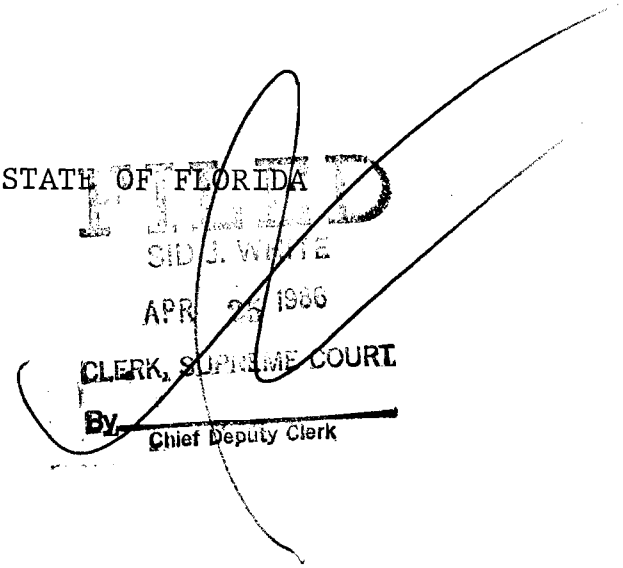
SUPREME COURT OF THE STATE OF FLORIDA



JOHN McINTOSH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,819

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In the appeal below Respondent was the Appellant/Petitioner and Petitioner was the Appellee/Respondent in the District Court of Appeal, Fourth District.

In the brief the parties will be referred to as they appear before this Honorable Supreme Court except that Respondent may also be referred to as the State, and Petitioner the Defendant.

The following symbol will be used:

"R" Record on Appeal

All enphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On March 30, 1983 Petitioner John Henry McIntosh was charged by information with committing lewd assault upon a child under the age of 14 years, a second degree felony under §800.04, Fla. Stat. (1983). The victim of the assault was [redacted] (R 153-154).

A probable cause affidavit had been filed on March 12, 1983 by West Palm Beach police officer Russell M. Bruce (R 150-152). The affidavit recited that the victim was 9 years old, and on the date of the assualt was staying with her younger brother and sister at the home of her grandmother, [redacted]. Petitioner was a friend of the family and was also spending the night at the [redacted] residence. The affidavit recites that during the course of the evening, Petitioner who had been sleeping on the couch across from the bed on which the victim and brother and sister were sleeping, unclothed the victim and sucked on her breasts, put his fingers inside her vagina and his penis up against her body. Ms. [redacted] had left the home at approximately 11:15 p.m., and when she returned at 11:45 p.m. she saw the victim's panties on the floor next to the bed. Ms. [redacted] "then asked [redacted] why her panties were on the floor and she replied that Petitioner had taken them off of her and molested her." (R 151). The grandmother then called her daughter who in turn called the police. The victim was interviewed at the scene by Officer Bruce and by Sergeant Ross, and was later interviewed at the police station by Detective VanDuesen, who

recorded that interview. Detective VanDuesen had the victim demonstrate the movements with two anatomically correct dolls, which demonstration confirmed that Petitioner had not penetrated the victim's vagina with his penis but rather with his fingers.

A deposition of the victim was taken on May 18, 1983. During the deposition (R 1-29), the victim did not respond to a number of questions asked by defense counsel. Thereafter, on May 26, 1983, the defense filed a motion to exclude [redacted] as a witness alleging that due to her non-responsiveness at the May 18 deposition Petitioner would be deprived of his right to effective cross-examination if she was allowed to testify at trial (R 164).

Several hearings were held on that motion, the first being on June 9, 1983 (R 47-75). During that hearing the prosecutor argued that the victim had given a 10 page statement on the night of the incident (R 60) and argued that since the victim had answered questions during that statement with the use of anatomically correct dolls, she should be allowed to testify in the same manner at trial (R 60-62). That hearing concluded with the judge expressing a willingness to consider the use of the dolls as a solution (R 70-71).

