IN THE SUPREME COURT OF FLORIDA

JOHN McINTOSH, Petitioner, v. STATE OF FLORIDA, Respondent.	)	CASE NO. 67,819

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the defendant in the trial court. Respondent was the Appellant in the court below and the prosecution in the trial court. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbols will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

(Limited to the issues before the Court)

On March 31, 1983, Petitioner, JOHN M. McINTOSH, was charged by information with committing a 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 alleged assault was [redacted] (hereinafter referred to as "[redacted]").

A deposition of [redacted] was taken on May 18, 1983 (R1-29). [redacted] did not respond to approximately forty (40) questions asked of her. She could essentially only give "yes" or "no" responses to leading questions.

On May 26, 1983, Petitioner filed a motion exclude [redacted] as a witness due to her unresponsiveness at the May 18 deposition alleging that the Petitioner would be deprived of his right to effective cross-examination if she was allowed to testify at trial (R164).

Several hearings were held on that motion, the first being on June 9, 1983 (R47-75). The prosecutor argued that [redacted] had been able to give a ten page statement on the night of the incident (R60). The prosecutor also admitted that [redacted]'s statement to the police consisted of answers to questions by police officers (rather than a narrative), some of which were "very leading in nature" (R60). The trial judge stated that [redacted] should not repeat what someone coaches her to say (R59). The prosecution stated that he had gone over her testimony with her prior to the hearing and that he had extensive talks with her (R63). The hearing concluded without a ruling on the motion.

A second hearing was held on September 22, 1983 (R76-94). Again, the motion to exclude [redacted]'s testimony was argued. The trial judge indicated that he could not rule on the motion without observing the witness (R81). The prosecutor indicated that he was going to use anatomically correct dolls to aid [redacted]'s testimony (R88). Defense counsel requested that she be allowed to use dolls in another deposition of [redacted] to see how she would testify (R89). The trial court ruled that the defense should be given such an opportunity and denied the motion to exclude the witness pending the new deposition (R89-92).

A deposition of [redacted] took place on October 13, 1983 (R33-46). Again, she was unable to answer numerous questions, and what responses she did make were essentially "yes" or "no" answers to leading questions.

A third hearing was held on November 14, 1983, the proposed day of trial. The trial court indicated that he would have to hear a proffer of [redacted]'s testimony before ruling on her competency and letting her testimony go before the jury (R95-96). A jury was picked before the proffer, but was not sworn (R98-99,130).

During the proffer, [redacted] failed to respond to eighty (80) questions (R104-123). On direct examination by the prosecutor, she would not respond to questions concerning: (1) Whether she saw John McIntosh in the courtroom (R106,107); (2) Whether she remembered what happened (R113); (3) What John McIntosh was doing prior to the alleged incident (R113); (4) What John McIntosh said to her (R109); (5) What she said to him (R109,113); (6) Where she

was pointing to on the anatomical doll (R109); (7) Where John McIntosh had touched her (R109); (8) What John McIntosh said after the incident (R111); (9) What she told her grandmother after the alleged incident (R111); (10) When John McIntosh had done things (R112); (11) When her grandmother had returned (R113); and (12) Whether John McIntosh had given her a dollar bill after the alleged incident (R114). [redacted] did respond to a few questions. [redacted] responded "yes" to the question whether John was a friend of her aunt (R106). She responded "John" when she was asked who took her panties off (R109), she pointed to the female doll when asked where John had touched her (R109) (and then refused to answer questions concerning where else he had touched her or to explain where she was pointing to) (R109-110), and she responded "before and after" when asked whether John had started doing these things before or after her grandmother left (referring to him offering her a dollar bill) (R112). [redacted] failed to respond to the vast majority of questions during cross-examination (R114-122), including questions about the incident and the difference telling the truth and telling lies (R121).

