IN THE SUPREME COURT
STATE OF FLORIDA

R. S. JOHNSON,

Appellant/Petitioner,

v.

CITIZENS STATE BANK,

Appellee/Respondent.

Case No. 71,877

(Consolidated with Case No. 72,007)

Answer Brief of Respondent

On Petition for Review of a Decision of
the First District Court of Appeal

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SUMMARY OF ARGUMENT

In his initial Point I, the Petitioner JOHNSON contends that the First District Court of Appeal committed error in failing to consider his "notice of appeal" as a "petition for writ of certiorari". On the contrary, the District Court assumed arguendo that Fla. App. Rule 9.100 applied and resolved this case on other grounds. As a result, there is no error as to Petitioner's Point I.

As to Petitioners' Point II, it is immaterial whether Petitioners filed the "petition" or a "notice", in order to seek review. Fla. App. Rule 9.040(c). The issue is rather, under Fla. App. Rule 9.100, an applicant for review must comply with the filing requirements of the rule and, if so, whether his failure to do so is jurisdictional. The provisions of "transfer to a court of proper jurisdiction" of Fla. App. Rule 9.040(b) have no application herein, where neither Petitioner sought review in the circuit court. Based on Southeast First National Bank of Miami and Lampkin, this Court should answer the certified question in the affirmative, affirm the opinions of the District Courts, and discharge the writ of certiorari issued herein.

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ARGUMENT

I. THE DISTRICT COURT DID NOT REFUSE TO TREAT THE PETITIONER JOHNSON'S NOTICE OF APPEAL AS A PETITION FOR WRIT OF CERTIORARI.

In his initial point, the Petitioner JOHNSON contends that the First District Court of Appeal "committed error" in failing to consider his Notice of Appeal as a petition for writ of certiorari. In raising this argument, Petitioner JOHNSON attempts to make manufacture an issue where one does not exist. In its opinion, the District Court did not refuse to "amend" the Petitioner's Notice to effect original proceedings in certiorari. Accordingly, there is no "error" from which the Petitioner JOHNSON may take exception under his Point I.

The practice of the First District in proceeding to review matters on their merits, rather than on the form of the petition for review, is well-established. See, e.g., Home News Publishing Company v. U-M Publishing, Inc., 246 So.2d 177 (Fla. 1DCA 1971). This practice, long accepted in the various district courts [see Hackenberg v. Artesian Pools, Inc., 440 So.2d at 475 (Fla. 5DCA 1983)], is grounded in constitutional and case law (discussed in detail in Point II herein) and embodied in Florida Appellate Rule 9.040(c).

A cursory reading of the opinion under review will reveal that the First District assumed arguendo, and never

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reached, the issue of whether the "notice" should be deemed a "petition".

> Before determining whether the petition, if so construed, demonstrated a preliminary basis for relief, this court sua sponte raised the issue of the timeliness of the petition. The Notice of Appeal was filed with the clerk of the lower tribunal on October 21, 1987, but a copy of the notice was not received by the clerk of this court until October 28, more than 30 days after rendition of the order. We noted that Rule 9.100(b), Florida Rules of Appellate Procedure requires the petition to be filed "with the clerk of the court deemed to have jurisdiction" and that Rule 9.100(c) requires a petition for writ of certiorari to be filed within thirty days of the date of rendition of the order sought to be reviewed.

R. S. Johnson v. Citizens State Bank, 13 F.L.W. 136 (Fla. 1DCA, Case Number 87-159, 4/5/88). The Court's numerous references to the filing and time requirements of Rule 9.100 suggest inescapably that, for the purpose of resolving the certified issue, the Court in fact applied the certiorari-original proceedings rule. As will be developed below, this Court's determination of the certified issue should likewise depend not on the appeal-certiorari distinction, but rather on the jurisdictional impediment resulting from Petitioner's failure to timely file his request for review with the appropriate clerk.

