IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,170

THE STATE OF FLORIDA,

Petitioner,

vs.

RICKIE LEE PALMORE,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner was the prosecution in the criminal proceedings at trial and the appellant in the appellate proceedings below. Respondent was the defendant in the criminal proceedings at trial and the appellee in the appellant proceedings below.

Citations to the record are abbreviated as follows:

(R) - Circuit Court Clerk's Record on Appeal

(SR) - Supplemental Record on Appeal

(T) - Circuit Court Transcripts of Proceedings in Trial Court

(A) - Appendix attached hereto containing District Court opinions

STATEMENT OF JURISDICTION

Petitioner, the State of Florida, invokes the discretionary conflict jurisdiction of the Supreme Court of Florida to review the decision of the Third District Court of Appeal, which directly and expressly conflicts with the decision in State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA), review denied, 419 So.2d 1201 (Fla. 1982) and State v. J.W.P., 433 So.2d 616 (Fla. 4th DCA) on the first question of law. The instant decision of the district court follows

the en banc holding in State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983). This court has heard two oral arguments regarding this issue in State v. C.C., Case No. 64,345 and J.W.P. v. State, 63,981. A third argument was pending, Ramos v. State, Case No. 65,964, April 9, 1985, at the time this brief was being prepared. Furthermore, the dismissal of the State's Petition for Writ of Common Law Certiorari upon the authority of State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982) evidences an express and direct conflict of the law between the Second, Third and Fourth District Courts of Appeal. See, State v. Haynes, 453 So.2d 926 (Fla. 2d DCA 1984), and State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982).

STATEMENT OF THE CASE

This case was dismissed upon the authority of State v. C.C., supra, in which the Third District Court of Appeal held the State had no right to seek appellate review from final or interlocutory orders of the trial court absent statutory authorization in juvenile or criminal proceedings and, that the State had no right to seek certiorari review of final or interlocutory orders from the trial court.

In State v. C.C., the Third District Court of Appeal held that the State's right to appeal is purely statutory,

the Florida Constitution contains no provision authorizing an appeal by the State, and there was no State right to appeal trial court orders not encompassed in Florida Statute Section 924.01.[1] The court expressly disagreed with the decision of the Fifth District Court of Appeal in State v. W.A.M., 412 So.2d 49, review denied, 419 So.2d 1201 (Fla. 1982) insofar as that decision found a constitutional right to appeal for the State. Additionally, the court found the State had not right to take interlocutory appeal because Article V, Section 4(b)(1) of the Florida Constitution permits interlocutory review only in cases in which appeal may be taken as a matter of right. Finding the rules do not allow for review of a motion in limine, the District Court dismissed the appeal.

After dismissing the instant appeal, the District Court denied relief under certiorari standards becasue of "...the State's failure to meet the requirements of State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982)."

From that decision this timely petition for review follows.

[1]A copy of the decision in State v. C.C. is included in the appendix to this brief. Also included are the opinion in Steinbrecher and the instant cause.

SUMMARY OF THE ARGUMENT

The en banc decision of the Third District Court of Appeal in State v. C.C., supra, held that since the State's right to appeal is purely statutory and because no legislative authorization for review of final orders in juvenile cases exists, the State has no right to appeal final judgments or orders absent legislative enactment. The decision specifically found that neither the Florida Juvenile Justice Act, chapter 39, nor chapter 924 of the Florida Statutes contained provisions authorizing an appeal by the State in juvenile cases. The decision also expressly rejected the contention that Article V, §4(b)(1) of the Florida Constitution provided the State a constitutional right to appeal final orders entered against it.

In addition, the Third District's decision held that the State also had no right to appeal interlocutory orders pursuant to Article V, §4(b)(1) of the Florida Constitution, because interlocutory review may be had only in those cases in which an appeal may be taken as a matter of right. Finding no right to appeal existed, the District Court declined to provide any alternative form of remedy to the State and accordingly held that review would not be had by petition for common law certiorari.

