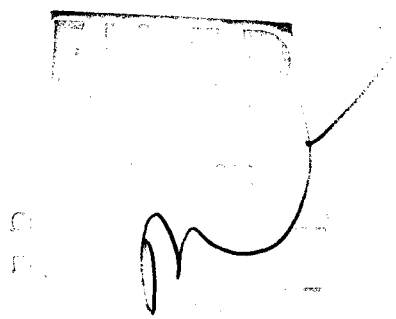
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
TODD JOHNSON,
Respondent.

CASE NO. 69,141



PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the prosecution, and Respondent, Todd Johnson, was the defendant, in the pre-trial proceedings held in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner and Respondent were designated as such, in Petitioner's proceeding for common-law certiorari, before the Fourth District Court of Appeal.

In this brief, the State of Florida and Todd Johnson will be referred to as Petitioner and Respondent, respectfully.

Additionally, the symbol PA means Petitioner's Appendix attached to its Initial Brief herein.

STATEMENT OF THE CASE AND FACTS

The Respondent, Todd Johnson, was charged by indictment with First Degree Murder. See PA, Exhibit "A". On January 29, 1986, Respondent filed a list of Witnesses in which Assistant State Attorney Ken Selvig (hereinafter "Selvig")was listed as a witness for the defense.See PA, Exhibit "B". On February 3, 1986, Petitioner filed a Motion to Quash Subpoena and to Strike Selvig from Respondent's witness list. See PA,"Exhibit "C". A hearing was held on the motion on March 5, 1986.

At the hearing, Respondent informed the court that Selvig had prosecuted Officer Sheridan for perjury in his role as an Assistant State Attorney. See PA, Exhibit "D", transcript of hearing, pg. 2, hereinafter designated by the symbol "D". Officer Sheridan was found not guilty of the perjury charges (D.17). Respondent stated that Selvig could testify to Officer Sheridan's reputation for truth and veracity (D.2).

Selvig testified that he could only testify to Officer Sheridan's "reputation within the narrowly defined law enforcement community but could not testify as to [Sheridan]'s reputation with friends, neighbors and acquaintances and things of that nature" (D.3,18). Selvig further stated that he would be unable to testify to Officer Sheridan's reputation for truth and veracity in the community at large (D.17). Selvig's only contact with Officer Sheridan was in his capacity as an Assistant State Attorney (D.18). Selvig had not contaced any of Officer Sheridan's friends or neighbors concerning Officer

Sheridan's reputation for truth and veracity (D.18). Selvig also testified that Ralph Wiles, a former investigator for the state attorney's office, had assisted him in investigating Officer Sheridan's perjury case (D.22). Selvig had minor involvement with the instant case prior to Respondent's indictment (D.17).

Petitioner objected to the defense using Selvig as a witness to Officer Sheridan's credibility on several grounds. First, Petitioner pointed out to the court that Selvig acquired information concerning Officer Sheridan while prosecuting the perjury charges, and that Officer Sheridan was acquitted of the perjury charges (D.15-16). Further, Petitioner informed the court that Selvig was not competent to testify as to Officer Sheridan's reputation for truth and veracity in his work community, the Boynton Beach Police Department, or his residential community (D.7).

The court indicated that Petitioner probably was correct (D.20). However, the court stated that "[it]" would like some guidance from the Fourth DCA before [it] waste all the time in a lawsuit and find out [it] was wrong" (D.20). See also D.16.

On March 5, 1986, the court entered an order denying Petitioner's motion. See PA, Exhibit "E". From the order, Petitioner filed a petition for writ of common law certiorari follows in the Fourth District Court of Appeal, seeking relief on the basis that the trial court departed from the essential requirement of the law in allowing the contested testimony. See

PA, Exhibit "F". On July 9, 1986, the Fourth District filed an opinion denying the writ, but certifying the same question that it certified in State v. Thayer, 489 So.2d 782 (Fla. 4th DCA 1986). See the Fourth District's opinion, PA, Exhibit "G", State v. Johnson, 11 F.L.W. 1522 (Fla. 4th DCA July 9, 1986). The question which the Fourth District certified in Thayer and the present case was as follows:

> DO THE HOLDINGS IN JONES V. STATE, 477 So.2d 566 (Fla. 1985), STATE v. G.P., 476 So.2d 1272 and STATE V. C.C., 476 So.2d 144 (Fla. 1985) PRECLUDE THE STATE FROM SEEKING CERTIORARI REVIEW OF NONAPPEALABLE INTERLUCUTORY ORDERS IN A CRIMINAL CASE WHERE THE STATE HAS DEMONSTRATED A CLEAR DEPARTURE FROM THE ESSENTIAL REQUIREMENT OF LAW?

Petitioner filed a timely notice to invoke the Discretionary Jurisdiction of this court on August 1, 1986. See PA, Exhibit "H".

POINT INVOLVED ON APPEAL

WHETHER STATE HAS RIGHT TO SEEK REVIEW ON NON-APPEALABLE, INTERLOCUTORY ORDER IN A CRIMINAL CASE, WHEN SUCH ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW, BY INDEPENDENT MEANS OF WRIT OF COMMON-LAW CERTIORARI: THUS, CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE?

SUMMARY OF ARGUMENT

The State's right to seek the independent remedy of common-law certiorari, to redress the trial court's ruling denying Petitioner's motion to preclude an Assistant State Attorney from testifying as a reputation witness for the defense, was not foreclosed by this Court's rulings, as cited in the Fourth District's certified question to this Court. A strict application of this Court's ruling in Jones v. State, 477 So.2d 566 (Fla. 1985), as followed by the Fourth District in its ruling, could serve to completely prevent the State from the remedy of common-law certiorari, whenever there was no right to direct appeal in a given case. This interpretation is unreasonable, given the nature of the writ of common-law certiorari and its requirements, as a discretionary basis for original jurisdiction, to redress rulings which depart from the essential requirements of law, and for which there exists no adequate legal remedy.

The certified question before this Court, should be answered in the negative. Affirmance of the Fourth District majority opinion, will leave a trial court's ruling uncorrected that is an erroneous departure from essential legal requirements; and will result in the Respondent calling as a reputation witness an Assistant State Attorney who has no knowledge of the witness's reputation in the general community, and whose information concerning the witness was acquired from prosecuting the witness for an offense for which the witness was not convicted.

ARGUMENT

STATE HAS RIGHT TO SEEK REVIEW ON NON-APPEALABLE, INTERLOCUTORY ORDER IN A CRIMINAL CASE, WHEN SUCH ORDER DEPARTS FROM ESSENTIAL REQUIREMENTS OF LAW, BY INDEPENDENT MEANS OF WRIT OF COMMON-LAW CERTIORARI: THUS, CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The Fourth District denied the writ in the present case on the authority of this Court's opinion in Jones v. State, 477 So.2d 566 (Fla. 1985). The Fourth District construed Jones to hold that the State had no right to seek redress of an erroneous order by resort to common-law certiorari where the State has no right to a direct appeal of such order. See State v. Johnson, 11 F.L.W. 1522 (Fla. 4th DCA July 9, 1986), attached as PA, Exhibit "G". The effect of the Fourth District's ruling herein was to prevent the State from seeking a remedy that was specifically deemed appropriate under the circumstances, based on prior decisions of Florida courts which have consistently held that testimony as to a witness's reputation must be bottomed upon reputation in the witness's community of residence and neighborhood. Parker v. State, 458 So.2d 750 (Fla. 1984); Stanley v. State, 112 So.2d 73 (Fla. 1972); Hawthorne v. State 377 So.2d 780 (Fla. 1st DCA 1979); Stripling v. State, 349 So.2d 187 (Fla. 3rd DCA 1977); Wolack v. State, 464 So.2d 587 (Fla. 4th DCA 1985); General Telephone Company v. Wallace, 417 So.2d 1022 (Fla. 2d DCA 1982); Florida East Coast Railway Co. v. Hunt, 322 So.2d 68 (Fla. 3d DCA 1975).

