IN THE SUPREME COURT OF FLORIDA

JOHN McINTOSH, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. _____

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, FL 33401
(305) 837-2150

JEFFREY ANDERSON
Assistant Public Defender

ANTHONY CALVELLO
Assistant Public Defender

Counsel for Petitioner.

TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was Appellee and the defendant and Respondent was the Appellant and the prosecution in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

"R" Record on Appeal.

"A" Appendix

STATEMENT OF THE CASE AND FACTS

The State of Florida appealed to the Fourth District Court of Appeal an order which dismissed an information and which declared a witness incompetent. The state, in the trial court, agreed that because of evidentiary rulings, declaring a minor witness incompetent and disallowing hearsay testimony, there was insufficient evidence to establish a prima facie case. The Fourth District Court of Appeal expressly treated the notice of appeal as a petition for writ of certiorari from a pretrial order holding that a minor witness was incompetent to testify at trial. See Appendix 1. The writ was granted and the ruling that the witness was incompetent to testify was reversed. Appendix 1. The Fourth District specifically held that the trial court's finding that the witness was incompetent was not supported by substantial competent evidence. Appendix 1. The Fourth District subsequently denied Petitioner's motion for rehearing. Appendix 2. Petitioner thereafter filed the instant cause in this Court.

SUMMARY OF THE ARGUMENT

By expressly treating the state's notice of appeal as a writ of certiorari from a pretrial order holding a minor witness incompetent, the district court's decision conflicts with Jones v. State, No. 64,042 (Fla. October 17, 1985); State v. G.P., No. 63,313 (Fla. August 30, 1985), State v. C.C., No. 64,354 (Fla. August 29, 1985).

In reviewing the trial court's evidentiary ruling the district court used certiorari to review "legal error", thus its decision is in conflict with Combs v. State, 436 So.2d 93 (Fla. 1983) which holds that certiorari may only be used where there is a "departure from the essential requirements of law."

Finally, the standard which the district court of appeal used to review whether the trial court's ruling should be disturbed conflicts with Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. den. 446 U.S. 918, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980).

ARGUMENT

POINT INVOLVED

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

Petitioner invokes this Court's "conflict" jurisdiction under Article V, §3(b)(3), Florida Constitution (1980) and Fla.R.App.P. 9.030(a)(2)(iv). Said rule provides that review may be sought of "decisions of district courts of appeal that: (iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law."

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the Supreme Court or another district, or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975).

At bar, the Fourth District Court of Appeal treated "the state's notice of appeal as a petition for writ of certiorari from a trial court pretrial order holding that a minor witness was incompetent to testify at trial...." The lower court granted the petition for writ of certiorari. By expressly treating the state's notice of appeal as a writ of certiorari from a pretrial order holding a minor witness incompetent the district court of appeal's decision in this case conflicts with this Court's decisions of Jones v. State, Case No. 64,042 (Fla. October 17,

1985) [10 FLW 565] and State v. G.P., Case No. 63,613 (Fla. August 30, 1985) [10 FLW 469] which hold that no right to review by certiorari exists if no right to appeal exists. In Jones, supra, this Court quashed a district court's decision where, as in the present case, the district court expressly stated that an unavailable appeal would be treated as a petition for writ of certiorari. The instant decision also conflicts with State v. C.C., Case No. 64,354 (Fla. August 29, 1985) [10 FLW 435], where this Court held that the state constitution permits interlocutory review only in cases in which an appeal may be taken as a matter of right. The writ of certiorari may not be used to circumvent the limitations on appellate review as was done in this case. Hence, the decision at bar expressly and directly conflicts with this Honorable Court's decisions in Jones v. State, State v. G.P. and State v. C.C. on the same question of law. Therefore, this Honorable Court should grant Petitioner's petition for jurisdiction.

In addition, the decision of the district court conflicts with Combs v. State, 436 So.2d 93 (Fla. 1983). In Combs, this Court held that certiorari may be used only where there is a "departure from the essential requirements of law." 436 So.2d at 95,96. Here, the district court used certiorari to review mere "legal error". The writ of certiorari was used to determine if there was competent substantial evidence to support a trial court's finding that a minor witness was incompetent to testify. The trial court's determination that the minor witness was incompetent to testify, if erroneous, was "legal error" and not a

"departure from the essential requirements of law." Hence the decision at bar expressly and directly conflicts with this Honorable Court's decision in Combs v. State, supra.

Finally, the decision of the district court conflicts with this Court's decision in Rutledge v. State, 374 So.2d 975 (Fla. 1979), cert. den. 446 U.S. 918, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980). In Rutledge, this Court held that a trial court's ruling on the competency of a minor would not be disturbed unless a "manifest abuse of discretion is shown." 374 So.2d at 979. In its decision the district court, reviewing a cold record, stated "The fact that the minor witness had an erratic record of responding at times to some questions while being unresponsive at other times is not, in our view, a basis to adjudge her not competent to be called as a witness at trial." Appendix 1. Thus, the district court has disturbed the ruling of the trial court not because "manifest abuse of discretion" was shown, but merely because in their own view the witness was not incompetent. It should also be noted that the trial court's ruling was largely based on his observation of the witness. Appendix 3. The lower court merely substituted its judgment for that of the lower court creating express conflict with the Rutledge case.

CONCLUSION

This Court may and should review the decision of the district court of appeal in the exercise of its certiorari jurisdiction.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, FL 33401
(305) 837-2150

Jeffrey Anderson
JEFFREY ANDERSON
Assistant Public Defender

Anthony Calvello
ANTHONY CALVELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to ROBERT S. JAEGERS, Assistant Attorney General, Room 704 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 30th day of October, 1985.

Anthony Calvello
Of Counsel