The State's position on its right to appeal from final and select interlocutory orders and judgments of the circuit court is that the Florida Constitution, Article V, §4(B)(1), supresedes the authority of the legislature to control access to the courts and allows appeal as a matter of right. Analysis of the evolution of Article V, the decisional process of this court, and the general rules of constitutional construction, will prove that Florida's court system has evolved away from a system controlled by the legislature. The constitution provides that control over interlocutory access to the courts is vested in the Florida Supreme Court. If the Rules of Appellate Procedure allow for interlocutory appeal, the rule controls the law. Excepting double jeopardy, the only limit on the State's right to appeal is the limit on access to the courts, set out in the rules. Since there is no doubt the ruling in the lower court effectively suppressed the introduction of evidence the State should be afforded an appeal under 9.140(c)(1)(B), Fla.R.App.Pro.

As a secondary point, the State contends the denial of the right to petition the court for a writ of certiorari is based upon a false premise and ignores the long established rule of law that certiorari applies to those situations in which a party has no recourse to appeal or writ of error. In doing so, it has ignored the provisions of Article V which vest original jurisdictional in the district courts of

appeal for the purpose of issuing the writ and it has ignored the great weight of opinion recognizing the unique role of the writ.

In seeking to constrict the State's ability to utilize the remedy, the District Court has announced a three-part test for determination of whether a petition shall be accepted which adds an element of "substantial impairment" not currently required by either the Second or Fourth Districts. This additional element injects the District Court into the role of prosecutor and allows the court to dictate to the local prosecutors what evidence is or is not necessary to successful criminal prosecutions. This intrusion is unwarranted, unsupportable in law and ripe for expungement.

STATEMENT OF THE FACTS

The Respondent, Rickie Lee Palmore, is currently charged in Information No. 82-28490, with kidnapping, in violation of section 787.01, Florida Statutes (1981), robbery, in violation of section 812.13, Florida Statutes (1981), and sexual battery, in violation of section 794.011(4)(b), Florida Statutes (1981). (R.4-6a). The information alleges that on November 22, 1982, the Respondent and one Charlotte Davenport, forcibly, secretely,

or by threat, confined, abducted and imprisoned one, Kathy Davis, against her will, with the intent to commit or facilitate the commission of robbery and/or sexual battery. The information also alleges that on November 22, 1982, the Respondent and Charlotte Davenport unlawfully took by force, violence, assault or fear, jewelry and/or a purse and its contents and cash, property of a value in excess of one hundred dollars ($100.00), belonging to and in the custody of Kathy Davis, with the intent to permanently deprive Ms. Davis of said property. It is further alleged that on the same date, the Respondent and Charlotte Davenport committed sexual battery upon Kathy Davis, without her consent by union or penetration of Kathy Davis' mouth with the Respondent's penis, when, the Respondent and Davenport coerced Ms. Davis to submit by threatening to use force or violence likely to cause serious personal injury on Ms. Davis.

On November 4, 1983, the Respondent filed a sworn motion to dismiss the information pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure. (R.50-53). The motion contained the following statement:

The following facts are material and undisputed taken from the depositions and sworn affidavits of the alleged victim herein, Kathy Davis and asserted as true and correct by the defendant:

a) On November 22nd, 1982 between 1:00 and 2:00 A.M. a car driven by a black male with two black female passengers approached Kathy Davis who was walking in the parking lot of Dino's Lounge.

b) As the car approached Miss Davis, the passenger's side door opened. Miss Davis then approached the car, thinking that the occupants wanted directions. She leaned over to hear what they were saying and was grabbing and pulled into the car.

c) Miss Davis does not know whether she was pulled into the car by all of the occupants or by only certain of them. I did not pull Miss Davis into the car. RL.P.

d) After Miss Davis was pulled into the car, the women asked her how much money she had and tore her purse out of her hand.

e) While the younger girl, subsequently identified as Trina White, keep pulling Miss Davis' hair, the older girl, Charlotte Davenport, struck Miss Davis in the head and face.