A second hearing was held on September 22, 1983 (R 76-94). Defense counsel again recounted the number of non-responses by the witness at the May 18 deposition. (R 76-81). The trial judge observed that while the witness did not respond in certain instances, she did respond to subsequent

questions (R 81). The prosecutor stated that the surrounding circumstances of the incident, and not just the victim's testimony, would be used at trial to prove the crime (R 82-83). He reiterated that on the night or the next day of the incident a full statement had been given by the victim (R 84), and that while she had been hesitant in her answers at the deposition it had not been shown that she was incompetent to testify (R 85-86). He stated that the prosecution intended to use an anatomically correct doll (R 88), and defense counsel requested that another deposition be taken using the dolls to see how the victim would testify (R 89). The trial judge denied the motion to exclude the witness pending the new deposition (R 89-92). The deposition took place on October 13, 1983 (R 33-46). Anatomically correct male and female dolls were used during that deposition (R 40). When asked if Petitioner took her underpants off on March 12, the victim answered yes. (R 40). He put them on the floor by her bed, stayed by the side of the bed, and put the victim on the side of the bed with her feet dangling toward the floor (R 40-41). Petitioner was on his knees, and using the dolls the victim testified that Petitioner touched her with his penis, and rubbed up and down her body (R 41-42). He also touched her on her breasts and between her legs with his mouth (R 43-44). Petitioner was on the couch when the victim's grandmother returned home, and her underwear was still on the floor (R 44). He did not take his pants off, but just pulled them down (R 45).

A third hearing was held on November 14, 1983. At that hearing defense counsel asked that the court exclude the dolls as demonstrative evidence during the trial. The victim's testimony was to be proffered at that hearing, and the judge ruled that the State would be able to use the dolls during the proffer (R 52). A jury was picked before the proffer, but was not sworn (R 98-99, 130). Thereafter, the victim, [redacted], was questioned by the judge, the prosecutor and defense counsel (R 102-123). There are numerous "no responses" indicated in the transcript of that examination. However, the victim did testify that Petitioner was a friend of her aunt (R 106), that he took her panties off (R 109), using the dolls she indicated what he did to her and indicated on the female doll where he touched her (R 108-110). She also testified that Petitioner did "these things" both before and after her grandmother left the home on the night of the incident, that he started after her grandmother had gone to bed, stopped when someone knocked at the door, started again after the grandmother left the house, and finally stopped when she returned (R 112-113). During cross-examination (R 114-122) there were numerous "no responses", many of which occurred after questions which did not relate directly to the incident. After the victim's proffered testimony, the prosecutor argued that she was able to testify in response to questions regarding the specific area of the assault with the use of the dolls, and that many of her non-responses took place after questions which did not relate

to the incident itsel. He also pointed out that during the second deposition she communicated well using the dolls (R 126). The trial judge ruled that the victim was not competent to testify (R 128), although he later stated for the record that what she described with the dolls would have been an offense covered by the information (R 129-130). Thereafter, the prosecutor stated that the State could not proceed with the case without the victim's testimony (R 130, 132), but made it clear that the State was not abandoning prosecution since the case was still in a pretrial posture (R 132).

Another hearing was held on November 28, 1983 (R 134-143). At the beginning of the hearing the prosecutor announced that the State was ready for trial (R 134), and argued that the evidence which he proposed to use was the position of the victim in the room with her panties laying on the floor when her grandmother entered in conjunction with the proximity of the Petitioner at the scene of the crime (R 142). At that hearing defense counsel also argued that the State should not be allowed to use the statement made by the victim to her grandmother when asked why her panties were on the floor, maintaining that the statement was inadmissible hearsay. Both the prosecutor and defense counsel agreed that no medical evidence would be offered (R 139).

The final hearing was held on November 29, 1983 (R 144-145). During the hearing it was agreed that in order to prosecute the case the State needed either the testimony of the victim herself or the statement made by the victim to her

grandmother. The trial judge found that statement to be inadmissible hearsay since it was elicited by a question from her grandmother. Therefore, he dismissed the case (R 148), and stated the reasons for dismissal in a subsequent written order (R 169).

The State timely filed its notice of appeal (R 170). Speedy trial was extended pending the disposition of this appeal.

The District Court of Appeal, Fourth District, treated the State's notice of appeal as a petition for writ of certiorari and held the trial court's holding, that the minor victim was incompetent to testify because of her erratic responses to some, but not all, questions, was insufficient to adjudge her incompetent and, the trial court's finding was unsupported by competent substantial evidence. State v. McIntosh, 475 So.2d 973 (Fla. 4th DCA 1985).