In view of the nature and purpose of common-law certiorari, and State's appropriate resort to such remedy herein, in a manner not at all intended as a "backdoor direct appeal," this Court should answer the certified question in the negative.

It is axiomatic that common-law certiorari exists as a remedy, to any litigant, to seek to correct court rulings which depart from the essential requirements of law, and for which the moving party has no adequate remedy at law, including the right to a direct appeal of the ruling. State v. Wilson,483 So.2d 23 (Fla. 1st DCA 1986); Jones, supra, at 567-569 (Boyd, specially concurring opinion) and cases cited therein; State v. Busciglio, 426 So.2d 1233 (Fla. 2nd DCA 1983); Jantzen v. State, 422 So.2d 1090 (Fla. 3rd DCA 1982); State v. Steinbrecher, 409 So.2d 510 (Fla. 3rd DCA 1982); State ex rel Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981); State v. Smith, 260 So.2d 489 (Fla. 1972); Kilgore v. Bird, 6 So.2d 541, 149 Fla. 570 (Fla. 1942). Among such decisions, as pointed out by Chief Justice Boyd in his specially concurring opinion in Jones, supra, are those cases where certiorari was denied, on the basis of the failure of the movant to establish the required criteria for common-law certiorari relief, but not the inability or lack of authority of an appellate court to issue such a writ, if warranted. Article V, §4(b)(3), Fla. Const. (1980); Jones, supra, at 507 (Boyd, C., J, specially concurring opinion), and cases cited; see also, Hydrocarbon Trading & Transport Company v. Ramco International, 11 F.L.W. 1178 (Fla. 4th DCA, May 21, 1986); Martin-Johnson, Inc.

v. Savage, 11 F.L.W. 978 (Fla. 1st DCA April 28, 1986). As these cases demonstrate, the remedy of common-law certiorari, and the prerequisites for properly invoking it, have been applied in a variety of circumstances, as a basis for invoking the discretionary jurisdiction of an appeals court, as an independent means of review, existing separate and apart from review by direct appeal. State v. Jones, supra (Boyd, C., J; Shaw, J; Ehrlich, J, concurring in part and dissenting in part); Jones v. State, supra (Boyd, C., J, specially concurring opinion); Steinbrecher, supra, at 511; Smith, supra, at 491; State v. Harris, 136 So.2d 633 (Fla. 1962); Article V, §4(b)(3), supra; Rule 9.100(a), Fla.R. App.P. (1985); Rule 9.030(b)(3), Fla.R.App.P. (1985). This procedure thus evidently does not encompass an alternate means of direct appellate review for the State, or any other litigant, since availability of such an appellate remedy immediately renders such relief inappropriate, and since the mechanism and scope of common-law certiorari does not address the same magnitude or degree of error in a legal ruling, as on direct appeal. State v. Jones, at 175 (Boyd, C., J; Shaw, J; Ehrlich, J, concurring in part, dissenting in part); Jones v. State, at 569 (Boyd, C., J, concurring opinion); Jantzen, supra; Steinbrecher; State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982); Smith. However, despite the scope and underlying requirements for the seeking of such relief, this Court's decision in Jones (upon which the Fourth District's ruling was based) could be interpreted to equate review by common-law certiorari with direct appellate

review. See also State v. G.P., 476 So.2d 1272 (Fla. 1985); State v. C.C., 476 So.2d 144 (Fla. 1985). In examining the actual nature of such decisions, and their context, the only legitimate conclusion to be drawn is that said cases should not be interpreted to prevent the entertaining or granting of Petitioner's action before the Fourth District.

