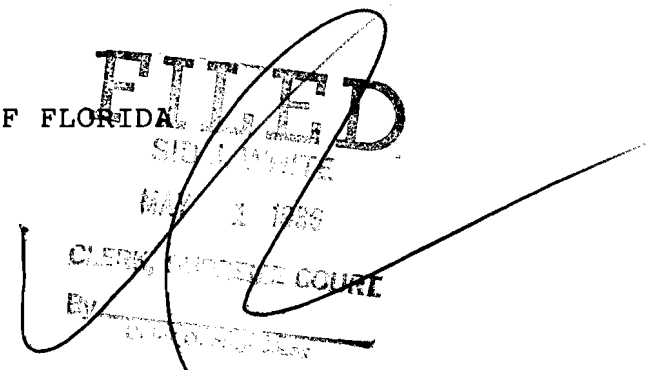
IN THE SUPREME COURT OF FLORIDA



JOHN McINTOSH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,819

PETITIONER'S REPLY 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.

The following symbols will be used:

"R"	Record on Appeal.
"SR"	Supplemental Record.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as presented in his Initial Brief, but would clarify several of the facts presented in Respondent's Statement of the Case and Facts.

Respondent refers to the facts alleged in the probable cause affidavit filed in this case. [redacted] never testified to those same facts in later depositions and court appearances. The affidavit was also incorrect in its alleged summary. The depositions of [redacted] ([redacted]'s grandmother) and [redacted] ([redacted]'s mother) indicate that [redacted] left [redacted] at her home while [redacted] went to her eldest daughter's house (SR7-8). When [redacted] returned, she saw [redacted]'s underwear on the floor (SR8). When [redacted] asked [redacted] about the underwear, [redacted] did not respond (SR9). It was only after the grandmother threatened [redacted] with telling her mother that [redacted] said that John made her take her panties off (SR9). [redacted] did not say anything else to the grandmother about the alleged incident (SR9,12). Thereafter, [redacted] did not tell her mother about what happened, if anything (SR24, 25).

Respondent refers to a ten page statement which the prosecutor alleged that [redacted] made on the night of the incident (R60). The prosecutor admitted that [redacted]'s statement to the police consisted of answers to questions by the officer (rather than a narrative), some of which were "very leading in nature" (R60).

Respondent refers to the October 13, 1983, deposition of [redacted]. At that deposition [redacted] was unable to answer numerous questions, and what responses she did make were essen-

tially yes or no, or two or three word, answers to leading questions (R33-46). She did not give narrative responses as it would appear from Respondent's statement of the facts.

Respondent refers to the November 13, 1983, hearing in which Teika failed to respond to eighty (80) questions. [redacted]'s "testimony" referred to by Respondent in its statement of the case and facts consisted of her responding yes to the question whether John was a friend of her aunt (R106), her responding "John" when she was asked who took her panties off (R109), her pointing to the female doll when asked where John had touched her (R109) (and then refusing to answer questions concerning where else he had touched her or to explain where she was pointing to) (R109-110), and her response "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).

In its statement of the case and facts, Respondent also states that the numerous no responses during cross-examination related to questions which did not relate to the incident. But many questions were relevant to what took place before, during, and after the incident and were relevant in regard to her prior statements she had made. For example, [redacted] would not respond when asked what happened while her grandmother was still at the residence, when asked what happened after her grandmother left, when asked whether she had ever told her grandmother what

happened, when asked about what she had told the police officer, and when asked questions concerning whether she knew the difference between telling the truth and telling lies (R114-122).

Petitioner relies on his statement of the Case and Facts to detail examples of the types of questions [redacted] would not respond to and for the trial court's observations of [redacted].