f) One of the women pulled Miss Davis' necklace from her neck and earrings from her ears.

g) The women began to tear her clothes, ripped off her blouse and removed her boots.

h) Miss Davis struggled and during the struggle one of the females repeatedly said, "get the gun, get the gun", putting Miss Davis in great fear for safety.

i) The women told the man driving the car to take his penis out.

j) Charlotte Davenport grabbed Miss Davis's head and hair and forced her head into the drivers lap while saying to her "suck my boyfriend's dick".

k) Miss Davis put the driver's penis in her mouth then subsequently stopped the car by forcing the gear shift into "park".

l) RLP- It is reported that after She exited the car, she was rescued by a passerby and subsequently identified the Defendant as the driver of the car.

m) The Defendant was then arrested for the charges lodged against him herein

Attached to the motion to dismiss was an affidavit, sworn to and signed by the Respondent stating "that he has read the Motion to Dismiss, and the facts and assertions contained in the Motion to Dismiss are true and correct."[2] The State did not file a traverse, but sometime thereafter, the motion to dismiss was withdrawn.

On December 6, 1983, prior to trial, a hearing was held before the Honorable Richard Y. Feder, to hear pre-trial motions.[3] During the hearing, the State requested that the trial court instruct the defense not to question the victim on the legitimacy of her children, as it was irrelevant, where the issue of consent was not present. Defense counsel alleged that the victim's chaste character was relevant. The State responded that in the Respondent's sworn motion to dismiss, he had sworn that the victim was forced to have oral sex with the driver of the car. Defense counsel stated that the issues raised by the defense are what the Respondent and counsel decide, and that the State cannot prohibit the Respondent from testifying contrary or in addition to that which was contained in the motion. Defense

[2]It should be noted that the notary who witnessed the Respondent's signature was Respondent's attorney, Jeffrey Samek.

[3]A copy of this transcript has been forwarded with a motion as a record supplement.

counsel conceded that the sworn statement could be used by the State to impeach the Respondent if he testified at trial. (Supplemental Transcript, p.35-36).

The State then stated that it intended to introduce the sworn statements made in the sworn motion to dismiss (SR.37), and asked the trial court to allow the sworn motion to dismiss to be admitted into evidence, for the court to take judicial notice of its court files, and to so instruct the jury. (SR.38). The purpose for admitting the sworn statment was to narrow the issues before the jury and to allow the jury to understand what the Respondent and the victim agreed had happened. (SR.38-39). The State asserted that the only fact in the motion that was disputed was who was the driver of the car, a disputed fact raised in the motion itself. (SR.42). The State argued that the sworn statement was more reliable than a confession given to a police agency because the statement was written by the Respondent and his attorney. (SR.41).[4]

The Respondent argued that under the State's position, once a defendant chooses to file a sworn motion to dismiss,

[4]Regarding the argument on the merits, the Petitioner would note that there is substantial authority in favor of its position in the trial court. Section 90.801(1)(a)(1) and Section 90.803(18), Florida Statutes (1978); Ferrell v. State, 45 Fla. 26, 34 So. 220 (1903); State v. Gibson, 362 So.2d 41 (Fla. 3d DCA 1978); Hampton v. State, 308 So.2d 560 (Fla. 3d DCA 1975) and Blake v. State, 332 So.2d 676 (Fla. 4th DCA 1976).

he no longer has the constitutional guarantees and protection from having to testify. If he doesn't choose to testify, the State gets to put his testimony into evidence anyway. (SR.46). The trial court held that the statements in the sworn motion to dismiss may be used to impeach the Respondent if he testifies, but could not be used as direct evidence if he does not testify. (SR.42-43, 11-12). The court held that the defendant does not have to make a choice as to whether he is going to file a sworn motion to dismiss or have it used against him if it is denied. (SR.43). A written order suppressing the statements was rendered on December 8, 1983. (R.111-112).