SUMMARY OF THE ARGUMENTS

POINT I

There is no reason to deny to the Respondent, the State, an opportunity to petition for a common law writ of certiorari when a trial court departs from the essential requirements of law on the basis of recent decisions of this Court restricting such petitions from being used where the State is by statute precluded from any appeal. Petitioner concedes this point in his Point II.

POINTS II & III

The trial court had no competent substantial evidence to support its finding that the victim was incompetent to testify. Such a finding was a departure from the essential requirements of law and was sufficient to authorize the District Court of Appeal to exercise its jurisdiction and issue the writ of certiorari.

ARGUMENT

POINT I

DISTRICT COURTS OF APPEAL HAVE AUTHORITY TO GRANT RELIEF BY THE COMMON LAW WRIT OF CERTIORARI WHEN A CIRCUIT COURT DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Petitioner requests this Court declare it has abolished the common law petition for writ of certiorari by the State of Florida. Respondent submits this Court has no authority to do so, and further submits that although recent decisions of this Court clearly suggest this Court will no longer permit a liberal granting of writs of certiorari, there is absolutely no basis for Petitioner's Argument that, "The State may not obtain certiorari review of decisions of the trial court where it has no right of appellate review."

Justice Boyd has addressed this issue in several opinions. He has cautioned against the very interpretation given to this Court's recent opinions by Petitioner, stating in his special concurrence in Jones v. State, 477 So.2d 566 (Fla. 1985):

> [Jones] could be read as holding that when there is no appeal available, certiorari is never available.
>
> * * *
>
> But it would be an erroneous interpretation of the Court's holding to conclude that when there is no entitlement to an appeal, certiorari is ipso facto not available as a remedy. To the contrary, the lack of an available remedy by appeal is one of the prerequisites to the issuance of the common-law writ of certiorari. The absence of

> a right to appeal does not preclude resort to certiorari; in fact it is one of the required elements making the aggrieved litigant eligible to seek issuance of the writ.

Respondent suggests that the Petitioner's confusion is generated by the subject matter of this Court's recent decisions involving attempts to abuse the common-law writ of certiorari in juvenile and probation cases which have purely statutory existence and which are specially designed by the legislature to limit the right of the State to appeal so as to ensure speedy resolution. Cf. R.L.B. v. State, 11 F.L.W. 174 (Fla. April 17, 1986), the State has no right to appeal an adverse order in a juvenile proceeding; D.A.E. v. State, 478 So.2d 815 (Fla. 1985), State has no right to appeal order dismissing delinquency petition; Jones v. State, supra, probation violation charges dismissed and no statutoty or other cognizable right to appeal, only ordinary legal error percieved by district court; State v. G.P., 476 So.2d 1272 (Fla. 1985), juvenile case with no discussion of circumstances save district court determined there was no basis for appeal; State v. C.C., 476 So.2d 144 (Fla. 1985) juvenile case, no statutory authority for state appeals and no departure from essential requirements of the law. It is clear this Court will not condone the granting of the writ in the absence of the common law requirements.

> The common law writ of certiorari may be exercised only to quash a lower-court judgment or order rendered without or in excess of

> jurisdiction or which constitutes a departure from the essential requirements of law when there is no other sufficient remedy (such as an appeal) available to the aggrieved litigant. See, e.g., Dresner v. City of Tallahassee, 164 So.So. 208 (Fla. 1964); State v. Andres, 148 Fla. 742, 5 So.2d 7 (1941); Cacciatore v. 147 Fla. 758, 3 So.2d 584 (1941); Mutual Benefit Health & Accident Association v. Bunting, 133 Fla. 646, 183 So. 321 (1938); American Railway Express v. Weatherford, 84 Fla. 264, 93 So. 740 (1922); Benton v. State, 74 Fla. 30, 76 So. 341 (1917); Jacksonville, Tampa, and Key West Railway v. Boy, 34 Fla. 389, 16 So. 290 (1894).

Jones v. State, supra.