ARGUMENT

POINT I

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

In Point II of his brief, Respondent makes the frivolous claim that Petitioner has conceded this point to be of no merit. Respondent fails to realize that Points I and II involve separate issues regarding the applicability of certiorari review to the instant case. Petitioner is not changing "horses in mid-stream," but rather, has two separate arguments as to why certiorari review should not have been granted. First, review should not have been granted because certiorari review is not a substitute for appellate review where there is no authority for appellate review. Jones v. State, 477 So.2d 566 (Fla. 1985). Second, assuming arguendo that certiorari review could be substituted for appellate review where there is no authority for appellate review, certiorari review is still not available where the trial court's ruling does not depart from the "essential requirements of law." Combs v. State, 436 So.2d 93 (Fla. 1983). By making the second argument, Petitioner does not concede the first argument.

As to this point, it is clear that an appellate court cannot afford review to the state by way of certiorari when the state has no statutory or other cognizable right to appeal. R.L.B. v. State, 11 FLW 174 (Fla.April 17, 1986); D.A.E. v. State, 478 So.2d 815 (Fla. 1985); State v. G.P., 476 So.2d 1272 (Fla. 1985); State v. C.C., 476 So.2d 144 (Fla. 1985); Jones, supra. It is

also clear that there is no statutory or other cognizable right for the state to review the trial court's evidentiary finding in this case. Thus, the district court could not review the evidentiary finding by way of certiorari review. This Honorable Court should not question the wisdom of the legislature in failing to authorize an appeal by the state under the circumstances presented here. And more important, this Honorable Court should not provide what the legislature had denied in the form of certiorari. Petitioner relies on his initial brief for further argument on this Point.

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 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. denied, 446 U.S. 918, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980). Once again, this is the "legal error" necessary for reversal on direct appeal. Petitioner does not concede that this legal error is sufficient to grant certiorari review. Rather, there must be some act of judicial tyranny perpetrated with disregard of procedural requirements which results in a gross miscarriage of justice (i.e. a departure from the essential requirements of law). Moreover, Petitioner maintains that neither a departure from the essential requirements of law nor mere legal error has been demonstrated.

Contrary to Respondent's assertions, Teika Gates never could narrate what happened. She was only able to respond "yes" or "no" to a few very leading questions during depositions. When she was proffered in front of the judge, without jury or spectators present, she could only answer a few leading questions,[1] and was unresponsive to eighty (80) questions. The use of the anatomical doll did not help. Teika only pointed to the doll when asked where John touched her, but she would not indicate

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1 Respondent implies that Teika was testifying to certain facts. However, this "testimony" was in the form of "yes" and "no" answers to leading questions.

where she was pointing to on the anatomical doll (R109). Even on direct examination by the prosecutor, whom she had extensive talks with concerning her testimony, Teika would not respond to questions concerning: whether she saw John McIntosh in the courtroom (R106,107); whether she remembered what happened (R113); what John McIntosh said to her (R109); what she said to him (R109,113); where she was pointing to on the anatomical doll (R109); where John McIntosh had touched her (R109); what John McIntosh said after the incident (R111); what she told her grandmother after the alleged incident (R111); when John McIntosh had done things (R112); when her grandmother had returned (R113).

Even more important is the trial court's observation of the witness during the proffer. The trial court noted that Teika would not even look at him nor communicate, when he tried to get her to talk:

> "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 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."
>
> (R127-129).

Consequently, the trial court was able to make observations which could not be fully portrayed by a cold record. See, Fernandez v. State, 328 So.2d 508 (Fla.3d DCA 1976), cert. den., 341 So.2d 1081 (Fla. 1976). 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). From the trial court's observations of the witness, and of the witness' unresponsiveness, it cannot be said that the trial court departed from the essential requirements of law, let alone legal error, in declaring the minor witness incompetent to testify. Petitioner relies on his Initial Brief for further argument on this Point.

POINT III

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

Petitioner relies on his Initial Brief for argument on this Point.

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 JOY B. SHEARER, Assistant Attorney General, Room 204 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 30th day of April, 1986.

Jeffrey L. Anderson
Of Counsel