POINTS ON REVIEW

I

WHETHER THE STATE HAS THE CONSTITUTIONAL RIGHT TO APPEAL INTERLOCUTORY ORDERS ENTERED AGAINST IT IN CERTAIN CASES PURSUANT TO ARTICLE V, §4(B)(1) AND RULE 9.140(c) OF THE FLORIDA RULES OF APPELLATE PROCEDURE, AS INTERPRETED BY THIS COURT IN STATE V. SMITH, 260 SO.2D 489 (FLA. 1972), REGARDLESS OF THE CONFLICTING OPINION EXPRESSED IN STATE V. C.C., 449 SO.2D 280 (FLA. 3D DCA 1983).

II

WHETHER THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN STATE V. STEINBRECHER, 409 SO.2D 510 (FLA. 3D DCA 1982), AND THIS CASE EXPRESSLY AND DIRECTLY CONFLICT WITH THE LONG RECOGNIZED STANDARD FOR ACCEPTANCE OF REVIEW BY PETITION FOR A WRIT OF COMMON-LAW CERTIORARI IN THAT THE DECISION OF THE THIRD DISTRICT PLACES ADDITIONAL RESTRICTIONS FOR ACCEPTING PETITIONS BROUGHT IN CRIMINAL CASES BY THE STATE OF FLORIDA.

ARGUMENT

I

THE STATE HAS THE CONSTITUTIONAL RIGHT TO APPEAL INTERLOCUTORY ORDERS ENTERED AGAINST IT IN CERTAIN CASES PURSUANT TO ARTICLE V, §4(B)(1) AND RULE 9.140(c) OF THE FLORIDA RULES OF APPELLATE PROCEDURE, AS INTERPRETED BY THIS COURT IN STATE V. SMITH, 260 SO.2D 489 (FLA. 1972), REGARDLESS OF THE CONFLICTING OPINION EXPRESSED IN STATE V. C.C., 449 SO.2D 280 (FLA. 3D DCA 1983).

"State Constitutions are limitations upon the power of the State Legislature."
Peters v. Meeks, 163 So.2d 753 (1964).

It is the contention of the State of Florida that the ratification of Article V, §5(3) of the Florida Constitution, effective in 1957, stripped the Florida legislature of its long recognized right to limit access to the Supreme Court of Florida and the newly created district courts of appeal. The plain language of the 1956 revision to Article V and the subsequent 1972 revision, has been previously interpreted by this court as an expression of the people's desire to strip away not only the legislature's power over appeals in the State courts but, also, the ability to promulgate rules or procedure which encompass the power to control the manner of access to appellate review. The plain language of Article V in the current

Constitution of the State of Florida cannot be diluted by the language of long-outdated decisional law, regardless of the opinion of the Third District Court of Appeal.

Pursuant to precedent, the obligation of this Honorable Court in cases of constitutional interpretation is to give effect to the language of the constitutional provision in light of "...what the people must have understood it to mean when they approved [the provision]," City of St. Petersburg v. Briley, Wild and Assoc., Inc., 239 So.2d 817 (1970). The obligation involves a strictly limited process of judicial interpretation:

> If the language is clear and not entirely unreasonable or illogical in its operation we have no power to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to the words used therein.
>
> Id. at 289 So.2d 822.

This court, as well as the various district courts, have wrestled with the issue of whether the State of Florida has an absolute right to appeal from final orders in criminal[5] and juvenile[6] cases. The focal point of the issue has been

[5]see, Ramos v. State, Case No. 65,964, oral argument heard April 9, 1985.

[6]see, State v. C.C., Case No. 64,345, oral argument heard May 10, 1984.

a portion of Article V, section 4(b)(1), Florida Constitution (1972) which provides:

> 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 the Circuit Court.

The key phase to be interpreted reads "...that may be taken as a matter of right,...". The entire clause is subordinate to the previous noun "...appeals...," i.e. <...Appeals, that may be taken as a matter of right>. According to Webster's Dictionary,[7] use of the word "that" to connect the noun "appeal" to the remainder of the phrase connotes a compliment or modification to the noun. In other words, the modifier "as a matter of right," stands in apposition to the noun "appeal." Simply stated, they refer to the same person or thing. Webster's Dictionary, p.43.

