IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. TODD JOHNSON, Respondent.	CASE NO. 69,141

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant and Appellee in the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County and the Fourth District Court of Appeal, respectively. Petitioner was the Prosecution and Appellant in the lower tribunals. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASES AND FACTS

Respondent, Todd Johnson, accepts Petitioner's Statement of the Case and Facts with the following addition and clarifications:

On March 31, 1986, Petitioner-State filed its Petition for Common Law Certiorari. On April 14, 1986, the Fourth District Court of Appeal ordered Petitioner to show cause why this cause should not be dismissed pursuant to Jones v. State, 477 So.2d 566 (Fla. 1985). On May 1, 1986, Petitioner filed its response.

On May 7, 1986, Respondent filed a Motion to Dismiss the Petition for Common Law Certiorari and/or Non-final Appeal (See Appendix 1). In said Motion to Dismiss, Respondent requested that the filing of the Motion to Dismiss be without prejudice to argue on the merits in support of the trial court's order and against the issuance of the common law certiorari.

Without any further pleadings or briefs from Respondent, the Fourth District denied Petitioner's Writ of Certiorari in a written opinion, State v. Johnson, 11 F.L.W. 1522 (Fla. 4th DCA July 9, 1986). On July 9, 1986, that Fourth District "ordered that the Respondent's May 7, 1986 Motion to Dismiss is hereby determined to be moot."

SUMMARY OF ARGUMENT

The authority of the District Courts of Appeal to review interlocutory orders is delineated in Article V, Section 4(b)(1) of the Florida Constitution. There are two requirements for such review: 1) The order under consideration must be the kind of order that could be appealed as a matter of right, and 2) the appeal will only lie to the extent that procedural rules, adopted by the Supreme Court, provide for such review. The order under consideration, sub judice, meets neither of the two prerequisites enumerated in Article V, Section 4(b)(1) of the Florida Constitution.

Petitioner here attempts to utilize the extraordinary writ of certiorari to procure review of this interlocutory or non-final order despite the fact that the constitutionally mandated jurisdictional prerequisites for review have not otherwise been met. When the jurisdictional requirements for District Court review have not been met, certiorari may not be utilized to circumvent the requirements necessary to establish such jurisdiction. See, State v. C.C., 476 So.2d 144 (Fla. 1985); Jones v. State, 477 So.2d 566 (Fla. 1985); McIntosh v. State, 11 F.L.W. 484 (Fla. August 21, 1986). This Honorable Court should answer the certified question in the affirmative and affirm the decision of the lower court.

ARGUMENT

THE STATE MAY NOT SEEK CERTIORARI REVIEW OF NON-FINAL OR INTERLOCUTORY ORDERS IN CRIMINAL CASES WHEN THERE EXISTS NO STATUTORY OR OTHER COGNIZABLE RIGHT TO REVIEW SUCH ORDERS.

A. THE RIGHT TO INTERLOCUTORY REVIEW IS DEPENDENT UPON THE RIGHT TO APPEAL FINAL ORDERS AND UPON AUTHORIZATION CONFERRED BY SUPREME COURT RULE.

Article V, Section 4(b)(1) of the Florida Constitution provides:

> District Courts of Appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the Supreme Court or a Circuit Court. They may review interlocutory orders in <u>such cases</u> to the extent <u>provided by rules</u> adopted by the Supreme Court. emphasis added).

Under this provision, there are two prerequisites that must be fulfilled in order for the District Court to entertain an interlocutory appeal. First, the "such cases" requirement mandates that before jurisdiction to hear an interlocutory appeal will vest in the District Court, the order must be in the class of cases enumerated in the preceeding paragraph, i.e., the kind of case in which a final order could be appealed "as a matter of right". Second, the "provided by rules" requirement dictates that any interlocutory or non-final appeal must be authorized by Supreme Court Rule.

Historically, the common law provided that in a criminal case a writ of error would lie with the defendant, but not with the sovereign. 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". State v. Creighton, 469 So.2d 739, 740 (Fla. 1985); see also, U.S. v. Sanges, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1892). In the context of interlocutory appeals of pretrial orders, the exceptions to the general proscription against state appeals are carefully crafted and limited.

In R.J.B. v. State, 408 So.2d 1048 (Fla. 1982), this Honorable Court held that the Fifth District Court of Appeal was without jurisdiction to consider an interlocutory appeal from a juvenile court's order waiving jurisdiction over a juvenile. The "provided by rules" precondition for interlocutory review found in Article V, Section 4(b)(1) was found dispositive in determining whether jurisdiction vested with the District Court of Appeal. See also, State v. Smith, 260 So.2d 489 (Fla. 1972).

And so it is with Petitioner's claim herein. Petitioner is unable to meet either of the requirements set forth in Article V, Section 4(b)(1). There is no statutory or rule basis for appealing as a matter of right the trial court's pretrial order denying Petitioner's Motion to Strike Assistant State Attorney Ken Selvig from the Defendant/Respondent's witness list and preclude him from testifying for the defense at trial.

B. THE STATE MAY NOT UTILIZE THE EXTRAORDINARY WRIT OF CERTIORARI TO PROCURE REVIEW OF INTERLOCUTORY OR NON-FINAL ORDERS WHEN THE JURISDICTIONAL PREREQUISITES FOR REVIEW HAVE NOT OTHERWISE BEEN MET.

When a Court is subject to jurisdictional limitations to the consideration of an appeal from a final judgment, certiorari may not be utilized to circumvent that limitation. State v. C.C., 476 So.2d 144 (Fla. 1985); Jones v. State, 477 So.2d 566 (Fla. 1985); McIntosh v. State, 11 F.L.W. 434 (Fla. August 21, 1986).