As to Petitioner JOHNSON'S Point I, therefore, there is no "error" upon which reversal might be based. This Court should instead consider this action based upon the

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issue as certified by the First and Third District Courts and developed in Point II hereof.

II. THE DISTRICT COURT DID NOT ERR IN DISMISSING PETITIONER'S REQUEST FOR REVIEW, WHERE THAT REQUEST WAS NOT TIMELY FILED IN THE APPROPRIATE SITUS.

In their second Points, the Petitioners JOHNSON and PAUL attempt to re-frame the issue certified by the District Courts. As stated by the Courts, the question is:

> When a party seeks appellate review of a non-appealable order, and assuming that the notice of appeal is timely filed in the lower tribunal, must the notice of appeal be filed in the appellate court within thirty days of rendition of the order in order for the appellate court to have jurisdiction to treat the notice as a petition for writ of certiorari?

In each of these consolidated cases, the party seeking review labeled his pleading "Notice of Appeal", notwithstanding that no right of appeal lay under Florida Appellate Rule 9.030(b)(1). Under ordinary circumstances, the proceedings would not have been dismissed, but could have been considered under the Court's certiorari authority. See, e.g., Hackenberg, 440 So.2d at 475. Unfortunately, each of these Petitioners failed to timely invoke that certiorari jurisdiction, by not filing his petition for

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review with the respective District Court Clerk within thirty days. Instead, the Petitioners erroneously filed their pleadings to invoke the jurisdiction of the District Court in the Circuit Court. After dismissal the Petitioners now ask that this Court excuse their error by carving an exception to previously-well-established jurisdictional thresholds of the District Court.

Each of the Petitioners relies on Article V Section 2(a) of the Florida Constitution and Florida Appellate Rule 9.040(b) to suggest that Rule 9.100(b) be amended to allow the filing of a petition of a writ of certiorari in an additional location (for example, the tribunal from whose order review is sought). In his analysis, the Petitioner PAUL erroneously argues that this is an instance of the filing of the wrong pleading (a "Notice of Appeal") in the "right court" (the lower tribunal). See PAUL'S Initial Brief at page 17.

Initially, it is important to note that the Petitioners have mischaracterized the import of the District Courts' holdings. What Petitioner JOHNSON sees as an invoking of the jurisdiction of the wrong court (arguably within the purview of Rule 9.040(b)) is rather an invoking of the jurisdiction of the correct court (the District Court) by the filing of his petition for review in the wrong court (the Circuit Court) [JOHNSON does not (and could not)

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contend that his "Notice" was actually an attempt to gain review in the Circuit Court]. What Petitioner PAUL views as the "wrong pleading" (a Notice of Appeal) in the "right Court" (the Circuit Court) is instead the "wrong pleading" in the wrong court (the Circuit Court).

In fact, the distinctions raised by PAUL and JOHNSON as to the correctness of their petition for review are rendered immaterial by Rule 9.040(c). Under that rule and the constitutional provision that it codifies [Article V Section 2(a), requiring in part that ". . . no cause shall be dismissed because an improper remedy be sought"], it was incumbent on the District Courts below to consider the petitions for review, regardless of their denomination as "notices of appeal" or "petitions for writs of certiorari". For that reason, the opinion of the First District herein properly refused to fall prey to the snares of the Petitioners' analysis; instead, the Court assumed arguendo that Petitioner JOHNSON'S "notice" be dealt with under Florida Appellate Rule 9.100 (regarding certiorari proceedings). Under the requirements of Rule 9.040(c) and Article V Section 2(a), this approach was both appropriate and required. For the purpose of resolving the certified issue, it is of no legal consequence whether Petitioner's requests for review were "notices" or "petitions". These mischaracterizations serve only to divert this Court's

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attention from the true issue herein, as resolved and certified by the District Court; that is, whether an applicant for original relief under Rule 9.100 must comply with the filing requirements of that rule and, if so, whether his failure to do so is jurisdictional.