If an appeal is a matter of right (or a matter of right is an appeal), this court cannot justify a limit upon that right by reading into the Constitution a common law exception which was not part of the language in the State Constitution approved by the voters. As was noted by former

[7]Webster's Seventh New Collegiate Dictionary, G. and C. Merriam Co., Springfield, Mass. (1965). P.914.

Chief Justice Ervin, it may be instructive to know the background to a Constitutional passage, to be educated in the intent of the provision's framers, and schooled in the case law of the time prior to the vote, but history, intent and case law are not what the people ratified as part of their Constitution. In re Advisory Opinion to the Governor, 223 So.2d 35, 40 (Fla. 1969). In Article V, §(4), the people voted to allow appeals, all appeals, to be taken as a matter of right to the district courts of appeal unless the appeal lies in the supreme court, as per Article V, §3(b)(1), or the circuit courts, as per general law and Article V, §5(b). This is an interpretation which is clear, reasonable and logical. As noted in City of St. Petersburg v. Briley, Wild and Assoc. Inc., supra, such an interpretation is not subject to an excuse, such as the rule at common law, which exists outside the plain language of the constitutional provision. Id. at 822. "The Constitution must be given effect according to its plain meaning and what the people must have understood it to mean at the time they adopted it." In re Advisory Opinion to the Governor, 223 So.2d 35, 39 (Fla. 1969). In the publication Improving Florida's Court System, A Study Guide to Proposed Constitutional Amendment No. 1, (July 1, 1956),[8] the Judicial Council provided the following questions and answers which shed some light on the question of

[8]Fla.Sup.Ct. Library, Revision of Article V (1957), File Not 10.

how the people of Florida, as opposed to various legal scholars, perceived the court amendments:

> SECOND SUGGESTED APPROACH: Answer the question: What will the Court Amendment do for me?
>
> * * *
>
> C. If you are an ordinary citizen who has never even been in traffic court and who certainly does not expect to take any appeals to the new district courts of appeal, it will:
>
> 1. Benefit you along with the rest of the people of the state through the increased public confidence that the courts will deserve.
>
> 2. Benefit you financially, though indirectly, since the heavy costs of an inefficient judicial system are, to the extent that they involve commercial and manufacturing establishments, passed along to you, the consumer, in the form of higher prices. Furthermore, it is a fair assumption that an inefficient judicial system places a heavier burden upon you as a taxpayer.
>
> 3. Perhaps benefit you directly, for we can never be absolutely certain that each of us may not one day "have our day in court."
>
> 4. Even if a citizen is never a party in a legal case, he may still be vitally affected by decisions of the Florida courts. This is

> especially true in cases involving questions of public policy such as court tests of the powers and acts of the Florida Milk Commission or the or the constitutionality of a state tax. The acts of the Milk Commission, and court decisions concerning these acts, affect citizens throughout the state, although those citizens are not directly involved in the court action. This is also true of cases involving wills, contracts, insurance policies, etc.

Can anyone refute the certainty of the peoples' belief that criminal law matters, involving the most significant aspects of public policy and constitutional law, would be included in the amendment? How could the widely accepted concept of the State's ability to appeal, as set out in Section 924.07, Florida Statutes (1939), have been ignored by an electorate which was presented with the opportunity to enact, as law, the proposition that appeals would be a matter of right to all litigants? The answers to these questions are found in Peters v. Meeks, 163 So.2d 753 (Fla. 1964), Sun Insurance Office v. Clay, 133 So.2d 735 (Fla. 1961), and City of Miami Beach v. Crandon, 35 So.2d 285 (Fla. 1948). As noted so succinctly in Crandon:

> ...under section 1 of Article III of the Constitution the legislature may exercise any lawmaking power that is not forbidden by the organic law of the State. "The

> Constitution does not grant particular legislative powers, but contains specific limitations of the general lawmaking power of the legislature." Stone v. State, 71 Fla. 514, 71 So. 634, 635. "Our state Constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid." Harry E. Prettyman, Inc., v. Florida Real Esate Commission, 92 Fla. 515, 109 So. 442, 445. See also State v. Board of Public Instruction for Dade County, 126 Fla. 142, 170 So. 602.

