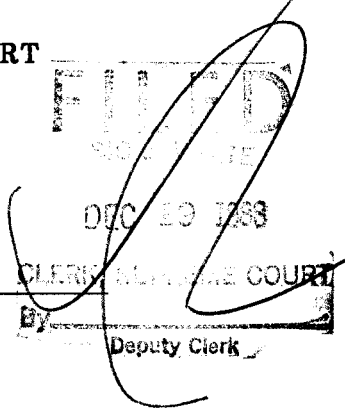
1-10-89

IN THE SUPREME COURT
OF FLORIDA



CASE NO. 73,239

H.W. JONES,

Petitioner,

vs.

OFFICE OF THE SHERIFF,

Respondent.

Answer Brief of Respondent

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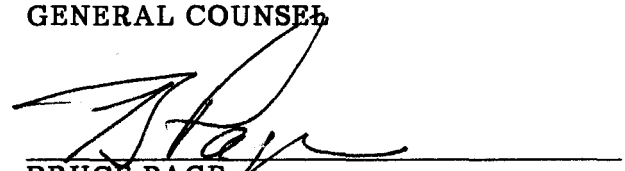
CONCLUSION

Petitioner Jones' "Petition for Writ of Certiorari" originally filed as a "Notice of Appeal" was not timely filed with the District Court. The District Court lacked jurisdiction and properly dismissed the "Petition."

Respectfully submitted,

JAMES L. HARRISON
GENERAL COUNSEL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Cyra C. O'Daniel, Esquire, 215 Washington Street, Jacksonville, Florida 32202, by U.S. Mail, this 16th day of December, 1988.

ATTORNEY

IN THE SUPREME COURT
STATE OF FLORIDA

DAVID PAUL, Appellant, Petitioner, vs. CITY OF MIAMI BEACH, a municipal corporation of State of Florida, and JOSEPH Z. FLEMING, Appellees, Respondents.	Case No. 72,007 (Consolidated with Case No. 71,877)

Answer Brief of Respondent, City of Miami Beach

On Petition for Review of a Decision of
the Third 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

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

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

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.
>
> * * *
>
> 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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IN THE SUPREME COURT
STATE OF FLORIDA

DAVID PAUL, Appellant, Petitioner, vs. CITY OF MIAMI BEACH, a municipal corporation of State of Florida, and JOSEPH Z. FLEMING, Appellees, Respondents.	Case No. 72,007 (Consolidated with Case No. 71,877)

Answer Brief of Respondent, City of Miami Beach

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

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OTHER AUTHORITIES

Introduction

This Court has consolidated this case with Johnson v. Citizens State Bank, 518 So.2d 410 (Fla. 1 DCA 1988) since these cases ask the identical certified question:

> When a party seeks appellate review of a nonappealable 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?

Respondent City of Miami Beach wishes to inform this court that in Gelinas v. City of South Miami, 13 FLW 747 (FLA. 3 DCA, March 22, 1988) the Third District Court of Appeal certified the identical question at issue herein, having dismissed the appeal on the authority of the case at bar, and the Johnson decision.

The parties in this brief will be referred to by name, record citations will be identified as "R ____", and references to the Appendix contained in Petitioner's Initial Brief shall be identified as "App.___". No appendix shall be filed herein since Petitioner's Appendix already contains a copy of the lower Court's Order to be reviewed. (See, App. 4).

The City takes objection with Petitioner's inclusion in its Appendix of four items (Appendix nos. 1, 2, 5, and 6) since they are not related to the question certified herein, yet deal primarily with the substance of Petitioner's original claim for relief, ie., a court order reversing the decision of the Miami

Beach City Commission in denying Petitioner's variance request. The remaining Appendix items (Appendix no. 3, "Petitioner's Notice of Appeal to lower Court", and Appendix no. 4 "Opinion of lower Court Dismissal of Petitioner's Appeal") are the only items relevant for purposes of ruling on the question certified herein.

Statement of the Case

Petitioner's Statement of the Case is accurate except in the following respects:

> - In February, 1987, the Miami Beach City Commission denied Paul's request for a variance from the City's boat, dock and marine facilities ordinance that would permit him to install pilings in Biscayne Bay in order to moor his yachts safely. ...

(Petitioner's Statement of the Case, first paragraph). This statement (dealing with matters not relevant to the question certified herein, yet responded to only for purposes of preserving the record) omits the fact that Petitioner sought a variance to install **additional** pilings in the waterway behind his home, for the purpose of mooring his 97 foot yacht, which yacht he could (if he chose to) moor in the dock on his adjacent property.

> - The City of Miami Beach and citizen Joseph Fleming moved to dismiss Paul's appeal in the Third District as untimely. ...

(Petitioner's Statement of the Case, third paragraph). This statement must be amplified as follows:

1. Joseph Fleming is not merely a citizen but has legal status in this action as intervenor (R-5, footnote no. 1); and

2. Respondents moved to dismiss Paul's appeal in the Third District Court of Appeal since the only relief available to review the lower Court's Order was by filing a petition for writ of certiorari, not by filing a notice of appeal (R. 1 - 4, 13, 14); since Petitioner filed a notice of appeal, Respondents successfully moved for dismissal since a notice of appeal, although timely filed in the lower tribunal, may not be treated as a petition for writ of certiorari when the notice has not been filed in the appellate court within thirty days of rendition of the order to be reviewed.