After the proffer, the trial court recognized that [redacted] would not answer questions addressed to her (R127). The trial court felt that Petitioner would be prejudiced, and unable to properly defend himself, when confronted with the unresponsive witness (R127). The trial court also noted that [redacted] would not

even look at him nor communicate, when he tried to get her to talk (R128-129). Finally, the trial court declared [redacted] incompetent to testify:

> THE COURT: If you can tell - well you cannot do that. I don't suppose because -- I hate to do it but that's what I have to do. It's something I rather leave in the hands of the jury but I don't feel I can do that and still live with myself on the thing. I am going to declare her incompetent.
>
> (R129).

Thereafter, the prosecutor stated that the state could not proceed with the case without [redacted]'s testimony (R130,132), but made it clear that the state was not abandoning prosecution (R132). The prosecutor requested the trial court to enter a written order excluding the witness for the state to appeal (R131). The prosecutor asked for a continuance to enable him to decide whether he would appeal the order (R132). The trial court granted the continuance (R133).

Another hearing was held on November 28, 1983 (R134-143). The prosecutor announced that the state was ready for trial (R134). Defense counsel moved that the state not be permitted to use a statement made by [redacted] to her grandmother as evidence maintaining that the statement was inadmissible hearsay (R136-137). The statement was made to her grandmother in response to a question by the grandmother. Initially [redacted] would not respond to the question (SR9). It was only after the grandmother threatened [redacted] with telling her mother that [redacted] made the statement (SR9). Defense counsel also moved to dismiss the case on the grounds that the state could not establish a prima facie

case without [redacted]'s testimony (R134,168). Both the prosecutor and defense counsel agreed that no medical evidence would be offered (R139). The trial court deferred ruling on the motions (R142-143).

A final hearing was held on November 29, 1983 (R144-148). During the hearing Petitioner moved to preclude the hearsay statement from being introduced into evidence (R145). The trial court found the statement made by [redacted] to her grandmother to be inadmissible hearsay since the statement was elicited by a question from the grandmother (R147). It was agreed that the state needed either the testimony of [redacted] or her statement to her grandmother in order to prosecute the case (R146). Because [redacted] was found incompetent to testify and because her statement was not admissible, the trial court dismissed the case (R147, 148). The trial court entered an order to that effect in writing (R169).

The state filed a notice of appeal (R170). The issues on appeal were whether the trial court erred in ruling [redacted] incompetent to testify and in ruling that the hearsay statements were inadmissible. 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 (Appendix 1). In its opinion filed September 11, 1985, the Fourth District decided that [redacted]'s statement to her grandmother would not be admissible and

that the trial court's ruling that [redacted] was incompetent to testify was not supported by competent substantial evidence (Appendix 1).

On September 23, 1985, Petitioner moved for rehearing. On October 16, 1985, Petitioner's motion was denied.

On October 21, 1985, Petitioner/Appellee timely filed his Notice of Invocation of Discretionary Jurisdiction asserting direct conflict with decisions of this Court. A motion for Stay of Mandate was filed October 21, 1985, and the Fourth District entered an order granting the motion on November 21, 1985. This Honorable Court accepted jurisdiction, dispensing with oral argument, by its order issued March 14, 1986.

SUMMARY OF THE ARGUMENT

POINT I: There is no statute or constitutional provision which authorizes an appeal of a pretrial order holding a minor witness incompetent to testify. Certiorari review may not substitute for appellate review where there is no authority for appellate review. Consequently, the district court erred in treating 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.

POINT II: Certiorari review is only permitted where a trial court's ruling departs from the "essential requirements of law." In the instant case the issue was whether the trial judge abused his discretion in declaring a witness incompetent to testify. Thus, certiorari was granted to review what, at best, would be mere "legal error." Consequently, certiorari review could not be granted in this case.

POINT III: A trial court's ruling as to the competency of a minor witness will not be disturbed unless a manifest abuse of discretion is shown. In the instant case the trial judge declared the witness incompetent based on his personal observations of the witness and based on the nature of her responses, or lack of, in her attempts to relate what had occurred. It cannot be said, based upon the cold record, that there was a manifest abuse of discretion by the trial judge in ruling the witness incompetent to testify.

