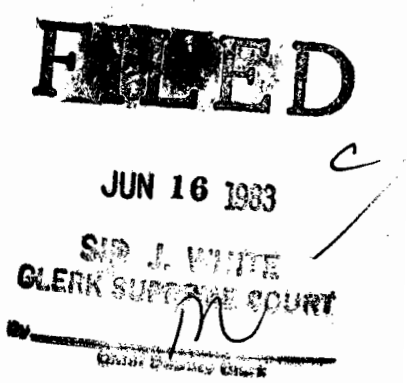
IN THE SUPREME COURT OF FLORIDA



CASE NO. 63,613

THE STATE OF FLORIDA,

Petitioner,

vs.

G.P., a juvenile,

Respondent.

* *

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

* *

BRIEF OF THE PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida was the prosecution in the Juvenile-Family Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida and the appellant in the District Court of Appeal of Florida, Third District. G.P., a juvenile, was the respondent in the trial court and the appellee in the district court. In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" followed by a page number will constitute a page reference to the record on appeal. The symbol "T" will be used to designate the transcript of the proceedings. The appendix to this brief will be referred to as "App." All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with committing the grand theft of a moped belonging to Jimmie Lee Lawrence and/or Cynthia Lawrence, on or about November 17, 1980, in violation of the provisions of §812.014, Florida Statutes. (R. 1-1A). The petition for delinquency was filed on June 23, 1981, as a result of Respondent's lack of success in the Juvenile Restitution Program. (R. 1-1A; 12). Respondent and his parent had signed a document entitled "Deferred Prosecution

Agreement; Speedy Trial Waiver; Filing Deadline Waiver" on January 22, 1981 [1] in order to allow for Respondent to participate in the pre-adjudicatory hearing diversionary program.

On July 22, 1981, Respondent sought to defer prosecution by making a Motion for Plan. (R. 3,4). The Petitioner consented to the motion which was signed by Respondent and his counsel, his mother and the assigned Youth Counselor. (R. 4). The Honorable Ralph N. Person, Circuit Judge, ordered that the plan was approved and that all parties thereto comply with its terms and conditions. (R. 4). The agreement stated that the speedy trial rule was waived. (R. 3).

On October 29, 1981, the respondent's Youth Counselor swore out a Petition Alleging Violation of Plan, (R. 5). A sounding as to this matter was held before the Honorable Seymour Gelber, Circuit Judge, on October 30, 1981. (T. 1-4; R. 6-6A). On that date, the court appointed the Public Defender to represent Respondent and set a hearing for November 30, 1981, in order to allow the respondent to comply with the plan. (T. 3; R. 6-6A). On November 30, 1981, the matter came for hearing before the Honorable N. Joseph Durant, Jr., Circuit

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[1] The agreement and waiver was filed with the Clerk of the Circuit Court, Eleventh Judicial Circuit of Florida, on May 21, 1982.

Judge, yet neither the respondent nor the Youth Counselor were present. The Petitioner requested that the matter be taken off the calendar and noted that the petition may have been withdrawn by the counselor. (T. 7).

A new Petition Alleging Violation of Plan was filed on March 3, 1982. (R. 7). A sounding as to this matter was held on April 28, 1982; a hearing was scheduled and Peter Kuter Esquire, was appointed to represent the respondent. (T. 9-15; R. 8). On or about May 12, 1982, Respondent filed a motion to dismiss the violation of plan and petition and/or to discharge the respondent for violation of the speedy trial rule. (R. 9-11).

A hearing as to Respondent's Motion to Dismiss and/or Discharge was held on May 21, 1982. (T. 16-37). At said hearing, the Petitioner argued that the speedy trial rule time periods had been waived and that the delay involved was not so unreasonable as to constitute a violation of the constitutional speedy trial provisions. (T. 20-36). The trial court determined that a reasonable time period had run and orally granted Respondent's "motion to discharge." (T. 37).

