IN THE SUPREME COURT OF FLORIDA

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| R. S. JOHNSON, | ** | |
| Petitioner, | ** | |
| v. | ** | CASE NO. 71,877<br>FIRST DISTRICT COURT<br>OF APPEAL NO. 87-1594 |
| CITIZENS STATE BANK, a Florida banking corporation, | ** | |
| | ** | |
| Respondent. | ** | |

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| | | |
|---|---|---|
| DAVID PAUL, | ** | |
| Petitioner, | ** | |
| v. | ** | CASE NO. 72,007<br>THIRD DISTRICT COURT<br>OF APPEAL NO. 88-217 |
| CITY OF MIAMI BEACH, ETC., ET AL., | ** | |
| | ** | |
| Respondents. | ** | |

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**PETITIONER JOHNSON'S BRIEF ON THE MERITS**

Bill A. Corbin, Esq.
305 Fannin Avenue
Blountstown, FL 32424
904/674-5424
Attorney for Petitioner
Johnson

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**STATEMENT OF THE CASE AND OF THE FACTS**

A Judgment was entered against Appellant/Petitioner Johnson in the County Court of Gadsden County. He filed his Motion for Relief from Judgment, which was denied. He appealed that denial to the Circuit Court acting in its appellate capacity. The Circuit Court entered its Order dated and filed September 24, 1987, which affirmed the County Court. It was recorded on October 1 in the Official Records Books.

On October 21 Petitioner timely filed his Notice of Appeal with the Clerk of the Circuit Court (App. 1; R 1), appealing the Circuit Court's Order to the First District Court of Appeal. All filing fees were paid at that time. However, the Circuit Court Clerk failed to promptly forward a copy of the Notice to the Clerk of the District Court so that it wasn't received there until October 28, four days after the 30 day period ended since the appealed Order was dated and filed.

The District Court entered its Order sua sponte raising the timeliness issue of the filing of Appellant's Notice of Appeal (App. 2-3; R 15-16), which was responded to by Appellant (R 17-19) and Appellee (R 21-23).

On January 5, 1988, the First District filed its Opinion on Motion to Dismiss, which dismissed Appellant's appeal and held that where a notice of appeal is not filed with the clerk of the appellate court within 30 days of rendition of the order sought to be reviewed, the notice may

not be treated as a petition for writ of certiorari (App. 4-7; R 24-27). The Court then certified the timeliness question involved, a situation of first impression in this State, to be one of great public importance. Thereafter, on February 1, 1988, Appellant/Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction with this Court. On March 7, this Court consolidated Petitioner Johnson's case with **Paul v. City of Miami Beach,** 13 F.L.W. 470 (Fla. 3d DCA February 16, 1988).

## SUMMARY OF ARGUMENT

I. **A NOTICE OF APPEAL SHOULD BE TREATED AS A PETITION FOR WRIT OF CERTIORARI.** The Constitution, Rules, Statute, and case law make it mandatory that the District Court of Appeal treat Petitioner Johnson's Notice of Appeal as a petition for writ of certiorari.

II. **THE TIMELY FILING IN AN INAPPROPRIATE COURT IS DEEMED A TIMELY FILING IN THE APPROPRIATE COURT.** Since the law in this State is clear that Petitioner's Notice of Appeal must be treated as a petition for writ of certiorari, and that Notice was timely filed with the Clerk of the lower tribunal, in light of the constitutional provision and applicable rule, the place requirement is not controlling in order to vest jurisdiction in a superior court. The fact that the Clerk of the lower Court did not timely comply with his responsibility to forthwith transmit a copy of Petitioner's Notice to the District Court of Appeal should not result in the District Court refusing jurisdiction. Since historically there has not been a strict compliance with all filings for appellate review, Petitioner's situation should not be treated differently. The First District Court's strict interpretation of the 30-day filing rule flies in the face of the clear mandate of the Constitution and the liberal policy recognized by the rules and case law of this State.

## CERTIFIED QUESTION

> **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 30 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?**

## ARGUMENT

### I. A NOTICE OF APPEAL SHOULD BE TREATED AS A PETITION FOR WRIT OF CERTIORARI.

The Florida Constitution is the foundation of the appellate review proceedings involved here which have been certified by the First District Court of Appeal to be of great public importance. Article V, § 2(a) provides that:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administration supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. (e.s.)