This is the rule, restated to some degree, in State v. Smith, 260 So.2d 489 (Fla. 1972). The people recognized the concept of a State appeal was good and viable under section 924.07. However, they also realized they could protect this concept from the whim of the legislature by expressly voting for appeals as a matter of right without exception based on the status of a litigant. This plain and unquestionable mandate shall not allow for tortured legal distinctions predicated upon common law concepts and long out-dated case law of which most lawyers, let alone laypersons, are unaware.

The central theme in State v. C.C. is that the State's right to appeal in criminal cases is purely statutory. As a result the District Court concluded that the failure of the legislature to explicitly permit an appeal from a particular

trial court ruling renders the State helpless and without an avenue of review. As has previously been noted, the legislature cannot restrict or expand the constitutional right to appeal. Crownover v. Shannon, 170 So.2d 299 (Fla. 1964); State v. Smith, 260 So.2d 489 (Fla. 1972). State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA), pet. for rev. den., 419 So.2d 1201 (Fla. 1982). Nonetheless, this court should clarify the confusion in this area. A close examination of the support for recent decisions holding that the State right to appeal is statutory, see, State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976); State v. C.C., demonstrates that the decisions were wrongly decided.

Both the Brown and C.C. decisions erroneously relied on this court's ruling in Whidden v. State, 32 So.2d 577 (Fla. 1947). This court accepted §924.07 as controlling the scope of State appeals in the Whidden case. The importance of Whidden, however, is the recognition of the fact that the sovereign could provide the State equal access to the appellate courts. It should be noted that at the time of the Whidden case, the legislature had the ability to limit access to the appellate courts in civil as well as criminal cases. Chapter 59.01(4), Fla.Stat. (1945), said:

> (4) Appeal as a matter of right -- Appeals except where otherwise expressly provided by law, shall be as a matter of right.

The legislature's role as arbiter of the question of access to the appellate courts in criminal and civil matters was rooted in the case law of the time. Burnett v. State, 198 So.2d 500 (Fla. 1940)(Florida Declaration of Rights, Section Four, provided for "open" court system; however, access to those courts is controlled by acts of legislature.); DeBowes v. DeBowes, 149 Fla. 545, 7 So.2d (1942) (statutes regulating the right to appeal should be construed liberally so as to preserve spirit of the constitution); and McJunkins v. Stevens, 88 Fla. 559, 102 So. 756 (1925). The McJunkins opinion clarifies much of the confusion which seemed to affect the Third District's analysis in State v. C.C. Keeping in mind that McJunkins was decided under the 1885 constitution, Article V, §5, the State directs attention to 102 So. 760:

> The constitution or Statute gives a court power to adjudicate litigated matters in classes of cause, an in appeal or writ of error or other authorized process duly taken gives a court jurisdiction to determine a particular case.
>
> While the constitution defines the appellate jurisdiction of the supreme court and the circuit courts, it does not prescribe the means by which such appellate jurisdiction is acquired in particular cases, therefore the legislature may prescribe such means...

This is the background upon which the Whidden opinion

was issued. Review of the trial court was justified by resort to common law (writs of mandamus, certiorari and other original writs) or the sovereign, (appeals), through the Constitution or, in its silence, the legislature. Accordingly, in its time, Whidden was a proper reflection of the law.

All this changed with the people's ratification of a new constitutional provision, revised Article V, in 1956. Now, the sovereign vested both jurisdiction of the various courts and the method of access to those courts in the supreme court. The revision limited appellate jurisdiction of the Supreme Court under Article V, §4(2):

> Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or degrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida of federal constitution, and from final judgments or degrees in proceedings for the validation of bonds and certificates of indebtedness.