As noted by the First District below, the precedent of this Court suggests that both questions be answered yes. In Southeast First National Bank of Miami v. Herin, 357 So.2d 716 (Fla. 1978), this Court held that the failure to timely file a notice of appeal (from a county court judgment to the circuit court) with the clerk of the circuit court deprived the circuit court of jurisdiction. In Southeast First National Bank, Appellant's counsel erroneously sent his Notice of Appeal to the district court clerk. This Court noted Appellant's argument [that Article V Section 2(a) required that the appeal should be allowed as filed, and transferred to the circuit court under Rule 2.1(a)(5)(d)], but nonetheless upheld the dismissal.

Seven months later, the same question was re-presented in the light of then-new Rule 9.040(b) in Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978), with an identical result. Petitioner therein suggested that the 1977 revision of Rule 2.1(a)(5)(d) in Rule 9.040(b) required a departure from Southeast First National Bank. As in Southeast First National Bank, Appellant's counsel sought to

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invoke the appellate powers of the circuit court by mailing his notice to the district court clerk. In reaffirming Southeast First National Bank and its predecessors, this Court expressly distinguished between an improper filing and an attempt to invoke the jurisdiction of the wrong appellate court:

> The reasoning of the late Mr. Justice Drew in Southeast First National Bank, supra, ably demonstrates why Florida Rule of Appellate Procedure 9.040(b) is inapplicable to this case:
>
> "This rule was designed to permit the transfer of cases where the appeal is taken to the wrong appellate court. For instance, where an appeal in a bond validation proceeding is taken to the District Court of Appeal instead of to the Supreme Court, or where an appeal in a case where the death penalty has been imposed is taken to the District Court instead of the Supreme Court, or where an appeal in which life in prison has been imposed is taken to this Court instead of the District Court. There are also instances where jurisdiction depends on whether the trial court directly passed on the validity or constitutionality of a statute. Where it is determined that the jurisdiction of the wrong court has been invoked, the Rule, and the Constitution, as amended, provide for such transfer.

Lampkin, 364 So.2d at 470, quoting from approval from Southeast First National Bank, 357 So.2d at 717-718. This rejected contention is identical to that relied on by the Petitioners herein (see pages 8-9 of JOHNSON'S Initial Brief, and page 9 of PAUL'S Initial Brief). The Petitioners here did not erroneously seek circuit court review by their filing of a pleading in that court; each should candidly

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admit that he sought relief from his district court. As in Lampkin, there is no mistaken impression that the circuit court might actually be empowered to reconsider; rather, there was only the erroneous conclusion that the avenue to further review (by the district court) required the filing of a petition or notice in the circuit court.

Furthermore, as noted by Justice Sundberg (in Lampkin at 936) and by the 1977 Revision Committee Notes, the former Rule 2.1(a)(5)(d) was amended in Florida Appellate Rule 9.040(b) to deal specifically with the holdings in Nellen v. State, 226 So.2d 354 (Fla. 1DCA 1969), and Engel v. City of North Miami, 115 So.2d 1 (Fla. 1959).

> It is argued Rule 2.1 was broadened in the new rules so as to protect from dismissal notices which are filed in the wrong court. We cannot agree with this contention. Florida Rule of Appellate Procedure 9.040(b) in no way altered the meaning or effect of Rule 2.1a(5)(d) or the cases construing it except as stated in the committee notes with respect to the results reached in Nellen v. State, 226 So. 2d at 354 (Fla. 1DCA 1969), and Engel v. City of North Miami, 115 So.2d 1 (Fla. 1959), which have no application here.

