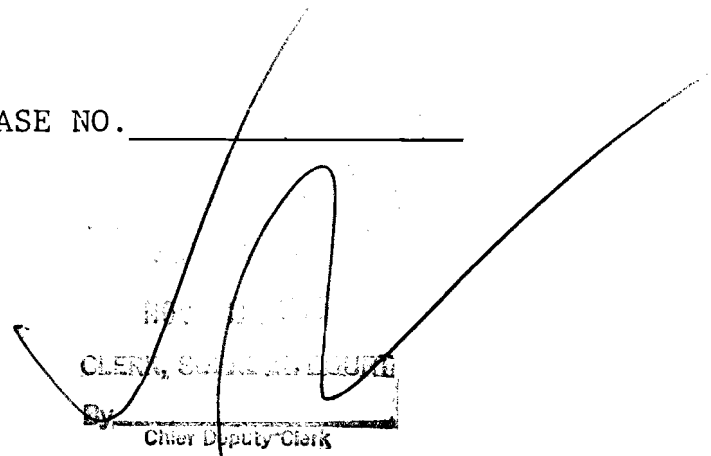


IN THE SUPREME COURT OF FLORIDA

JOHN McINTOSH,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. _____



CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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AMENDED

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2-4
POINT INVOLVED	5
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6-9
THIS COURT HAS NO JURISDICTION AS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS NOT IN CONFLICT WITH ANY DECISION OF THIS HONORABLE COURT.	
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

	<u>Page</u>
<u>Combs v. State</u> , 436 So.2d 93 (Fla. 1983)	8
<u>Jones v. State</u> , 10 F.L.W. 565 (Fla. October 17, 1985)	3, 6
<u>Kaelin v. State</u> , 410 So.2d 1355 (Fla. 4th DCA 1982)	8
<u>Mancini v. State</u> , 312 So.2d 32, 733 (Fla. 1975)	8
<u>State v. C.C.</u> , 10 F.L.W. 435 (Fla. August 29, 1985)	3, 6
<u>State v. G.P.</u> , 10 F.L.W. 469 (Fla. August 30, 1985)	3, 6

OTHER AUTHORITIES

Florida Statute §924.07	3
Fla. R. App. P. 9.140(c)(1)(A)(B)	2
Fla. R. App. P. 9.140(c)	2
Fla. R. App. P. 9.140(c)(1)(B)	2

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, appealed to the Fourth District Court of Appeal the Order of the trial court granting Petitioner's Motion to Dismiss and to declare the victim incompetent to testify as a witness in the Petitioner's trial. Respondent timely filed its Notice of Appeal and briefs were filed. The District Court of Appeal entered an Order to Show Cause directing Respondent to demonstrate the authority upon which the State based its right to appeal and to the jurisdictional basis upon which the District Court of Appeal could act on the appeal. A response to this Order to Show Cause was filed by Respondent, the State of Florida, citing as authority Florida Rule of Appellate Procedure, Rule 9.140(c)(1) (A) and (B). Respondent also indicated the District Court might treat the appeal as a petition for a common law writ of certiorari pursuant to Florida Rule of Appellate Procedure, 9.140 (c). Petitioner responded by arguing that the order dismissing the information did not constitute a separate order suppressing the evidence, even though on the face of the order of dismissal the trial court held the victim incompetent to testify in the case. Further, Petitioner responded that this finding was not appealable under Florida Rule of Appellate Procedure, Rule 9.140 (c)(1)(B). Petitioner further responded that the District Court should not grant common law certiorari.

In its opinion, the District Court treated the Respondent's Notice of Appeal as a petition for writ of certiorari from a trial court pretrial order holding the victim incompetent to testify at trial. (Petitioner's Brief, A-1). The District Court granted the writ of certiorari and held that the trial court's finding that the victim was incompetent was unsupported by competent substantial evidence. (A-1).

Petitioner moved for rehearing on the basis of this Court's decisions in State v. G.P., 10 F.L.W. 469 (Fla. August 30, 1985), and State v. C.C., 10 F.L.W. 435 (Fla. August 29, 1985). Respondent replied that this Court clearly indicated in both of the above opinions, that the cases turned on the issue of whether the State is provided an appeal by statute, which the State was not provided in those cases. The District Court denied Petitioner's Motion for Rehearing. (A-2). Petitioner thereafter filed the instant cause in this Honorable Court.

The victim was a nine year old girl staying with her younger brother and sister at the home of her grandmother. Petitioner was a friend of the family who also was spending the night at the grandmother's residence. During the evening, Petitioner, who had been sleeping on a couch across from the bed on which the victim and her brother and sister were sleeping, approached the victim, unclothed her, sucked on her breasts, put his fingers inside her vagina and his penis up against her body. The grandmother had been out of the house for approximately half an hour and when she returned she saw the victim's panties on the floor next to her bed. The victim told her grandmother that Petitioner

had taken her panties off of her and molested her. The victim later demonstrated what had happened to police using two anatomically correct dolls. The victim was subjected to two depositions, and finally, at a third hearing before the trial court on November 14, 1983, the trial court judge declared the victim incompetent to testify based upon her numerous "no responses."

POINT INVOLVED

WHETHER THIS COURT HAS ANY JURISDICTION AS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS NOT IN CONFLICT WITH ANY DECISION OF THIS HONORABLE COURT?

SUMMARY OF THE ARGUMENT

There is a statutory right of appeal available to Respondent in the instant case pursuant to Florida Statute §924.07. Consequently, this case is clearly distinguishable from Jones v. State, 10 F.L.W. 565 (Fla. October 17, 1985); State v. G.P., 10 F.L.W. 469 (Fla. August 30, 1985); and State v. C.C., 10 F.L.W. 435 (Fla. August 29, 1985), in which cases the State did not possess a statutory or other cognizable right to appeal. There is, therefore, no basis for Petitioner's claim that the decision of the Fourth District Court of Appeal, below, is in conflict with decisions of this Honorable Court.