This Court's decision in C.C., supra, involved circumstances in which the State sought appellate review of the granting of a suppression motion in a delinquency proceeding, among other orders therein. C.C., at 145. This Court concluded that since no statutory right to direct appeal of such rulings by the State, and the statutory provisions governing criminal cases were not analogous to juvenile proceedings, the State had no right to appeal interlocutory or plenary judgments or rulings. C.C., at 146. The majority relied on Article V, §4(b)(1),Fla. Const. (1980), in further concluding that, regarding appeals of interlocutory orders, such direct appellate review existed only in cases involving direct appeal as a matter of entitlement, and that the Florida Supreme Court had not created rules enabling the State to appeal any adverse ruling. Id. Clearly, the C.C. decision's impact and effect was limited solely to attempts by the State to seek review by direct appeal, which, as aforementioned, is not tantamount or analogous to review by common-law certiorari. Jones v. State, supra (Boyd, C., L, specially concurring opinion); Wilson, supra, at 25. Since there was obviously no discussion or mention of certiorari review of a non-appealable,

interlocutory order, the C.C. decision does not prevent the State from seeking such review, where, as herein, there was a demonstration by Petitioner, before the Fourth District, of a ruling by a trial court which clearly met the magnitude of error required for such relief.

This Court's decision in G.P., supra, encompassed a final order, dismissing a juvenile delinquency petition, from which the State sought direct appeal, and appeal be certiorari, G.P., at 1273. Without much discussion, this Court noted that interlocutory appellate review was limited to cases encompassing a right to direct appeal, and concluded that "Chapter 39, dealing with juveniles, is a purely statutory creation which does not give the State the right of appeal. The State has no greater right by certiorari." Id. (e.a.) It is thus apparent that the Second District correctly interpreted the G.P. case, as standing for the proposition that the State could not employ certiorari review, as an alternative means of direct appellate review. Wilson, at 25; Jones v. State, (Boyd, C., J, specially concurring opinion). Given the fact that the State sought common-law certiorari herein as its independent and sole basis for review, before the Fourth District, and the fact that any other interpretation of G.P. would not be reasonable, in light of the aforementioned consistent and appropriate invoking of the remedy of common-law certiorari in Florida decisional law, supra, this Court's G.P. decision does not impede the State's seeking of certiorari review herein.[1]

[1]It is noteworthy to point out that in the most recent session, the Florida legislature adopted a measure that specifically provides for the State to seek direct appellate review (con't.)

In Jones, supra, as in C.C. and G.P. this Court was faced again with factual circumstances --- a State appeal of a final order, dismissing probation violation charges --- not presented by the present case. Jones, at 566; Wilson, at 25. The holding of this Court therein, which the Fourth District expressly relied on in denying certiorari in the present case, was that the appeals court therein "erred...in reviewing by certiorari a case it could not review by appeal." Jones, at 566. However, as Chief Justice Boyd consistently stressed in his specially concurring opinion, such a ruling must be appropriately limited to the conclusion that common-law certiorari, while not congizable as a substitute method of seeking direct appellate review, does exist to provide a remedy to the State, for errors far beyond mere legal error, which cannot be rectified by any adequate legal remedy. Jones v. State, supra, at 567-569 (Boyd, C., J, specially concurring opinion). Based on the nature of the remedy of common-law certiorari, and its discretionary jurisdictional basis, on factors other than those involved in direct appeal of an order or judgment as an entitlement to a litigant, it appears that Chief Justice Boyd's view in Jones, as interpreted and applied by the Second District in Wilson, appropriately and correctly interprets the State's right to

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of pre-trial orders that were the subject of C.C. and G.P. as part of the statutes governing juvenile law and procedure. Committee Substitute for Committee Substitute for Senate Bill 730, Sections 1-4 (PA, Exhibit "I"). Although not yet established as in effect, Section 4, supra, Exhibit "I", such legislation at the very least, indicates legislative intent that the State possess the right to review of the validity of such pre-trial orders. Thayer v. State, 335 So.2d 815 (Fla. 1976).

certiorari review of a non-appealable interlocutory order in a criminal case. Steinbrecher, at 511. As further pointed out in Justice Boyd's opinion in Jones, and in Wilson, a strict, board application of the majority opinion of this Court in Jones, would have necessitated a complete rejection, of the consistent recogniztion by this and other courts of the appropriate use and common-law requirements for certiorari. Wilson, at 25; Jones v. State, supra, at 567, 568 (Boyd, C., J, specially concurring opinion); Smith, supra; State v. Thayer, supra, (Glickstein, J, dissenting opinion). An interpretation of Jones, in its strictest sense, thereby reaching a conclusion that "...when there is no entitlement to an appeal, certiorari is ipso facto not available as a remedy...", Jones v. State, at 567 (Boyd C., J, specially concurring opinion), effectively elimininates common-law certiorari as an available remedy to the State, to correct precisely the kind of error committed by the trial court in this case, as recognized by the Fourth District, State v. Johnson, supra, that certiorari was specifically designed to correct.