Lampkin, 364 So. 2d at 936. In Engel, this Court had declined to sanction the now-accepted practice of treating a petition for certiorari as a notice of appeal. In Nellen, the First District Court of Appeal dismissed a request for review of a county court order, rather than transferring the action to the circuit court. It is clear from that context

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that neither Nellen nor Engle would have had application to the certified question at bar. In this case, neither of the Petitioners sought to invoke the jurisdiction of the Circuit Court; each clearly sought review only by his respective district court. Consequently, the concept of transfer to a Court of proper jurisdiction (which was the solution refused in Nellen and modified by Rule 9.040(b)) is not applicable herein. Similarly, the rationale of Engle (that a petition for a writ of certiorari may not be a vehicle for appeal), superseded by Rule 9.040(c), is inapposite in this case; the First District Court of Appeal in fact treated the Petitioner's "notice" as a "petition", but resolved the motion to dismiss on wholely-different grounds. None of Nellen, Engle, or the Committee Notes to the revised rule speak to the issue in this case, whether a litigant may attempt to invoke the certiorari jurisdiction of a court by filing his initial pleading in another court. A reading of the entire Committee Notes, rather than the isolated portions quoted by Petitioners, bears out this conclusion (". . . . under this rule, a petition for writ of certiorari should be treated as a notice of appeal, if timely") (emphasis supplied).

Properly framed, the certified issue is not controlled by Rule 9.040(b) or (c), or affected by changes to the prior holdings of Engel and Nessen. Instead, there is simply the

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matter of whether Rule 9.100(b) should be revised to allow the filing of a petition with, not only "the clerk of the court deemed to have jurisdiction", but also with any other clerk of any other court. The holdings of Lampkin and Southeast First National Bank, as well as sound policy, militate against such revision.

The filing requirement provide more than the "notice" function emphasized by Petitioner PAUL (at page 11 of his Initial Brief). In addition, it is the landmark from which the Court's exercise of authority is launched. In the absence of a jurisdictional foundation for that exercise of authority, a court has no power to act. State ex rel. Diamond Insurance Agency v. Carroll, 102 So. 2d 129, at 131 (Fla. 1958). Were a contrary result possible, parties might well seek Supreme Court review of a district court opinion by the filing of a "notice" with the Clerk of a circuit court. The creation of the exception requested by the Petitioners herein might well open a Pandora's box of mis-filings, misnomers, and necessitated transfers.

Petitioner PAUL rightly recognizes the inherent unfairness of the strict jurisdictional rule. Nothwithstanding, the sound policy, requiring precise limitations on the "window of entry" to certiorari review overrides potential concerns of inequity in individual cases. If a different rule applied, there would be little

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definition to the power of a particular reviewing court to act.

> Despite what might appear to be the imposition of a hardship, we are compelled to conclude under applicable rules the timely filing of a Notice of Appeal at the place required by the rules is essential to confer jurisdiction on the Appellate Court. We have on numerous occasions held in similar situations that jurisdiction could not even be conferred by consent of the parties, when the notice of appeal was not filed as required by applicable rules.
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> * * *
>
> A court has no power to act in the absence of a jurisdictional foundation for the exercise of the power. The timely and proper filing of a Notice of Appeal is a jurisdictional essential to enable an appellate court to exercise its power.

Southeast First National Bank, 357 So.2d at 718.

The Respondent Citizens State Bank respectfully requests that this Court adhere to the precedent announced in Lampkin, Southeast First National Bank, and Diamond Berk, answer the certified question in the affirmative, and discharge the writ of certiorari.

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CONCLUSION

The District Courts did not refuse to treat the Petitioner JOHNSON's "Notice of Appeal" as a "Petition for Writ of Certiorari". Further, the District Court did not err in dismissing Petitioner's request for review, where that request was not timely filed in the appropriate situs. Accordingly, this Court should answer the certified question in the affirmative and discharge the writ of certiorari.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Answer Brief of Respondent was mailed to Bill A. Corbin, Esq., 305 Fannin Avenue, Blountstown, FL 32424, and Arthur J. England, Jr. Esq., Stuart Simon, Esq., Charles M. Auslander, Esq., One CenTrust Financial Center, 100 Southeast 2nd Street, Miami, Florida 33131, Arnold M. Weiner, Esq., City Attorney of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, and Joseph Z. Fleming, Esq., Fleming and Klink, 620 Ingraham Building 25 Southeast Second Avenue, Miami, Florida 33131, this 6th day of May, 1988.

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