IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES WILSON, et al.,

Petitioners,

vs. Case No. 68,369

STATE OF FLORIDA, 2d DCA 85-1397

Respondent.
_____/

PETITIONERS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The District Court of Appeal abused its discretion when it granted certiorari to the State in this case. The State cannot file successive appeals in a criminal case. Since the State had already filed one appeal in this case, the District Court of Appeal was without jurisdiction to consider the petition for writ of certiorari as a substitute for a second appeal.

ARGUMENT

THE DISTRICT COURT OF APPEAL ABUSED ITS DISCRETION BY GRANTING COMMON-LAW CERTIORARI TO THE STATE OF FLORIDA IN THIS CASE.

The common-law writ of certiorari is an extraordinary remedy and is only available in a very limited number of circumstances. As cited by the State in their brief, Chief Justice Boyd's concurring opinion in Jones v. State, 477 So.2d 566 (Fla. 1985) contains an excellent discussion of when the writ will lie. In his concurring opinion in Jones, Chief Justice Boyd states:

> 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. (emphasis added)
>
> (Jones v. State, 477 SO.2d 566 (Fla. 1985))

In the case at bar, the nature of the ruling for which review has been sought was the denial of a motion in limine filed by the State of Florida on the date of trial. Pursuant to the motion being filed, the trial court held a hearing on the motion, heard the argument of counsel and the law cited by both defense counsel and the assistant state attorney who were present at the hearing and the trial court then made its ruling based on the law and argument as presented to it on that date. Nowhere has it

been alleged that the trial court departed from essential due process nor was the State ever foreclosed from presenting its theories and the relevant law in support of its motion. Based on the foregoing, it is without question that the trial court afforded the State of Florida an opportunity to present its views in reference to the motion filed. Nowhere can it be stated that the court failed or precluded the State from being heard. Obviously, the State is dissatisfied with the outcome of the hearing and even if the ruling was erroneous, it was not such a departure from the essential requirements of law so as to result in the type of "tyrannical action" which would be necessary for the remedy requested to lie. As further support that the ruling could not be a departure from the essential requirements of law can be found in the nature of the motion itself. The motion sought to exclude evidence that may be presented by the defense. This ruling was an evidentiary ruling pertaining to one small part of the total case that would be presented to the jury. The trial court's ruling in no way affects the State's ability to present any evidence it intends to present to the jury in its case in chief.

In Patterson v. Whitehead, 360 So.2d 1136 (2d DCA 1978) the Second District Court of Appeal considered a petition for certiorari based on the trial court's denial of a motion in limine. The motion dealt with whether or not evidence of petitioners' decedents blood alcohol level would be admitted at trial. Although the trial court's ruling appeared to be in direct contravention of Florida Statutes Section 316.066 in a per curiam opinion the First District Court of Appeal held:

> The admissibility of such evidence, not-withstanding the terms of Section 316.066,

> Florida Statutes (1977), must ordinarily be determined at trial upon the evidence then submitted. Though prospective evidentiary rulings are often convenient and desirable, they may not ordinarily be reviewed immediately by proceedings in the nature of common law certiorari.
>
> (Patterson v. Whitehead, 360 So.2d 1136 (2d DCA 1978))

In the case at bar, the evidence in question is not dispositive of the issue of whether or not the defendants are guilty of first degree murder. If it is, then the State's case should be dismissed immediately.

In State v. Creighton, 469 So.2d 735 (Fla. 1985), this Court held that the State's right of appeal in criminal cases depends on statutory authorization as governed strictly by statute. In Creighton, this Court went to great lengths to explain and point out that the State is not the same as "any other litigant" in a criminal prosecution. In Creighton, the Court stated:

> This understanding is in keeping with the common-law rule that a writ of error would lie for the defendant but not for the state. Thus it is now generally held that, unless expressly provided for by statute, in criminal cases the state is not entitled to appeal adverse judgments and orders. See United States v. Sanges, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1892). The general common-law rule applied not only to judgments rendered upon verdicts of acquittal but also to determinations of questions of law. Id.
>
> The weight of authority is overwhelming, not only in this country but in England, that the writ will not lie at the instance of the State, and it is evident from the character of the legislation on the subject in this State that it has never been contemplated that the State could further

> pursue parties who have obtained judgment in their favor in prosecutions by indictment, whether by the judgment of the court or the verdict of a jury.
>
> State v. Burns, 18 Fla. 185, 187 (1891). In view of this virtual prohibition of the common-law, we can see sections 924.07 and 924.071 as strictly limited and carefully crafted exceptions designed to provide appellate review to the state in criminal cases where such is needed as a matter of policy and where it does not offend against constitutional principles.
>
> (Creighton v. State, 469 So.2d at 740)

Given the holding in Creighton, we must again look to Florida Statutes 924.07 and 924.071 to see what remedies have been given to the State. An avenue of relief was available to the State in this case to appeal a pretrial ruling such as the one in question. However, the State had already taken advantage of this provision and previously appealed a separate and distinct pretrial order. It is not as the State alleges that they have had no chance to appeal the trial court's ruling, when in fact they had a chance to appeal but failed to raise this issue when the previous matter was appealed. The State is attempting to get successive appeals in the same case by couching its second appeal as a petition for writ of certiorari. By analogy, this situation is no different than the law prohibiting a criminal defendant who, after a conviction, attempts to raise matters that could have or should have been raised by direct appeal in a motion for post conviction relief under Fla. R.Crim. P. 3.850. Williams v. State, 462 So.2d 871 (4th DCA 1985).

Based on the plain reading of Jones, supra, the District Court can not review by certiorari a Circuit order when the State had no right to

direct appeal. In Jones, this Court stated:

> 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). This district court erred in the instant case, therefore, in reviewing by certiorari a case it could not review by appeal.
>
> (Jones v. State, 477 So.2d 566 (Fla. 1985))

There is virtually no distinguishing characteristics between the holding in Jones and the facts before the court in this case.

CONCLUSION

The State has failed to allege any facts that would allow this Court to rule as a matter of law that the trial court acted beyond the bounds of due process or in a tyrannical manner. Certainly, the opposite is true as the trial court held a hearing, listened to the arguments and law presented by the counsel at that hearing and entered its ruling based on the law and facts presented to it. For this Court to allow the State successive appeals through the use of petitions for common-law certiorari would open the door for the State to take successive appeals in criminal cases in contravention of the laws of the State of Florida. Based on the foregoing, this Court should reverse the ruling of the Second District Court of Appeal with directions to dismiss the petition for writ of certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Reply Brief was furnished to each of the following:

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