Second, newly-formed district courts of appeal were established:

> Jurisdiction. Appeals from trial courts in each appellate district, and from final orders or

> decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, 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.

This new provision also declared:

> The Supreme Court shall provide for expeditions and inexpensive procedure in appeals to the District Courts of Appeal and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the District Courts of Appeal.

These new provisions swept away all notions of who should have access to the courts. Now, "all final judgments and decrees" as a matter of right, and "interlocutory orders and decrees in matters reviewable by the district courts of appeal," when allowed by the supreme court. The old legislative control of access, §§59.01 and 924.07 was a thing of the past. This Court agreed with this analysis of the new Article V in Crownover v. State, 170 So.2d 299 (1964). In Crownover, it was held that the time limits on appeals imposed by statute, i.e. §59.01(4) and §924.07, were invalid.

In response, opponents of the constitutional right to appeal have been forced to rely on Harris v. State, 136 So.2d 633 (Fla. 1962), and certain language contained therein which suggested that the State's right to appeal could still be limited by the legislative through §924.07. Harris v. State, supra, 136 So.2d 634. A close review of the facts in that case and the issue on appeal demonstrates such a suggestion was gratuitous dicta contrary to the court's actual holding.

This court, acting sua sponte, obtained supplemental briefs in Harris on the issue of whether the State could constitutionally obtain conflict certiorari review pursuant to Article V, §4(2), Florida Constitution (1957). Rejecting Harris' contention that the State could not seek conflict review, this court held Article V, §4(2) was self-enacting and operated completely apart from any provision in §924.07. Id, 136 So.2d at 634. In doing so, this court stated:

> There can be no doubt that this Court has the authority to entertain a petition for certiorari filed by the state in a criminal proceeding if the requisite conflict of decisions exists. Article V, Section 4(2), Florida Constitution, F.S.A., empowers this Court to review by certiorari "any decision" of a district court of appeal which is in conflict with a prior decision of this Court or of another district court of appeal,

> There is nothing in the constitution which limits the authority of this Court to entertain such petitions by the state in criminal proceedings, nor is the right of the state to file such a petition in a criminal proceeding limited by this or any other provision of the constitution. [Emphasis added].
>
> Id.

A number of conclusions are readily drawn from the Harris opinion. First, the issue on appeal was the State's appellate rights under Article V, §4(2), not Article V, §5(3). As such, any language suggesting that the legislature could in some way limit the State's right to appeal was gratuitous dicta on a question not briefed or before the court for resolution.[9] Secondly, and more importantly, the analysis utilized by this court in determining the State's appellate rights under Article V, §4(2), leads equally to the conclusion that it also has a constitutional right to appeal under Article V, §5. Nothing in the Constitution excludes applicability of the constitutional right to appeal to the State of Florida. As such, the State must stand before the court as any other ordinary litigant.

[9]The Third District's reliance on Harris in State v. C.C. is therefore erroneous. Contrary to the concurrence's contention, it is Harris, not Crownover, which contains language not essential to its decision. Crownover dealt squarely with a litigant's constitutional right to appeal under Article V, §4(b), and Harris did not.

In summary, this court should finally reject all arguments against the State's constitutional right of appeal. It is plainly contained in Article V, §4(b)(1) and been so recognized by this court's Smith and Crownover decisions. There is no well-reasoned authority to the contrary and public policy cries out for such a result. It is irrational to interpret Article V, §4(b)(1), as permitting the people of this State to appeal individually, but to prevent their doing so collectively.

II

THE DECISIONS OF THE THIRD DISTRICT COURT OF APPEAL IN STATE V. STEINBRECHER, 409 SO.2D 510 (FLA. 3D DCA 1982), AND THIS CASE EXPRESSLY AND DIRECTLY CONFLICT WITH THE LONG RECOGNIZED STANDARD FOR ACCEPTANCE OF REVIEW BY PETITION FOR A WRIT OF COMMON-LAW CERTIORARI IN THAT THE DECISION OF THE THIRD DISTRICT PLACES ADDITIONAL RESTRICTIONS FOR ACCEPTING PETITIONS BROUGHT IN CRIMINAL CASES BY THE STATE OF FLORIDA.