ARGUMENT

POINT I

THE STATE MAY NOT OBTAIN CERTIORARI REVIEW OF DECISIONS OF THE TRIAL COURT WHERE IT HAS NO RIGHT OF APPELLATE REVIEW.

The Fourth District treated the state's notice of appeal as a petition for writ of certiorari from a trial court pretrial order holding a minor witness incompetent to testify (Appendix 1).

There is no statutory authority or rule authorizing an appeal of such a pretrial order by the state. No constitutional right to appeal a pretrial order holding a minor incompetent exists, the district court erred in reviewing the case by certiorari. This Court's decision in Jones v. State, 477 So.2d 566 (Fla. 1985) is dispositive of the issue in this case:

> The question we have to answer, therefore, is whether an appellate court can afford review to the state by way of certiorari when the state has no statutory or other cognizanable right to appeal the judgment sought to be reviewed.
> We have recently considered that issue. In State v. C.C., 476 So.2d 144 (Fla.1985), we held that article V, section 4(b)(1) of the state constitution permits interlocutory review only in cases in which an appeal may be taken as a matter of right. Moreover, we approved State v. G.P., and held that no right of review by certiorari exists if no right of appeal exists. State v. G.P., 476 So.2d 1272 (Fla. 1985). The district court erred in the instant case, therefore, in reviewing by certiorari a case it could not review by appeal. We quash Jones and direct that the petition for writ of certiorari be dismissed.
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> 477 So.2d at 566.

As in Jones, the question of whether the district court correctly found no appeal available to the state is not in question. It should be noted that the state agreed that because of the adverse evidentiary rulings (i.e. [redacted]'s incompetency and the inadmissibility of the hearsay statement) that there was not sufficient evidence to establish a prima facie case. Thus, the issues only involved these evidentiary rulings. The district court afforded review of the evidentiary rulings by treating the notice of appeal as a petition for writ of certiorari. As argued supra, this was error.

Based on the authorities cited herein, the Fourth District Court of Appeal erred by treating the notice of appeal as a petition for writ of certiorari. Hence the decision at bar should be reversed and the state's appeal dismissed.

POINT II

WHERE THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW, THE COURT OF APPEAL ERRED BY TREATING THE STATE'S IMPROPER APPEAL AS A PETITION FOR WRIT OF CERTIORARI, AND BY GRANTING THE WRIT.

The government was not entitled to certiorari review of a trial court ruling which did not depart from the "essential requirements of law." Combs v. State, 436 So.2d 93 (Fla. 1983). This is the same standard as that for fundamental error. Gulf Cities' Corp. v. Cihak, 301 So.2d 250 (Fla.2d DCA 1967). In his concurring opinion in Jones v. State, 477 So.2d 566 (Fla. 1985), Justice Boyd details the high standard required for certiorari review:

> It is important to distinguish the concept of a "departure from the essential requirements of law" from the concept of legal error. On a petition for the common-law writ of certiorari, the legal correctness of the judgment of which review is sought is immaterial. The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.
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> 477 So.2d at 569.

Accordingly, the issue now before this Court is whether the trial court committed "an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice."

The ruling of the trial court as to the competency of a minor witness will not be disturbed unless a manifest abuse of discretion is shown. Rutledge v. State, 374 So.2d 975,979 (Fla. 1979), cert. den. 446 U.S. 918, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Rowe v. State, 87 Fla.17, 98 So.613 (1924). This is the standard of review for "legal error." There must be something far beyond a manifest abuse of discretion, the legal error in this case, to permit certiorari review. There clearly was no departure from the essential requirements of law where the trial judge based his ruling on the unresponsiveness of the witness and his own observations of the witness. 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). It is clear that the district court was, at best, analyzing mere "legal error", and not a departure from the essential requirements of law. Consequently, the district court erred by treating 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.

POINT III

THE TRIAL COURT DID NOT ERR IN RULING THAT THE MINOR WITNESS WAS INCOMPETENT TO TESTIFY AT TRIAL.

