.11-12). However, in that non-jury case, the trial court decided issues which the parties had removed from consideration from the court in a pretrial stipulation. Thus, the parties tried their cases assuming that the specific issues in question were not being tried, yet the trial court decided the issues anyway. That is a far cry from the circumstances we have here where Edwards, pre-trial, sought to limit the issues tried based upon *inter alia*, prejudice to him and the likelihood of confusion of the jurors.

In *Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So.3d 1037 (Fla. 4th DCA 2015), this Court discussed the importance of the pretrial stipulation, because the trial court did not let an issue go to the jury that the parties had agreed in a pretrial stipulation was to be decided by the jury. That case has no application here where a severance was necessary to ensure a fair trial, and the order did not eliminate any issues; it only provided for separate trials.

Epstein also claims that Edwards waived the ability to seek severance by waiting until "the Eleventh Hour" to request a separate trial (Pet., p.13). As discussed above, however, the need to try the cases separately was not clear until the final weeks before trial when it became apparent that Epstein was going to attempt to taint the jury as to Edwards's claim by presenting his case against Rothstein with witnesses who would serve no other purpose than to prejudice Edwards.

Bifurcation is Necessary to Ensure a Fair Proceeding and Will not Waste the Resources of the Parties or Court

Epstein claims that separate trials are not warranted here because it would not be convenient or necessary to conduct two trials (Pet., p.15). To the contrary, as the trial court expressly held, separating these two cases for trial is necessary in order to eliminate the possibility of confusion of the jury and of prejudice to Edwards.

Epstein claims that his claim against Rothstein and Edwards's claim against him are "inextricably interwoven" (Pet., p.15). Of course, that is completely irreconcilable with his proposed jury instructions. Interestingly, Epstein cites a significant portion of his counsel's argument from the hearing (Pet., pp.15-16), but does not cite the extensive conclusions of the trial court wherein the court came to the opposite conclusion. Specifically, as discussed above, the court found that the two cases address separate legal theories, were independent claims, and bore no significant relationship to each other.

As explained above, Edwards's malicious prosecution claim was obviously independent of Epstein's remaining claim against Rothstein. By definition, a malicious prosecution count cannot be brought until the underlying claims, i.e., Epstein's claims against Edwards, have been terminated in Edwards's favor (and by virtue of the likely default by Rothstein, the identical allegations will be terminated in Epstein's favor, a directly opposite result). *See Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352 (Fla. 1994). Thus, Edwards's malicious prosecution claim was not a compulsory counterclaim and would at best be considered a permissive counterclaim which a trial court has discretion to sever in the absence of prejudice. *See Turner Construction Co. v. ENF Contractors, Inc.*, 939 So.2d 1108 (Fla. 3d DCA 2003); *see also Trak v. Microwave Corp. v. Medaris Management, Inc.*, 236 So.2d 189, 192 (Fla. 4th DCA 1970).

As the trial court noted, "the only thing that it [Edwards's counterclaim] now shares is a common case number" (App.19, p.222). The court also noted that there was "nothing that I can think of that would necessitate these two matters to be tried together" (App.19, p.224). Based on those factors, the trial court severed the claims and directed that Edwards's malicious prosecution claim against Epstein could proceed to trial (App.19, p.257). Epstein's counsel conceded that "it is clearly in this court's discretion to sever this case" (App.19, p.226).

Denial of Bifurcation Will Prejudice Edwards

Epstein next claims that Edwards will suffer no prejudice if the cases are tried together. He suggests that the trial court could "instruct the jury that the presentation of damages evidence with Epstein's case against Rothstein in no way suggests or implies that Edwards is liable for the damages Epstein claims" (Pet., p.17). This simplistic approach will not work here.

As discussed thoroughly above, Epstein and Edwards's positions are inherently in conflict with each other. Epstein will be trying a damages-only claim against Rothstein alleging that he was damaged by Rothstein's conspiracy **with Edwards** to commit abuse of process. The jury will be told to presume that Edwards had, in fact, conspired with Rothstein to commit abuse of process in filing the underlying civil actions against Epstein. On the other hand, in Edwards's action

against Epstein, Edwards will have to prove to the jury that there was no probable cause for Rothstein to bring the abuse of process action against Edwards.

The trial court expressly found that there is a very real possibility that the jury would be confused if the two cases are tried together. This conclusion is supported by the facts and the circumstances of this case. Accordingly, the trial court did not abuse its discretion in separating the cases for trial.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be dismissed or denied.

CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of the Response of Respondent is Times New Roman 14pt.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail to The Honorable Donald W. Hafele, 205 N. Dixie Highway, Room 10.1216, West Palm Beach, FL 33401 and to all counsel on the attached service list, by email, on March 19, 2018.

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Epstein v. Rothstein/Edwards
Case No. 4D18-0787

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