On June 4, 1982 the trial court entered a written order (filed on June 9, 1982) entitled: "Order Granting Dischrage for Failure to Grant a Speedy Trial" (R. 18-29) stating its Dismiss and/or Discharge. Among the court's factual findings

was that Respondent was initially taken into custody on December 8, 1980. (R. 18). In said order, the court stated its legal ruling as follows:

> While the child's right to a speedy trial under Florida Statute c39 and Florida Rule of Juvenile Procedure 8.180 was not violated, the child's constitutional right to a speedy trial was violated. The Court specifically finds that under the circumstances outlined above, the period of time from October 30, 1981 when the first petition alleging violation of plan was filed, until May 20, 1982 when trial on the violation was finally scheduled, constituted an unreasonable delay which denied the child his constitutional right to a speedy trial.
>
> (R. 20)

On June 7, 1982, the Petitioner filed a Notice of Appeal to this Honorable Court from the trial court's entry of the Order Discharging Respondent for Failure to Grant a Speedy Trial. (R. 13). In an order filed on June 9, 1982, the trial court granted Petitioner's motion for an order extending the period of time established by Rule 8.180, Florida Rules of Juvenile Procedure for an adjudicatory hearing. (R. 21). Appellate briefs were filed in the District Court and oral argument was presented on March 7, 1983. (App.8).

On April 12, 1983, the Third District filed an opinion dismissing Petitioner's appeal (App. 1-7). The District Court noted that it agreed with the dictum in Crowhover v. Shannon,

170 So.2d 299 (Fla. 1964), relied by the Fifth District in State v. W.A.M., 410 So.2d 49 (Fla. 5th DCA 1981), pet. for rev. denied, 419 So.2d 1201 (Fla. 1982) to the effect that:

> The right to appeal from the final decisions of trial courts to the Supreme Court and to the District Courts of Appeal has become a part of the constitution and is no longer dependent on statutory authority or subject to be impaired or abriged by statutory law, but of course subject to rules promulgated by the Supreme Court regulating the practice and procedure.
>
> (App. 2)

Notwithstanding its agreement with the dictum noted above, the District Court felt that while it felt that there were changes in the rule, it was compelled by Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), to follow this Court's decision in Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947), stating that the right of the State to appeal from final judgments in criminal cases was entirely statutory. (App. 3). The Court recognized that it was in conflict with State v. W.A.M., supra. (App. 4). The Third District went on to state that §39.14, Florida Statutes (1981) has not legislatively conferred upon the State the right to appeal a juvenile's right to discharge for a speedy trial violation and that it consequently agreed with Respondent's position that the (Petitioner) State has no right to appeal the (Respondent) juvenile's discharge on constitutional speedy trial grounds. (App. 4).

The District Court's opinion went on to address the question of whether or not the Court could elect to treat the notice of appeal as a petition for common law certiorari. The Court concluded that the State may not utilize the petition (for writ of common law certiorari) to seek review of a final judgment in a criminal case not otherwise appealable. (App. 4). The Court concluded that the Court's review by certiorari of final judgment is limited to the supervisory review of a decision of a lower court sitting it its appellate capacity where the Circuit Court has departed from the essential requirements of law. (App. 6). The Court held that since the Petitioner (State) sought a petition of certiorari of a lower court order sitting in its trial capacity, such a ruling was not within the District Court's purview to supervise and that it was accordingly declining to do so. (App. 7).

The Third District found that both issues decided by its opinion are of great public importance and pursuant to Article V, Section 3 (b) (4) of the Florida Constitution (1980), certified the following questions to this Honorable Court:

> Are the provisions of Article V, Section 4 (b) (1) of the Florida Constitution (1980) self-executing so as to afford the State the right to appeal from a final judgment in a criminal case the same as any other party litigant except where an appeal would be futile under applicable principles of double jeopardy?

> If the answer to the first question is in the negative, may the district court of appeal utilize the common law writ of certiorari to review the final judgment assuming the elements of the writ are satisfied?
>
> (App. 7)

The Petitioner filed a timely Notice to Invoke Discretionary Juristiction of this Court on April 22, 1983. On May 3, 1983, this Court issued a briefing schedule directing Petitioner to serve and file a brief in the instant cause. This brief is being filed as a result of this Court's briefing schedule and ruling on Petitioner's motion for extension of time. The Petitioner respectfully reserves the right to raise additional facts in the argument protion of this brief.

QUESTIONS PRESENTED

I.

WHETHER THE PROVISIONS OF ARTICLE V, SECTION 4 (b) (1) OF THE FLORIDA CONSTITUTION (1980) ARE SELF-EXECUTING AND AFFORD THE STATE THE RIGHT TO APPEAL FROM FINAL JUDGMENTS IN CRIMINAL CASES (INCLUDING JUVENILE DELINQUENCY PROCEEDINGS) WHERE DOUBLE JEOPARDY IS NOT A BAR TO PROCEEDINGS?