Proceeding to the merits of this case, the trial court did not err in declaring the witness incompetent to testify.

It is within the sound discretion of the trial judge to decide whether a minor witness has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling will not be disturbed unless a manifest abuse of discretion is shown. 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). The prerequisites of competency have been universally recognized. A witness must have sufficient intelligence to understand the nature and obligations of the oath and the ability to perceive, remember and narrate the incident. Kaelin v. State, 410 So.2d 1355 (Fla.4th DCA 1982). A decision concerning the competency of a child to testify is one peculiary within the discretion of the trial judge because the evidence of intelligent, ability to recall, relate and to appreciate the nature and obligations of an oath are not fully portrayed by a bare record. Fernandez v. State, 328 So.2d 508 (Fla.3d DCA 1976), cert. den. 341 So.2d 1081 (Fla. 1976).

In the case at bar, [redacted] simply could not in any way narrate what happened to her. The trial judge specifically found that "I do not feel that she is competent to testify because she won't -- she just won't answer questions. And if you say she is able to answer questions and she won't, I think its prejudicial

to the defendant... I, I have got to declare her, her testimony incompetent on the basis of what I have seen here today.... She would not even look at me in the eyes and I just wanted to say anything to her to get her to communicate. She wouldn't look up at the defendant when I said can you identify him...If you can -- well, you cannot do that I don't suppose because -- I hate to do it but that's what I have to do. It's something I'd rather leave in the hands of the jury but I don't feel I can do that and still live with myself on the thing. I am going to declare her incompetent." (R80-83).

Thus, the trial judge obviously made his decision based not only on the oral responses or lack thereof of the witness, but also upon his own perceptions of the witness. It certainly cannot be said based on the bare record that the trial judge abused his discretion in reaching that conclusion. All reasonable inferences and deductions capable of being drawn from the evidence must be interpreted in a light most favorable to sustain the trial court. Churney v. State, 348 So.2d 395 (Fla.3d DCA 1977); Crawford v. State, 334 So.2d 141 (Fla.3d DCA 1976).

The witness in this case was similar to the witness in McKinnies v. State, 315 So.2d 211 (Fla.1st DCA 1975). There, the primary witness was mentally unable on his own initiative to verbalize the elements of the alleged crime, testified only in response to leading questions, and gave contradictory answers to leading questions concerning the obligations of the oath. This is exactly what [redacted] did in the case at bar.

In addition to being unable to narrate the incident, [redacted] was totally unresponsive to cross-examination. Of course, the Sixth Amendment guarantees a defendant the right to cross-examine witnesses against him. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 115, 39 L.Ed. 347 (1974). Here, [redacted]'s total failure to respond to cross-examination deprived Appellant of that right. It was therefore proper for the Court to exclude her from testifying based on that reason. This is similar to a court striking a witness where a defendant's cross-examination is restricted by the witness exercising his fifth amendment right. See U.S. v. Cardillo, 316 F.2d 606 (2d Cir. 1963), cert. den. 375 U.S. 822 (1963); Fountain v. United States, 384 F.2d 624 (5th Cir. 1967), cert. den., 390 U.S. 1005 (1968); Kelly v. State, 420 So.2d 81 (Fla.2d DCA 1983) pet. for rev. den. 434 So.2d 888 (Fla. 1983).

In summary, there was no showing of a manifest abuse of discretion by the trial court in declaring the minor witness incompetent to testify. Consequently, the decision of the district court should be reversed.

CONCLUSION

For the reasons stated in Points I and II, Petitioner respectfully requests this Honorable Court to reverse the decision of the court of appeal and direct that the petition for writ of certiorari in the court of appeal be dismissed.

For the reasons stated in Point III, Petitioner requests this Honorable Court to reverse the decision of the court of appeal and affirm the rulings of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to ROBERT S. JAEGERS, Assistant Attorney General, Room 204 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 31st day of March, 1986.

Jeffrey L. Anderson
Of Counsel