ARGUMENT

THIS COURT HAS NO JURISDICTION
AS THE DECISION OF THE FOURTH
DISTRICT COURT OF APPEAL IS NOT
IN CONFLICT WITH ANY DECISION
OF THIS HONORABLE COURT.

The three cases which Petitioner cites as the main bases for his claim of conflict involve situations where the State did not possess a statutory or other cognizable right to appeal. Jones v. State, 10 F.L.W. 565 (Fla. October 17, 1985); State v. G.P., 10 F.L.W. 469 (Fla. August 30, 1985); and State v. C.C., 10 F.L.W. 435 (Fla. August 29, 1985). In the instant case, Respondent possessed a statutory right of appeal pursuant to Florida Statute §924.07(1) and §924.07(8). As has been often cited by this Court, the State may, pursuant to these sections, appeal from an order dismissing an indictment or information and all other pretrial orders (such as pretrial orders finding the victim incompetent to testify). For this reason, Respondent submits that the three cases relied upon by Petitioner are clearly distinguishable. In both State v. G.P. and State v. C.C., this Court held that Chapter 39 of the Florida Statutes, dealing with juvenile proceedings, did not provide for an appeal by the State of Florida and therefore, Chapter 39 being a purely statutory creation, a common law petition for writ of certiorari would not be permitted to afford the State an appeal where the Legislature did not intend one to exist. In Jones v. State, this Court similarly quashed the District Court's opinion

and dismissed the petition for writ of certiorari where the District Court found no appeal available to the State but treated the appeal as a petition for writ of certiorari. Thus, all three of these cases are predicated upon the non-existence of a right to appeal on the part of the State.

Respondent suggests that the District Court may have chosen to consider the State's Notice of Appeal as a petition for writ of certiorari unnecessarily. Nevertheless, the common-law writ of certiorari is within the jurisdiction of the District Courts of Appeal and issuable in the Appellate Court's discretion under circumstances when there is no right of appeal. Of course, the lack of availability of an appeal or other remedy is normally one of the prerequisites to the issuance of the writ. Only when there is no other adequate remedy available should the question of seeking or providing certiorari review arise. Respondent contends that it was entitled to appellate review of the trial court's order suppressing the victim's testimony and dismissing the information. However, the District Court of Appeal elected to treat Respondent's Notice of Appeal as a petition for writ of certiorari even though in Respondent's belief this writ was unnecessary as, as was stated before, the State did have a right to appeal pursuant to statute.

This Court's "conflict" jurisdiction under Article V, Section 3(b)(3), Florida Constitution (1980) and Fla.R.App.P. 9.030(a)(2)(iv) is not available in this case because there is neither (1) the announcement of a rule of law which conflicts

with a rule previously announced by this Court or another District Court, nor (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as another case. Cf. Mancini v. State, 312 So.2d 32, 733 (Fla. 1975).

In a response to Petitioner's suggestion that the decision of the Fourth District Court of Appeal conflicts with Combs v. State, 436 So.2d 93 (Fla. 1983), holding that certiorari may be applied only where there is a "departure from the essential requirements of law," Respondent submits that the proper reading of the complete opinion in Combs shows that this Court found "the phrase 'departure from the essential requirements of law' should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure." *Supra* at 95. This Court held that a District Court should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. In the trial court below there was a violation of a clearly established principle of law resulting in a miscarriage of justice. The District Court recognized this in citing to Kaelin v. State, 410 So.2d 1355 (Fla. 4th DCA 1982), a similar type of case involving a sexual battery victim with language abilities of a six to eight year old child. Respondent therefore submits that there is clearly no conflict between the District Court's opinion below and this Court's opinion in Combs v. State.

Finally, when viewed in light of Kaelin, supra, the trial court committed a "manifest abuse of discretion." Respondent submits that the District Court was fully justified in pointing out that the trial court's finding that the victim was incompetent to testify was unsupported by competent substantial evidence. As the record indicates, contrary to Appellant's contentions, the victim did present a coherent and completely understandable description of the sexual battery committed by Petitioner. It was only when trial defense counsel propounded numerous irrelevant questions to the nine year old victim that the "no responses" multiplied. Respondent acknowledges that the standard of abuse of discretion is a difficult one, however, under the circumstances of the instant case, Respondent submits there was an abuse of discretion. To permit the trial court's order to stand would work a cruel irony permitting an alleged perpetrator of a crime to escape from a trial on the charge due to the very trauma perpetrated on the victim. The victim's responses during her depositions demonstrated that she was capable of responding adequately. The trial court's order took away the opportunity to call the victim as a witness at trial where she may have become more articulate.

CONCLUSION

This Honorable Court should decline to grant the writ of certiorari as there is no basis for this Court to assert discretionary jurisdiction because there is no express and direct conflict with a decision of another District Court of Appeal or of this Supreme Court on the same question of law.

Respectfully submitted,

JIM SMITH
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Tallahassee, Florida

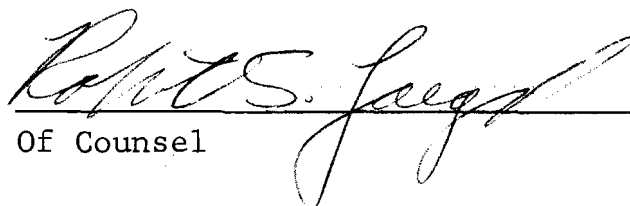


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to JEFFREY ANDERSON, ESQ., Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 19th day of November 1985.


Of Counsel