II.

IF THE PROVISIONS OF ARTICLE V, SECTION 4 (b) (1) OF THE FLORIDA CONSTITUTION ARE NOT SELF-EXECUTING SO AS TO AFFORD THE STATE A RIGHT TO APPEAL, THE DISTRICT COURT OF APPEAL UTILIZE THE PETITION FOR WRIT OF COMMON LAW CERTIORARI TO REVIEW A FINAL JUDGMENT WHERE THE ELEMENTS OF THE WRIT ARE SATISFIED?

ARGUMENT

I.

THE PROVISIONS OF ARTICLE V, SECTION 4 (b) (1) OF THE FLORIDA CONSTITUTION (1980) ARE SELF-EXECUTING AND AFFORD THE STATE THE RIGHT TO APPEAL FROM FINAL JUDGMENTS IN CRIMINAL CASES (INCLUDING JUVENILE DELINQUENCY PROCEEDINGS) WHERE DOUBLE JEOPARDY IS NOT A BAR TO PROCEEDINGS.

The question as to whether or not the provisions of Article V, § 4 (b) (1) of the Florida Constitution (1980) are self-executing and afford the State the right to appeal from final judgments in criminal cases, including juvenile delinquency proceedings involving application of criminal law such as in the instant case, is indeed one of great importance to the public as the Third District Court of Appeal has certified to this Court. Interpretation of constitutional provisions necessarily involves a determination as to the greatest means which the public has to exercise its will. Petitioner submits that Article V, § 4 (b) (1) is indeed self-executing, thereby provides the State a right to appeal from final judgments and that as such the first certified question presented should be answered in the affirmative. It is further noted that the decision of the District Court in the cause sub judice directly and expressly acknowledges its conflict with the decision of the Fifth District Court of Appeal in State v. W.A.M, 412 So.2d 49 (Fla. 5th DCA 1982), pet. for review denied, 419 So.2d 1201 (Fla. 1982). (See App. 4).

For the reasons herein this Court is urged to resolve the conflict in favor of the decision and rationale espoused in State v. W.A.M., supra.

It is well-settled that the basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. This test was clearly set out by this Court in Gray v. Bryant, 125 So.2d 846, 851 (Fla. 1960) and has been applied in numerous cases. See, e.g., State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561, 566 (Fla. 1980); Plante v. Smathers, 362 So.2d 933, 937 (Fla. 1979); Williams v. Smith, 360 So.2d 417, 420 (Fla. 1978); Alsdorf v. Broward County, 333 So.2d 457, 459 (Fla. 1976); Schreiner v. McKenzie Tank Lines & Risk Management Services, Inc., 408 So.2d 711, 714 (Fla. 1st DCA 1982). See also, 10 Fla. Jur.2d Constitutional Law §§41, 42 (1979).

The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the

power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. Gray v. Bryant, supra.

Article V, § 4 (b) (1) of the Florida Constitution as it presently exists reads as follows:

> (1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

The language of Article V, § 4 (b) (1) is not dependent on the legislature to "breathe life" into its provisions. The language of the constitutional provision makes it clear that there is a right to appeal to the district court from final judgments or orders of trial courts. No legislative enabling or implementing clause is necessary. This fact renders the constitutional provision in question self-executing as it passes muster under the test enumerated in Gray v. Bryant, supra, Thus, there is a constitutional right for parties to appeal from final judgment and orders entered in trial courts.

In State v. W.A.M., supra, the Fifth District specifically held that the State had a constitutional right to appeal from

final judgments in juvenile cases. Accord, State v. A.N.F., 413 So.2d 146 (Fla. 5th DCA 1982). In arriving at this decision, the Court examined the predecessor provision to the challenged one, Article V, 5 (3), Fla. Const. (1956). That provision read as follows:

> Appeals from the trial courts in each appellate district . . . may be taken to the court of appeal of such district, as a matter of right from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.
>
> 412 So.2d 49 at 50.