Pursuant to this constitutional mandate, the Supreme Court adopted the subject Florida Rules of Appellate Procedure, including Rule 9.040, effective at 12:01 a.m., March 1, 1978. **In re PROPOSED FLORIDA APPELLATE RULES,** 351 So.2d 981 (Fla. 1977). Of particular importance in this proceeding are portions of the stated Rule.

Subsection (b) provides:

> **(b) Forum.** If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court. (e.s.)

Subsection (c) provides:

> **(c) Remedy.** If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy. (e.s.)

In reverse order, these two rule requirements shall be discussed.

For many years the policy of this State has been liberal in according a party seeking review of a lower tribunal's decision that right even though he improvidently misnames the remedy sought. For more than forty years there has been a statutory basis for this policy with the enactment of § 59.45, Fla. Stat. In addition, consistently through the years virtually every intermediate appellate court of this State has followed this trend in considering a notice of appeal as a petition for a writ of certiorari, **Home News Publishing Company v. U-M Publishing, Inc.,** 246 So.2d 117 (Fla. 1st DCA 1971); **In re Wood's Estate,** 114 So.2d 640 (Fla. 2d DCA 1959); **Schommer v. Bentley,** 489 So.2d 40 (Fla. 2d DCA 1986); **Hillsborough County v. Marchese,** 13 F.L.W. 362 (Fla. 2d DCA February 5, 1988); **Pavey v. Pavey,** 112 So.2d 589 (Fla. 3d DCA 1959); **Radio Communications Corporation v. Oki Electronics of**

**America, Inc.,** 277 So.2d 289 (Fla. 4th DCA 1973); **Sunshine Dodge, Inc. v. Ketchem,** 445 So.2d 395 (Fla. 5th DCA 1984); **Hackenberg v. Artesian Pools of East Florida, Inc.,** 440 So.2d 475 (Fla. 5th DCA 1983), as well as this Court, **Kilgore v. Bird,** 149 Fla. 570, 6 So.2d 541 (1942); **State v. Johnson,** 306 So.2d 102 (Fla. 1975); **Combs v. State,** 436 So.2d 93 (Fla. 1983). Likewise, a petition for writ of certiorari may be treated as a notice of appeal, **Pearce v. Parsons,** 414 So.2d 296 (Fla. 2d DCA 1982), as can a petition for writ of habeas corpus, **Garner v. Wainwright,** 454 So.2d 28 (Fla. 1st DCA 1984). Indeed, the rationale of the Supreme Court in some instances indicates that "some method of review" should be made available to an aggrieved person, **State ex rel. Scaldeferri v. Sandstrom,** 285 So.2d 409 (Fla. 1973), and where the overriding intent appears obvious defects in the form or substance in the review attempt should not defeat appellate jurisdiction absent actual prejudice to the opponent. **State v. Allen,** 196 So.2d 745 (Fla. 1967).

Rule 9.030(b)(2)(B) provides that the certiorari jurisdiction of district courts of appeal may be sought to review final orders of circuit courts acting in their review capacity. Of course, the Order herein of the Circuit Court below was one in which that Court acted in its review capacity. Since Petitioner's Notice of Appeal may be considered a petition for writ of certiorari, and Rule 9.040(c) provides that, "If a party seeks an improper

remedy, the cause shall be treated as if the proper remedy had been sought...," it appears that Petitioner is entitled to have his case heard on the merits. Indeed, it appears that the Rule is mandatory in requiring an appellate court to treat a case as if the proper remedy has been sought. **Pridgen v. Board of County Commissioners of Orange County,** 389 So.2d 259 (Fla. 5th DCA 1980), **Pet. for rev. den.** 397 So.2d 777 (Fla. 1981). And, of course, there can be no serious question but that a district court of appeal may review a decision of the circuit court, sitting in its appellate capacity, which affirms a decision of the county court. **McNamara Pontiac, Inc. v. Sanchez,** 388 So.2d 620 (Fla. 5th DCA 1980); **Wakulla Wood Products v. Richey,** 465 So.2d 660 (Fla. 1st DCA 1985). Also, there is authority for a district court to review by plenary appeal the merits of a final order of the circuit court acting in its review capacity. **County of Volusia v. Transamerica Business Corporation,** 392 So.2d 585 (Fla. 5th DCA 1980); **Odham v. Petersen,** 398 So.2d 875 (Fla. 5th DCA 1981).