This Court's ruling in Jones, as in G.P., additionally relied upon an interpretation of Article V, §4(b)(1), supra, as allowing interlocutory appeals solely in cases where direct appeal as of right exists. Jones, at 566; G.P., at 1273. This conclusion is supported by the express language of this state Constitutional provision, dealing exclusively with direct appellate jurisdiction. Article V, §4(b)(1). Said provision is also necessarily so limited in scope, because of the nautre of ths

common-law certiorari requirements, most significantly the absence of a legal remedy such as direct appeal. Thus, to interpret Article V., §4(b)(1), as having any effect on the propriety or scope of common-law certiorari, as an independent means of review and not an unauthorized means of direct appellate review, is belied by the consistently recognized role and scope of the remedy of certiorari. Article V, §4(b)(3), supra; Steinbrecher, supra, at 511.

Petitioner is not unmindful of the fact that a strict reading of this Court's post-Jones v. State, decisions on the issue of the State's right to seek certiorari review, in State v. Jones, supra, and R.L.B. v. State, 11 F.L.W. 174 (Fla. May 17, 1986), could be interpreted as confirming a strict application of the Jones v. State holding. However, it is initially significant to point our that both of these recent decisions did not directly confront or address an attempt by the State to seek certiorari review of a non-appealable, interlocutory order.[2] This distinguishing feature between the present case, and each of the aforementioned cases except Wilson, is particularly apt, given the nature of common-law certiorari. It is not only the absence of a right to appeal that fulfilled the requirement in Johnson,but the interlocutory nature of the trial court's order

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[2]Both decisions involved an attempt at direct appeal, of a final order. Jones (discharge by trial court of affidavit of violation of probation); R.L.B., supra (dismissal of a juvenile delinquency proceeding).

which, unlike final orders, reinforces the absence of an adequate legal remedy, in view of the possibility that a final order of acquittal would completely deprive the State of any review. Horvatch, supra.

Furthermore, both the later Jones opinion and R.L.B. decision, were essentially summarily based, on the issue of the State's right to certiorari review, on this Court's prior decisions in Jones, G.P. and C.C. If read as a continuation of the strict holding of these prior cases, the Jones and R.L.B. decisions must also be viewed as an unreasonable interpretation of the scope and role of common-law certiorari, as completely contrasted from that of direct appellate review. To the extent that these decisions could be so interpreted, Petitioner respectfully requests that this Court recede from this view, based not only on the arguments contained and encompassed by Wilson and Chief Justice Boyd's Jones opinion, but on the additional analysis in State v. Jones, supra, at 216 (Boyd, C., J; Ehrlich, J; Shaw, J, concurring in part and dissenting in part), and R.L.B., supra, at 174-175 (Boyd, C., J, concurring in part and dissenting in part).

In its decision in State v. Palmore, 11 F.L.W. 194, 195 (Fla. May 1, 1986), this Court appears to have confirmed the interpretation of its decisions on this issue, that appear in Wilson, and Chief Justice Boyd's concurrence in Jones. In its discussion, expressing disagreement with the Third District's view of the nature of orders which the State has a direct sta-

tutory appeal from, in State v. Palmore, 469 So.2d 136 (Fla. 3rd DCA 1984), and State v. Steinbrecher, supra, this Court nevertheless did not expressly disapprove, criticize or reject the analysis in those two cases, on the issue of common-law certiorari. Palmore, at 195. In fact, this Court's interpretation of Palmore, as decided by the Third District, implicitly recognized said decision, in light of Steinbrecher, as one involving appropriate considerations of certiorari, resulting in the inability of the movant in Palmore to establish the common-law requirements. Id.; Palmore, at 137; Steinbrecher, at 511. Thus, this Court's decisions in Jones, G.P., Jones, and R.L.B. not to recede from decisions involving the interpretation and application of the common-law certiorari requirements, e.g., Smith, supra, when coupled with the decision in Palmore not to recede from such a case directly before this Court (the Third District's Palmore decision), suggests that the Wilson decision and the Jones concurring opinion are dispositive.