The Court noted that this Court, in Crownover v. Shannon, 170 So.2d 299 (Fla. 1969), held that the lower constitutional provision granted a right to appeal from final decisions as a matter of course. In Crownover, this Court stated that:

> The right to appeal from the final decisions of trials to the Supreme Court and to the District Courts of Appeal has become a part of the constitution and is no longer dependent on statutory authority or subject to be impaired or abridged by statutory law, but of course subject to rules promulgated by the Supreme Court regulating the practice and procedure.
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> 170 So.2d at 301.

The Fifth District reasoned that notwithstanding the changes in the language of each constitutional provision,

the one currently in question and the one interpreted in Crownover, the changes were not intended to eliminate the right to appeal from final judgments.

The opinion of the Third District in the instant case indicates that the Court would be inclined to concur with the holding in W.A.M. that the State has a constitutional right to appeal in juvenile cases. The court reasoned that since the jurisdictional provision makes no distinction between the State's right to appeal and any other party litigants', the State should enjoy the same right unless barred by double jeopardy. (App. 3). The Third District's basis for reaching a decision contrary to W.A.M. [2] was that the Court felt compelled by Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) to follow this Court's decision in Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947), holding that the right of the State to appeal from final judgments in criminal cases was entirely statutory.

It is readily apparent that this Court's decision in Whidden v. State, supra, is not applicable to the current, self-executing provisions of Art. V, § 4 (b) (1), Fla. Const. and should no longer be adhered to. Moreover, Whidden was

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[2] Another opinion of the Third District which reached a result contrary to State v. W.A.M., supra, State v. C.C., et. al, __ So.2d __ (Fla. 3d DCA 1983) (ase Nos. 81-2564, 82-666, 82-797, 82-1825; Opinion filed March 24, 1983) is currently pending on rehearing en banc. Oral argument is scheduled for Tuesday, June 14, 1983.

decided in 1947, prior to the establishment of district courts of appeal. In State v. Smith, 260 So.2d 489 (Fla. 1972), this Court noted that the provisions of the former Article V of the constitution granted appellate review from a final judgment as a matter of right. This court adopted the language of the district court's opinion in that case and stated:

> "Appellate review of any order or judgment entered by a trial court is not a right derived from the common law. The right of appellate review is derived from the sovereign; i.e., the citizens of this State. By means of Article V of the Florida Constitution, the citizens have granted to a ligigant as a matter of right appellate review of a final judgment . . ."
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> 260 So.2d 489 at 490.

Cases decided after the 1956 amendments to the Florida Constitution and creation of the district courts of appeal have by the most part acknowledged that Article V enumerates a constitutional right of appeal. In Robbins v. Cipes, 181 So.2d 521 (Fla. 1966), this Court stated:

> Appeals to the Supreme Court and the District Courts of Appeal are constitutionally guaranteed rights in this State. This being true, it is fundamental that statutes or rules regulating the exercise of such rights should be liberally constured in favor of the appealing party and in the interest of manifest injustice.
>
> 181 So.2d 521 at 522.
> [footnotes omitted]

Accord, Helker v. Gouldy, 181 So.2d 536 (Fla. 3d DCA 1966); See also, City of Miami v. Murphy, 137 So.2d 825 (Fla. 1962); Marshall v. State, 344 So.2d 646 (Fla. 2d DCA 1977).

This Court is therefore urged to find that the present Article V is self-executing and provides party litigants, including the State of Florida, with the right to appellate review of final orders and judgments of trial courts. There is no indication that once the right to appeal was granted by the citizens in the State Constitution, there was any intention to repeal that act. It remains the will of the people that party litigants should be empowered to seek appellate review from final decisions in the district courts of appeal.

Assuming arguendo that this Court should decline to find that Petitioner has a constitutional right to appeal from final judgments in criminal and juvenile cases, there is statutory authority which supports a finding that the State may appeal from final judgments. Chapter 924, Fla. Stat., provides for appeals in all criminal cases. Section 924.07 (1), Fla. Stat. states that in criminal cases, the State may appeal from an order dismissing an indictment or information. § 924.08 (2), Fla. Stat. specifically provides that appeals from final judgments in criminal cases which are not appealable shall be to the district courts of appeal.[3]

[3] These statutory provisions do not make Article V, § 4 (b) (1) not self-executing. (continued on page 16).

This Court has also promulgated rules which provide for the district courts to review by appeal final orders of the trial courts not directly reviewable by the Supreme Court or a Circuit Court. Fla.R.App.P. 9.030 (b) (1). Likewise, Fla.R.App.P. 9.140 (c) (1) (a) states that the State may appeal an order from the trial court's dismissal of an indictment or information.