In State v. C.C., supra, this Court reviewed the Third District Court's order refusing to hear state appeals from final and interlocutory orders of the circuit court juvenile division. This Court agreed with the lower tribunal 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.

Id. at 146.

In Jones v. State, 477 So.2d 566 (Fla. 1985), this Court directed the Fourth District Court of Appeal to dismiss a state petition for certiorari resulting from the trial court's order dismissing an affidavit of violation of probation. This Court reiterated the now oft repeated maxims that:

> (1) The State Constitution permits interlocutory review only in cases in which an appeal may be taken as a matter of right... and...
>
> (2) No right of review by certiorari exists when no right to appeal exists.

Id. at 566. See also, R.L.B. v. State, 486 So.2d 588 (Fla. 1986).

In State v. Jones, 488 So.2d 527 (Fla. 1986), this Honorable Court held that the District Court of Appeal may not utilize the common law writ of certiorari to review a final judgment in a criminal case even if the elements of that writ are satisfied.

In McIntosh v. State, 11 F.L.W. 434 (Fla. August 21, 1986), the trial judge entered a pretrial order holding that a minor witness was incompetent to testify against the defendant which the state appealed. The Fourth District determined that the state had no direct right of appeal and treated the appeal as a petition for certiorari and reversed the trial court's order. This Court quashed the decision of the Fourth District holding:

> McIntosh contends that because the district court found that the state had no right to directly appeal the pretrial order, it was without authority to afford review by way of certiorari. We agree.
>
> In **C.C.**, 476 So.2d at 146, we held that the state is entitled to interlocutory review only in those cases where an appeal may be taken as a matter of right. In **State v. G.P.**, 476 So.2d 1272 (Fla. 1985), we held that no right of review by certiorari exists in the absence of a right of appeal. **See also Jones**, 477 So.2d at 566 (appellate court cannot afford review to the state by way of certiorari when the state has no statutory or other cognizable right to appeal the judgment sought to be reviewed).
>
> Accordingly, we quash the decision below on the authority of **C.C.**, **G.P.**, and **Jones.**

At bar, the Fourth District certified the identical question certified by the Fourth District in a previous decision, State v. Thayer, 489 So.2d 782 (Fla. 4th DCA 1986):

> DO THE HOLDINGS IN **JONES V. STATE**, 477 So.2d 566 (FLA. 1985); **STATE V. G.P.**, 476 So.2d 1272 (FLA. 1985) AND **STATE V. C.C.**, 476 So.2d 144 (FLA. 1985) PRECLUDE THE STATE FROM SEEKING CERTIORARI REVIEW OF NON-APPEALABLE INTERLOCUTORY ORDERS IN A CRIMINAL CASE WHERE THE STATE HAS DEMONSTRATED A CLEAR DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW?

However, the Thayer court did not have the benefit of this Court's decisions in State v. Jones, supra and McIntosh v. State, supra, at the time it certified the questions now before this Honorable Court.

The McIntosh decision dealt expressly with the State's attempt to "appeal" by way of the writ of certiorari an interlocutory, or non-final order of the trial court. Petitioner's attempt to distinguish prior rulings of this Court on the basis that said decisions were final as opposed to non-final appeals is no longer viable in light of McIntosh. In fact on the last page of Petitioner's Brief on the Merits, Petitioner presents an unconvincing request for reconsideration of the McIntosh decision which should be rejected out of hand by this Honorable Court.

Sub judice, the Fourth District correctly denied the state's petition for certiorari from an interlocutory order which was not within the scope of appeals available to the state under Fla.R.App.P. 9.140(c). The question certified by the Fourth District should be answered in the AFFIRMATIVE.

In summary, the trial court's ruling here is precisely the kind of order from which this court has refused to grant the state a right to appeal. If the District Courts have jurisdiction to hear interlocutory appeals by certiorari in matters like this, they would also be empowered to entertain appeals on a multitude of other pretrial rulings, e.g., orders to sever defendants or charges, granting change of venue, continuing trial dates, perpetuating testimony, granting additional peremptory challenges, limiting scope of voir dire, etc.

If, as Petitioner suggests, this Court were to recede from its carefully considered prior decisions construing Article V, Section 4(b)(1) of the Florida Constitution, it would be inviting a plethora of potentially frivolous appeals based on nothing more than a prosecutor's shrill cries of "foul". We must also consider the ripple-effects of such an expansion of the District Court's jurisdiction: 1) The state's petition for writ of certiorari is accompanied by the ever-present Motion for Stay of Proceedings. 2) The stay is nearly always granted, in order to allow the reviewing court sufficient opportunity to determine whether or not the lower court action constitute a departure from the essential requirements of law. 3) The end result is the

overburdened criminal justice system, and appellate courts becoming hopelessly enmeshed in an ever expanding web of unauthorized interlocutory appeals through the filing of a "petition of common law certiorari" by the state. Therefore, Respondent respectfully requests this Honorable Court to answer the certified question in the affirmative and affirm the decision of the lower court.

Assuming arguendo that the Fourth District Court of Appeal has jurisdiction to entertain this state's petition for common law certiorari, Respondent submits that the prerequisites for issuing such a writ have not been met in the instant case. See, Combs v. State, 436 So.2d 93 (Fla. 1983).

Respondent respectfully requests this Honorable Court to remand this cause to the lower court to allow Respondent an opportunity to address the issue of the propriety of an issuance of a writ of certiorari in this case and the merits of the trial court's non-final order. This request is only made in the absence of caution because it is clear that the Fourth District does not have jurisdiction to entertain this petition for commong law certiorari

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited, Respondent respectfully requests this Honorable Court to answer the certified question in the affirmative, and to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to EDDIE J. BELL, ESQ., Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, by courier, this 23rd day of SEPTEMBER, 1986.

Of Counsel