Based upon the above, there is ample authority for the Petitioner's Notice of Appeal to be properly, and mandatorily, considered and treated as a petition for a writ of certiorari; and, in light of Subsection (b) of the Rule, it matters not where it is initially filed. The First District Court of Appeal, in failing to so consider Mr. Johnson's Notice of Appeal, committed error.

## II. THE TIMELY FILING IN AN INAPPROPRIATE COURT IS DEEMED A TIMELY FILING IN THE APPROPRIATE COURT.

Subsection (b) of Rule 9.040 also appears to be mandatory:

> If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court. (e.s.)

To interpret it otherwise would mean that the Rule promulgated by the Supreme Court as mandated by the Constitution is meaningless and accomplishes nothing. **Tascano v. State,** 393 So.2d 540 (Fla. 1981). The First District Court did not follow this directive and therefore committed error. Pursuant to the Rule, and its constitutional basis, Art. V, § 2(a), it does not seem that the place requirement for filing a notice governs the timeliness of a jurisdictional pleading which is inappropriately filed with another court. Both the First District in the case sub judice and the Third District in **Paul v. City of Miami Beach,** 13 F.L.W. 470 (Fla. 3d DCA February 16, 1988), have construed the "place" requirement of the Rule in a way that contradicts Article V, § 2(a) of the Florida Constitution. The Constitution requires a transfer "to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked...." Rule 9.040(b) was adopted by this Court for the express purpose of implementing that constitutional mandate.

The Committee Notes under Rule 9.040 state:

> Under these provisions [Sections (b) and (c)] a party will not automatically have his case dismissed because he...invokes the jurisdiction of the wrong court. The court must...transfer it to the court having jurisdiction. All filings in the case have the same legal effect as though originally filed in the court to which transfer is made.

**In re PROPOSED FLORIDA APPELLATE RULES,** 351 So.2d 981 (Fla. 1977), at 989. The legal effect of Mr. Johnson's filing a timely Notice of Appeal with the Clerk of the Circuit Court is to invoke the jurisdiction of the First District Court, the reviewing Court. Rule 9.110(b). By operation of 9.040(b), the filing of such a notice with the clerk of the circuit court is deemed to have "the same legal effect" as though it, when treated as a petition for writ of certiorari, was originally filed with the district court of appeal. To allow the clerk to have the power to, intentionally or unintentionally, delay the forwarding of that notice for a period of time until the 30 days are past, as was done in the case at bar and in **Paul,** would dissipate the constitutional mandate and clear requirement of the Rule. Here, Petitioner's Notice of Appeal was filed with the Clerk of the Circuit Court on October 21, 1987, but the Clerk did not "forthwith" forward a copy of it to the Clerk of the District Court so that it was not received until October 28, more than 30 days after rendition of the Order on review on September 24. This transmittal delay by the clerk should not affect the jurisdiction of the reviewing court and thereby deny one the appellate review he

is seeking and guaranteed by the Constitution and Rule.

In light of Rule 9.040(h), and decisional law on the general subject of timeliness of filing, it appears that the First and Third District Courts of Appeal have placed too much unwarranted emphasis on the date they received copies of Petitioners' Notices of Appeal, especially since those notices were timely filed with the clerk of the lower tribunals. Of course, strict compliance of such filing has not always been adhered to in appellate proceedings in this State. For example, when the last day of filing for appellate review falls on a Saturday, Sunday or holiday, the strict time for filing is extended in administrative proceedings, **Mick v. Florida State Board of Dentistry,** 338 So.2d 1297 (Fla. 1st DCA 1976), regular court proceedings, **Rubenstein v. Richard Fidlin Corporation,** 346 So.2d 89 (Fla. 3d DCA 1977), in mechanic's liens cases, **Stockslager v. Daly Aluminum Products, Inc.,** 246 So.2d 97 (Fla. 1971), and Industrial Relations Commission cases, **Dade County Planning Department v. Ransing,** 158 So.2d 528 (Fla. 1963). In addition, there have been other situations in which the rationale of the First and Third District Courts has not been strictly followed as in the case at bar and in **Paul.**