Although juvenile proceedings involve the filing of a petition for delinquency, as opposed to an indictment or information the provisions governing the juvenile charging document (see Fla.R.Juv.P. 8.110) are analogous to the provisions of Fla.R.Crim.P. 3.140. It therefore follows, that there is no basis for strictly and literally construing the references to charging documents in the appellate rules.

The district court correctly noted that §39.14, Fla.Stat. does not specifically provide the State with the right to appeal in juvenile cases. This Court has found, however, in R.J.B. v. State, 408 So.2d 1048 (Fla. 1982) that Chapter

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As noted in Schreiner v. McKenzie Tank Lines & Risk Management Services, supra, citing to Gray v. State, supra, at 851, "The fact that a right granted by a constitutional provision may be supplemented by legislation, further protecting the right or making it available, does not itself prevent the provision from being self-executing."

39, Fla. Stat. does not govern appellate proceedings in juvenile cases, it merely provides that appeals by a juvenile defendant (respondent) may proceed within the time parameters and manner prescribed by the appellate rules. The issue considered in R.J.B., supra, was whether a juvenile could appeal an order of the juvenile court waiving jurisdiction and transferring the case to adult court. Although this Court found that the juvenile could not appeal from the order because it was an interlocutory order and Rule 9.140 (b), Fla.R.Crim.P. does not provide a defendant with the right to appeal interlocutory orders. This Court's analysis of whether or not the juvenile had the right to appeal was not limited to Chapter 39, Fla. Stat.; it was predicated on appellate rules governing a defendant's right to appeal in criminal cases.

The order in question in the present case is an order dismissing a case for constitutional speedy trial violations. It is clearly well-established that an order discharging a defendant on speedy trial gorunds is a final order. State v. W.A.M., supra, State v. Wise, 336 So.2d 3 (Fla. 4th DCA 1976); State v. Johnson, 287 So.2d 322 (Fla. 3d DCA 1974); State v. Mims, 267 So.2d 52 (Fla. 1st DCA 1977).

It does not follow that it is the will of the citizens of this State nor of the legislature that only one of the parties to a final order is entitled to seek review of the order.

No positive policy considerations would be advanced by such a result. The absurdity of such an occurrence is evident in the language of the Second District in Bohannon v. McGowan, 222 So.2d 60 (Fla. 2d DCA 1969):

> We cannot conceive a situation in which a trial judge can, under our constitution, render his final disposition of a case appealable or not according to which party succeeds there. We guarantee every litigant two days in Court. The motion to dismiss is denied.
>
> 222 So.2d at 61.

Such unbridled authority is clearly not intended to be vested in the trial courts.

The Florida judicial system is predicated upon the adversary process, one of the foundations of the Anglo-American system of justice. The adversary process will clearly be stifled by an interpretation of the constitution, statutes and rules of this State which necessarily results in precluding one of two party litigants from challenging a court's ruling. The adversary system can only work if the propriety of a trial court's ruling as to interpretations of law can be challenged. It is absurd to cccept the logical result of a finding that the State may not appeal from final orders rendered in juvenile cases, namely that every legal ruling adverse to the State will stand regardless of its propriety. It is also plausible that Respondents would suffer from such a system, as there is great incentive for trial courts to rule in favor of the State on

certain narrow issues which are not well-settled by case law, knowing that if the court is in error, a respondent will have appellate recourse.

This Court is therefore urged to affirmatively find that the State has the constitutional right to appeal from final judgments or orders in criminal and juvenile cases in light of the self-executing nature of Article V, § 4 (b) (1), Fla. Const. Even if this Court feels that it is presented with a choice, which Petitioner submits it is not, it should be remembered that the constitutional provision must always be construed to be self-executing for such construction avoids the occasion by which the people's will may be frustrated. Gray v. Bryant, supra, at 852. Should this Court ascertain that the State does not possess a constitutional right of appeal, Petitioner submits that the right to appeal from final judgments and orders can also be found in § 924, Fla. Stat. and in the appellate rules. The decision of the district court should clearly be reversed.