The State of Florida contends that its ability to review actions of the trial courts by petition for writ of certiorari is seriously curtailed in Dade and Monroe counties due to the decision of the Third District Court of Appeal in the case of State v. Steinbrecher, 409 So.2d 510, 511 (Fla. 3d DCA 1982):

> We believe, therefore, that the correct interpretation of Florida law is that if the requirements permitting certiorari jurisdiction otherwise exist, a pre-trial order excluding evidence which has the effect of substantially impairing the ability of the state to prosecute its case is subject to certiorari review.

This decision goes beyond the traditional test for certiorari recognized by the Fourth District in State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982) and followed by the Second District, State v. Haynes, 453 So.2d 926 (Fla. 2d

DCA 1984). That standard does not include the element of "substantially impairing the State's ability to prosecute" required by the Third District. The decision in Horvatch and Haynes adhere to the traditional view of when certiorari should issue as expressed by the Second District in the case of In re Estate of Dahl, 125 So.2d 332, 336 (Fla. 2d DCA 1960):

> Since the order is interlocutory in nature, the question then arises whether the remedy of common law certiorari is available. The common law writ of certiorari is a discretionary writ and ordinarily will not be allowed by an appellate court to review an interlocutory order since such an order may be corrected through appeal. However, in an exceptional case, as where the lower court has acted without and in excess of its jurisdiciton or where an interlocutory order does not conform to essential requirements of law and may reasonably cause material injury throughout subsequent proceedings for which the remedy of appeal will be inadequate, an appellate court may exercise discretionary power to issue such writ. Kilgore v. Bird, 1942, 149 Fla. 570, 6 So.2d 541; Saffran v. Adler, 1943, 152 Fla. 405, 12 So.2d 124; Kauffman v. King, Fla.1956, 89 So.2d 24; Easley v. The Garden Sanctuary, Inc., Fla. App.1960, 120 So.2d 59; and 5 Fla.Jur., Certiorari, section 12, p.496, and section 31, pp. 526-531.

In the instant case, the Third District Court of Appeal erroneously refused to grant certiorari review of a ruling

on a motion in limine when that order excludes certain evidence contrary to overwhelming statutory and case law. Compare, Haynes, supra. (certiorari granted to quash order granting motion in limine which clearly violated law regarding admission of co-conspirator testimony) and State v. Busciglio, 426 So.2d 1233 (Fla. 2d DCA 1983)(certiorari granted to quash order granting motion in limine which clearly violated case law regarding State's ability to present evidence as to certain elements of a crime regardless of defendant's concession of the issue). The only authority cited by the court was the Steinbrecher opinion. The only difference between these cases is the additional requirement of "substantial impairment" set out in Steinbrecher. It follows that the State of Florida's petition in the instant case was erroneously treated under a super-restrictive standard not authorized by any court save the Third District. Under the proper standard of Kilgore v. Bird, 6 So.2d 541 (Fla. 1942) as noted in Dahl, supra, the writ should have issued. The suppression of the sworn admission of the accused might reasonably harm the State's ability to prove its case. The trial, absent this evidence, is a swearing contest between the victim and accused. Should the victim become confused or frightened the jury might decide the case on an evidentiary issue which could most easily be proved by introduction of the sworn statement of Ricki Palmore. Accordingly, the State asks this court to

disapprove the "substantial impairment" element of Steinbrecher and release and remand this case with instructions to grant the writ and quash the trial court's order upon the authority of the above-cited cases. see, Footnote 4, infra,

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to JEFFREY SAMEK, 1925 Brickell Avenue, Suite D-207, Miami, Florida 33125, on this 19TH day of April, 1985.

RICHARD E. DORAN
Assistant Attorney General

/vbm