On the other hand:

> It is clear that the district courts of appeal have authority to grant relief by the common-law writ of certiorari when a circuit court departs from the essential requirements of law. E.g., Dressner v. City of Tallahassee, 164 So.2d 208 (Fla. 1964); State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981); State v. Farmer, 384 So.2d 311 (Fla. 5th DCA 1980); State v. Gibson, 353 So.2d 670 (Fla. 2nd DCA 1978); State v. Wilcox, 351 So.2d 89 (Fla. 2nd DCA 1977); State ex rel. Wainwright v. Booth, 291 So. 2d 74 (Fla. 2nd DCA 1974); State v. Williams, 237 So.2d 69 (Fla. 2nd DCA 1970); Marlowe v. Ferreira, 211 So. 2nd 228 (Fla. 2nd DCA 1968); Gulf Cities Gas Corp. v. Cihak, 201 So.2d 671 (Fla. 2nd DCA 1966); Boucher v. Pure Oil Co., 101 So.2d 408 (Fla. 1st DCA 1957).

R.L.B. v. State, supra, Justice Boyd, concurring in part and dissenting in part.

POINTS II & III

THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY SUPPRESSING THE TESTIMONY OF THE VICTIM. THEREFORE THE GRANTING OF THE WRIT OF CERTIORARI BY THE DISTRICT COURT WAS WITHIN ITS AUTHORITY.

Contrary to his argument in Point I, supra, Petitioner in Point II of his initial brief changes horses in mid-stream and argues Respondent is "not entitled to certiorari review of a trial court ruling which did not depart from the "essential requirements of law." Respondent concedes this is the law and submits Petitioner's initial point on appeal is here conceded by Petitioner to be totally lacking in merit. Having dispensed with this issue, by Petitioner himself recognizing the State does have the ability to seek common law certiorari review, Respondent suggests this Court may no longer have jurisdiction as the instant cause of action is concededly not in direct conflict with decisions of this Supreme Court or decisions of other district courts of appeal. Fla. R. App. P., Rule 9.030(a)(2)(A)(iv).

TRIAL COURT'S ORDER IS A DEPARTURE FROM ESSENTIAL REQUIREMENTS OF LAW.

Petitioner concedes that if a manifest abuse of discretion is shown, the trial court's ruling may be disturbed. Rutledge v. State, 374 So.2d 975, 979 (Fla. 1979) cert. denied 446 U.S. 918, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980). Despite Petitioner's contention that the district court applied an in-

correct standard, the Fourth District Court of Appeal recognizes the standard of review in common law certiorari is a departure from the essential requirement of law. State v. Abelson, 11 F.L.W. 685 (Fla. 4th DCA March 19, 1986).

The instant case presents a serious error on the part of the trial judge. As the district court opinion held:

> [O]n the record as it existed at the time of the pretrial hearing the court's finding was unsupported by competent substantial evidence.

State v. McIntosh, 475 So.2d 973 (Fla. 4th DCA 1985). This is precisely the type of violation of a clearly established principle of law resulting in a miscarriage of justice which this Court has determined to be appropriate for district courts to grant writs of common law certiorari. Combs v. State, 436 So.2d 93 (Fla. 1983).

The review by certiorari of whether a trial judge's findings are supported by the evidence has long been recognized by this Court.

> In certiorari the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law.

DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957).

The district court's grant of the writ is fully supported by the record. The victim adequately answered the questions which were pertinent to the crime charged. This was true not only of the deposition taken on May 18, 1983, but more particularly during the deposition of October 13, 1983, at which the anatomically correct dolls were used. She admittedly became less responsive during the proffer in front of the judge. However, even there during direct examination by the prosecutor (R 104-114), she testified that Petitioner was present on the night of the incident, and demonstrated what he did to her using the dolls (R 108-110), and again testified that Petitioner took her panties off and put them on the floor. (R 110). The "no responses" multiplied during cross-examination by defense counsel (R 114-122), but Respondent maintains that an examination of that portion of the transcript will show that very few of the questions put to the witness during that cross-examination were relevant to the incident. They prompted objections from the prosecutor which were sustained by the trial judge. (R 119, 121).

The victim's responses during the depositions clearly demonstrated she was capable of responding adequately. The trial court had no competent substantial evidence before it to support its finding and order. The district court's granting of the writ of certiorari must therefore be affirmed. Combs, DeGroot, supra.

CONCLUSION

For the foregoing reasons the Respondent submits this Honorable Court must affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to JEFFREY L. ANDERSON, ESQ., Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 22nd day of April 1986.

Of Counsel