It is clear that both the immediate and long-term effects, of a decision to uphold the Fourth District's "strict application" of Jones v. State, to deny certiorari to Petitioner in this case, would be severely detrimental to the State, and to the criminal justice system itself. Initially, it cannot be overemphasized that approval of the Fourth District's result in Johnson, will leave untouched and uncorrected, an error in a trial court ruling of a magnitude far greater than that of simple legal error. Horvatch; Jones v. State, at 569 (Boyd

C., J, specially concurring opinion); R.L.B., supra, at 175 (Boyd, C., J, specially concurring in part and dissenting in part); Jantzen, supra. Furthermore, such a result would absolutely foreclose the State from seeking the remedy specifically designed to address such departures from essential legal requirements.

The practical effect of the Fourth District's opinion is to allow Respondent to circumvent the well-established rule that a witness's reputation for truth and veracity must be bottomed upon reputation in the witness's community of residence and neighborhood. Stanley v. State,112 So.2d 73 (Fla. 1972); Stripling v. State, 349 So.2d 187 (Fla. 3rd DCA 1977). The trial court's denial of the motion to strike, if left uncorrected, would allow Respondent to use an Assistant State Attorney to testify concerning the reputation of a witness for truth and veracity in the community, although the Assistant State Attorney has no knowledge of the witness's reputation in either the witness's residential or work community. (D.17-18). Officer Sheridan, the subject of the reputation testimony, had a fixed residence in Palm Beach County, and had served his entire professional career as a policeman in Palm Beach County (D.9). Respondent did not make any effort to show that Selvig's reputation testimony was needed because of the unavailability of reputation witnesses from Officer Sheridan's residential community. In Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979), the court held that it must be shown that testimony from the

community, in which the subject of the reputation testimony lives, is unavailable before persons outside of the residential community could testify as reputation witness. The Hawthorne court relied on Stanley v. State, supra, in which this Court stated:

> It is a cardinal rule of evidence that to prove any fact the best evidence of such fact should be adduced. A man is best known by his neighbors or people in the community in which he resides. It is their opinion formed and expressed, based on their general knowledge of him, which establishes his general reputation.

Additionally, the trial court's ruling contravenes the prohibition by Florida courts of persons in the law enforcement system basing reputation testimony on information acquired in their official capacity. In Wolack v. State, 464 So.2d 587 (Fla. 4th DCA 1985), the court held that when a police officer's knowledge of the reputation of a state witness was gained solely through the officer's official position, such knowledge was an insufficient basis upon which to predicate reputation testimony. In Stripling v. State, supra, the court held that police investigators could not base reputation testimony on what they learned in an official inquiry. The only information that Selvig had concerning Officer Sheridan was acquired from Selvig prosecuting Officer Sheridan in the criminal justice system. This information was an improper predicate for reputation testimony because it was acquired as a result of Selvig's official duties.

In addition, Selvig's knowledge was limited to information concerning Sheridan in the criminal justice system. (D.17-18). In Parker v. State, 458 So.2d 750, 754 (Fla. 1984), this Court held that the criminal justice system was neither neutral enough nor generalized enough to be classed as a community.