As a result of inadvertance or error, this Court has allowed belated direct review of appellate cases. **Hollingshead v. Wainwright,** 194 So.2d 577 (Fla. 1967); **Baggett v. Wainwright,** 229 So.2d 239 (Fla. 1969);

**State v. Meyer,** 430 So.2d 440 (Fla. 1983), albeit it in criminal rather than civil cases. Whether criminal or civil should not matter. As the court stated in **Meyer,** "Holding one party to a standard of practice different from that required of others violates the basic principles of justice on which our legal system is founded." At 443.

This Court also recently applied the doctrine of equitable tolling in the case of **Machules v. Department of Administration,** 13 F.L.W. 239 (Fla. S.Ct., March 31, 1988). Such doctrine is applicable when a party has in some extraordinary way been prevented from asserting his rights or has timely asserted his rights mistakenly in the wrong forum, as in the cases at bar.

Even though Rule 9.110(b) requires the filing of a notice of appeal to be with the clerk of the lower court, and Art. VIII, § 1(k), Fla. Const., seems to contemplate that the county seat is the location for the filing of such notice of appeal, this Court has held that the timely filing of such a notice in a branch office of the clerk of the county court constitutes timely filing within the contemplation of the rule. **Sanchez v. Swanson,** 481 So.2d 481 (Fla. 1986). **Hoffman v. Hoffman,** 485 So.2d 1282 (Fla. 1986). Therefore, it is obvious that there has not been strict compliance with the 30 day filing rule in all instances, and the Appellee herein may not successfully contend that all cases, at all times, must be governed by a strict timetable in order for a court to obtain jurisdiction

for review purposes. Because Petitioner did in fact timely file his Notice of Appeal with the Clerk of the Circuit Court, and such notice must be considered as a petition for writ of certiorari, the District Court, in strictly requiring, under the circumstances, the actual filing with its Clerk within the 30 days was error. In doing so, the Court simply chose not to be bound by the clear mandate of the Constitution and the liberal policy recognized by the rules and case law of this State.

The subject order of the Circuit Court below, acting in its appellate capacity, was dated and filed with the Clerk of that Court on September 24, 1987. Appellant's Notice of Appeal was filed with that Clerk, along with the appropriate filing fees, on October 21. However, the Clerk, for reasons unknown, did not immediately ("forthwith") forward a copy of that Notice to the Clerk of the District Court, but only did it so that it was filed with that Clerk on October 28, one week later. Of course, Appellant had no control over the Clerk's noncompliance with the Rules' requirements.

Subsection (g) requires that upon the filing of a notice [of appeal] the clerk shall <u>forthwith</u> transmit the fee and a certified copy of the Notice to the appellate court. Therefore, pursuant to this Rule, the Clerk of the Circuit Court below should have "forthwith" transmitted a certified copy of the Notice of Appeal to the First District Court of Appeal. The Clerk did not do this, which resulted

in the District Court ultimately determining that the Notice was not timely filed with its Clerk.

The Committee Notes under Subsection (g), state, in part, "The clerk must transmit the notice and fees immediately. This requirement replaces the provision of the former rules that the notice be transmitted within five days. The Advisory Committee was of the view that no reason existed for any delays." (e.s.) The violation of the Clerk performing his duty under the Rule should not prejudice Mr. Johnson's right to rely upon the constitutional mandate and rules implementing it.

Rule 9.040(h) provides that the failure of a party or clerk to timely file fees or additional copies of notices or petitions shall not be jurisdictional. However, no mention is made of what happens if the clerk fails to follow the duty as provided in Subsection (g).

In footnote 1 at page 2 of the District Court's Opinion on Motion to Dismiss (App. 19; R 25), it is observed that:

> There is no requirement under the appellate rules that counsel file a copy of the notice of appeal with the appellate court. In practice, this court is often served a copy by counsel for the appellant at the time it is filed below, but where this is not the case the court will ordinarily first obtain a copy of the notice when it is forwarded by the clerk of the lower tribunal.