II

IF THE PROVISIONS OF ARTICLE V, SECTION 4 (b) (1) OF THE FLORIDA CONSTITUTION ARE NOT SELF-EXECUTING SO AS TO AFFORD THE STATE A RIGHT TO APPEAL, THE DISTRICT COURT MAY UTILIZE THE PETITION FOR COMMMON LAW CERTIORARI TO REVIEW THE JUDGMENT WHERE THE ELEMENTS OF THE WRIT ARE SATISFIED.

If this Court should ascertain that the provisions of Article V, Section 4 (b) (1) of the Florida Constitution are not self-executing so as to afford the State the right to appeal from final jugments; and that there is no other basis upon which the State has the authority to appeal, it is urged that this Court answer the second question certified to it in this case by the Third District Court of Appeal affirmatively. The policy reasons stated in Point I of this brief are equally applicable to this issue. If no other authority is found to enable district courts to exercise their jurisdiction over final judgments which may be rendered unappealable because they are adverse to one party litigant, namely the State of Florida, then the district court is clearly empowered to issue a writ of common law certiorari to obtain review of such cases.

Since the time when district courts of appeal have been established, Article V has always, regardless of changes, authorized district courts to issue writs of certiorari and other writs necessary or proper to the exercise of their jurisdiction. See, Art. V., § 4 (b) (3), Fla. Const. (1980). See,also Art. V, 5 (3), Fla. Const. (1957).

Although as the Third District pointed out in its opinion in this case (see App. 6), historically, there have been many instances where district courts' review of decisions of a trial court by common law certiorari have involved suprevisory review of a decision of a lower court sitting in an appellate capacity, there is no valid reason for limiting the use of the writ of common law certiorari to that purpose. In fact, both the Third District and Second District Courts of Appeal have in the past used writs of common law certiorari to review appeals from interlocutory orders. The lack of authorization for an appeal from an interlocutory order was not found to be a bar to the district court's power to grant certiorari review. State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982); State v. Latimore, 284 So.2d 423 (Fla. 3d DCA 1973); State v. Williams, 227 So.2d 253 (Fla. 2d DCA 1969). See also, State v. Joseph, 419 So.2d 391 (Fla. 3d DCA 1982); State v. Hughes, 212 So.2d 65 (Fla. 3d DCA 1968); State v. Coyle, 181 So.2d 671 (Fla. 2d DCA 1966);

District Courts have equally reached findings to the effect that lack of authorization for an appeal from final orders does not preclude the State from having its intended appeal treated as a petition for common law certiorari. See, State v. I.B., 366 So.2d 186 (Fla. 1st DCA 1979); State v. Gibson, 353 So.2d 670 (Fla. 2d DCA 1978); See also, State v. Jones, ___So.2d ___ (Fla. 4th DCA 1983;) (Case No. 82-1061; Opinion filed May 18, 1983) [8 F.L.W. 1407]. In State v. Harris, 136 So.2d 633, 634 (Fla. 1962), this Court specifically

found that § 924.07, Fla . Stat. does not and was not intended to proscribe the authority of the State to seek common law certiorari by the district court.

It is readily apparent that this situation is clearly one in which the writ of common law certiorari should be available. If no other viable means of review of a trial court's legal determinations is available to one of the party litigants, policy reasons suggest that utilizing the writ of common law certiorari will indeed further the ends of criminal justice as it is a means of helping to insure fairness and legal propriety in decisions in the trial court. As quoted by this Court in State v. Jones, 204 So.2d 515 (Fla. 1967), Justice Cardczo noted the following in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338 (1934):

> "But justice, though due to the accused, is due to the accusar also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Likewise, concepts of fairness and justice will support a determination that district courts are empowered and should be empowered to treat intended, yet frustrated State appeals from final judgment or orders in criminal cases (including delinquency proceedings) as petitions for common law certiorari. The decision of the Third District declining to treat the instant case as either a viable appeal or petition for common

law certiorari should therefore be reversed, regardless of this Court's ruling as to whether or not the State has the right to an "appeal".

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this Court should answer the questions certified to it affirmatively, reverse the district court's opinion and remand the cause for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing BRIEF OF THE PETITONER ON THE MERITS, was furnished by mail to PAUL MORRIS, Esquire, 2000 S. Dixie Highway, Suite 212, Miami, Florida, 33133, on this 13th day of June, 1983.

CALIANNE P. LANTZ
Assistant Attorney General

CPL:isj