Further, if left uncorrected, the trial court ruling would allow Respondent to exploit an issue that is completely non relevant and non probative, but highly prejudicial to the State. As Charles Burton, the prosecutor, pointed out to the court, the defense's use of an Assistant State Attorney to attack the credibility of the primary witness in a case prosecuted by the State Attorney's Office would allow the defense to attack collaterally the State Attorney's Office, rather than confining the evidence to the relevant issues in the trial. Respondent admitted that its purpose was to attack the credibility of the State Attorney's Office:

> MR. GREENE: Well, that is what we would like to bring to the jury's attention. On the one hand they [State Attorney's Office] are prosecuting Officer Sheridan and on the other hand they are relying on him almost exclusively for this prosecution. (D.10)

The credibility of the State Attorney's Office is not a relevant issue in the case. By allowing Selvig to testify, the trial court creates the danger of the defense misleading the jury into believing that the real issue in the trial is the credibility of the State Attorney's Office, rather than the

credibility of Sheridan's testimony. The trial court was aware that the admission of Selvig's reputation testimony would improperly get the State Attorney's Office involved in the case as a witness:

> THE COURT: With a broad brush, it is wrong to get the State Attorney's Office involved as witnesses, or the Public Defender's Office.
>
> On the other hand, they need some mechanism to attack the credibility of a witness on whom the State's principal case rests (D.22)

As Mr. Burton pointed out, there were members of Officer Sheridan's residential and work communities available to testify as reputation witnesses (D.22). Respondent did not refute the availability of these potential reputation witnesses. Thus, although the trial court recognized it was wrong, the trial court makes the State Attorney's Office a witness by allowing the testimony of Selvig. The trial court's decision was a departure from the requirement of the law because the probative value of Selvig's reputation testimony is outweighed by its potential to prejudice unfairly the State's case and to confuse the issues by making the State Attorney's Office a witness in the case.

Because Officer Sheridan was found not guilty of the offense which Selvig prosecuted, the trial court's denial of the motion to strike provides Respondent a "back door" method to impeach Officer Sheridan with an offense of which he was not convicted. Florida law is settled that a witness cannot

be impeached with an unconvicted offense. Aaron v. State, 345 So.2d 641 (Fla. 1977).

On the face of the decisions in Jones, G.P. and C.C. and other relevant decisions, it appears that this Court is seeking to prevent the abuse of certiorari, to gain indirectly what the State cannot directly obtain. G.P., supra. This apprehension is unfounded, particularly in considering the nature of certiorari. It is quite improbable that the State would resort to wholesale attempts to obtain de facto direct appellate review, by certiorari, because this remedy provides for a means of review, where no legal remedy exists. Since the basic requirement of the writ would be unfulfilled, in the event there exists an adequate remedy at law, and since the issuance of the writ is discretionary, there is no realistic chance that the State could improperly seek or obtain a writ. Moreover, the application of the writ of certiorari by Florida courts, has not been shown to be historically abused. Wilson, Jones v. State (Boyd, C., J, specially concurring opinion).

Since Florida courts, as noted supra, have consistently held that reputation testimony must be bottomed on a person's reputation in his community of residence, the trial court's ruling which allows the defense to call as a reputation witness an Assistant State Attorney who had absolutely no personal contact with anyone in the witness's residential community was a departure from the essential requirement of law. Therefore, the circumstances before this court present a compelling basis for this court to quash the Fourth District's denial of certiorari and remand with instructions to grant the writ.

Petitioner acknowledges this Court's recent decision in McIntosh v. State, Case No. 67,819 (Fla. August 21, 1986). However, this Court should reconsider the issue because the preclusion of certiorari review of an interluctory order, where an appeal may not be taken as a matter of law, would leave the state without a remedy to seek redress of the most egregious departures from the essential requirement of law by trial courts. In the present case, the trial court ruled against Petitioner, although admitting that Petitioner's position was probably correct (D.20). The trial court denied Petitioner's motion for the express purpose of seeking guidance from the Fourth District Court of Appeal (D.20). The right to certiorari review of interluctory order is needed to provide the State a remedy to redress trial court's order of this nature.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests that this Honorable Court quash the opinion of the Fourth District, and remand with instructions to grant Petitioner's petition for common-law certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished by courier to, ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida this 29th day of August, 1986.

OF COUNSEL