One wonders whether the informal receipt by the District Court of a copy of Mr. Johnson's Notice of Appeal would have been sufficient under the First District's reasoning to have

considered Appellant's Notice to have been properly and timely filed with it within the 30 days limitation. The restricted view taken by the First and Third District Courts are not in line with the constitutional mandate and the rules implemented by this Court.

There are two cases of this Court that at first blush appear to be adverse to Petitioner's position in this cause. They are **Southeast First National Bank of Miami v. Herin,** 357 So.2d 716 (Fla. 1978), and **Lampkin-Asam v. District Court of Appeal,** 364 So.2d 469 (Fla. 1978). The question in **Southeast** was whether the failure to file a notice of appeal from a county court judgment in the office of the clerk of the circuit and county court in a timely fashion deprives the circuit court of appellate jurisdiction where the notice of appeal was filed in an otherwise timely fashion but in the district court of appeal. The answer was affirmative, with the Court relying on a 20-year-old Supreme Court case and a case of the First District Court of Appeal in 1972. However, the Court did acknowledge that old Rule 2.1(a)(5)(d), now 9.040(b), was designed to permit the transfer of cases where an appeal is taken to the wrong appellate court, with the Court stating that:

> 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. At 717.

The **Lampkin-Asam** case was a situation where the

petitioner inadvertently mailed his notice of appeal to the district court of appeal rather than to the circuit court of Dade County. As a result, after being mailed to the circuit court, it arrived too late, outside the 30 day jurisdictional time limit. The Third District dismissed the appeal as not being timely filed. Petitioner argued in this Court that old Rule 2.1 was broadened by 9.040(b) so as to protect from dismissal notices which are filed in the wrong court, but the Court rejected this contention.

Of course, the facts and circumstances in those cases are not exactly the same as in the case sub judice. As noted by the First District Court below, no Florida appellate court has addressed the precise issue presented in the case at bar (App. 6; R 26). It is submitted that there are sufficient differences between **Southeast** and **Lampkin-Asam** and the cases at bar, when compared to the authorities cited in this Brief, so that this Court may rationally either distinguish the cases or have second thoughts about those holdings now some ten years later. In light of the authorities cited herein, it is suggested that the latter approach be the prevailing one.

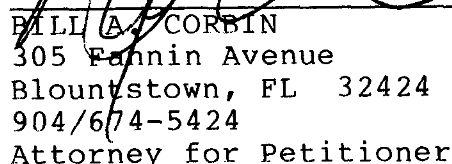
Rule 9.040(a) provides that an appellate court shall have such jurisdiction as may be necessary for a complete determination of the cause. The Supreme Court may determine all the issues in the subject litigation without remanding the case back to the District Court. Because it is the policy of this Court to avoid needless litigation and secure

a final determination whenever possible, **Ellison v. City of Ft. Lauderdale,** 183 So.2d 193 (Fla. 1966); **Zirin v. Charles Pfizer & Co.,** 128 So.2d 594 (Fla. 1961); **P. C. Lissenden Co. v. Board of County Commissioners,** 116 So.2d 632 (Fla. 1960), Petitioner Johnson respectfully requests that this Court hear and determine the merits of his case so as to secure a final determination as expeditiously as possible.

## CONCLUSION

The Certified Question of the District Court of Appeal, First District, should be answered in the negative, and the Court's decision should be quashed and the cause remanded with instructions that the Petitioner's appeal be reinstated or, in the alternative, that this Court determine the whole matter here.

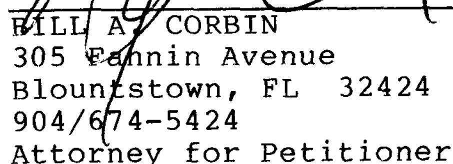
Respectfully submitted this 13th day of April, 1988.



BILL A. CORBIN
305 Fannin Avenue
Blountstown, FL 32424
904/674-5424
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Glenda F. Swearingen, Esq., P. O. Box 894, Marianna, Florida, 32446; and, Stuart Simon, Esq., Fine, Jacobson, Schwartz, Nash, Block and England, 100 S.E. 2nd Street, Miami, Florida, 33131, by regular U.S. Mail this 13th day of April, 1988.



BILL A. CORBIN
305 Fannin Avenue
Blountstown, FL 32424
904/674-5424
Attorney for Petitioner