Statement of the Facts

The City of Miami Beach again maintains that the only relevant facts for purposes of the certification at bar concern the procedural filings that occurred below. Respondent City maintains that a full discussion of what facts occurred in regards to Petitioner's variance request is neither necessary nor appropriate in this forum. Nonetheless, the City of Miami Beach offers the following for purposes of clarifying Petitioner's Statement of the Facts:

> - ...After the initial application for variance was modified through a reduction in the number of pilings sought, the City's Marine Authority approved the dock and reconfigured pilings. ...

(Petitioner's Statement of the Facts, second paragraph). This statement fails to explain that Petitioner sought a reduced number of pilings in its variance application because the Marine Authority refused to grant the number of pilings originally requested. (App. 6, page 51, lines 24-25; page 52, lines 1 and 2).

> - ...In February, 1987, the City Commission denied Paul's request for a variance, both as to the original and the modified proposal for a dock and pilings. ...

(Petitioner's Statement of the Facts, second paragraph) At the February 4, 1987 meeting of the Miami Beach City Commission, the Marine Authority's recommendation of Petitioner's modified variance application was considered by the City Commission--since, as stated above, Petitioner's original variance request was not approved by the Marine Authority, the only proposal at issue at the February 1987 City Commission meeting was the modified proposal. Petitioner's original proposal for his variance request was thus not considered by the City Commission.

Summary of Argument

The District Court properly dismissed the action below since Petitioner incorrectly filed a notice of appeal when the proper remedy for review in this case was via the filing of a petition for writ of certiorari, (see, City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982)) and although received timely in the Circuit Court, said Petition was not filed in the District

Court within thirty days of rendition of the Order to be reviewed. See, Fla. R. App. P. 9.100(b),(c). Since jurisdiction was lacking, the District Court could not consider the Petition.

Basically, Petitioner's arguments for asserting error below are two-fold:

1. The District Court failed to adhere to the constitutional directive of Article V, Section 2(a) of the Florida Constitution that causes shall not be dismissed merely for seeking the wrong remedy; and

2. The District Court's treatment of Petitioner's appeal as untimely is in direct contravention of Article V, Section 2(a) of the Florida Constitution and in violation of Rule 9.040(b) of the Florida Rules of Appellate Procedure which authorizes the transfer of cases to an appropriate court when filed in the inappropriate court.

Petitioner's first argument does not adequately address the question certified by this Court since the District Court did not dismiss the appeal simply because the wrong remedy was sought. The District Court's Order held (in part) that:

> ...An improvidently taken appeal from a judgment of the circuit court sitting in its review capacity may not be effectively treated as an appropriate petition for writ of certiorari when a notice of appeal is not transmitted to the appellate court--where certiorari must be initiated--within thirty days of the rendition of the lower court order sought to be reviewed. <u>In sum, the appeal does not lie; if considered as a petition for certiorari, it is untimely. ...</u>

(R-15, 16). (Emphasis added). As such, the Court held that even

if the improper remedy (Notice of Appeal) was treated as the proper remedy (Petition for Writ of Certiorari) the appeal still would not lie due to the untimeliness of the Petition, as received in the District Court.

Petitioner's second argument concerning the purported duty of a Court to transfer a cause to an appropriate court is also not persuasive since this Court has held that Florida Rule 9.040(b) of the Florida Rules of Appellate Procedure has application only to situations wherein a party has filed his action in the wrong **appellate** court. See, Southeast First National Bank v. Herin, 357 So.2d 716, 717 (Fla. 1978). Such is not the situation here wherein Petitioner filed the Notice of Appeal with the Circuit Court, as opposed to the Appellate Court. Rather than filing in the wrong appellate court (in which case a transfer would have been proper under the Rules) Petitioner filed its Notice of Appeal with the Clerk of the lower court which had rendered the Order sought to be reviewed; no authority exists for transferring a case in this latter situation. Even if treated as a Petition for Writ of Certiorari, the Notice of Appeal was not received timely by the District Court for it to have jurisdiction to consider the Petition. Thus, the District Court acted properly in not permitting the Notice of Appeal to stand as a validly filed Petition for Writ of Certiorari.

Argument

1. The District Court of Appeal did not have to Treat the Notice of Appeal as a Petition for Writ of Certiorari.

A District Court of Appeal may treat a notice of appeal as a petition for writ of certiorari, Bridges v. Williamson, 449 So.2d 400 (Fla. 2 DCA 1984), yet has no absolute duty to do so.[1] Petitioner statement that "Innumerable decisions of the courts of Florida have applied this [Article V, Section 2(a)] provision of the Constitution to require that an improperly filed notice of appeal be treated as a petition for writ of certiorari. ..." (Petitioner's Initial Brief at 7, 8) serves no purpose in enlightening this Court, since none of the cited cases discuss the precise issue certified herein dealing with jurisdiction when the proper remedy (however achieved) has not been timely invoked.

Moreover, Petitioner's representation that: "The Third District Court of Appeal simply erred in failing to treat Paul's Notice of Appeal as a Petition for Writ of Certiorari" [under Fla. R. App. P. 9.040(c)] (Petitioner's Initial Brief at 8), is inaccurate since the District Court held that even if treated as

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[1] Pridgen v. Board of County Commissioners of Orange County, 389 So.2d 259 (Fla. 5 DCA 1980) cited by Petitioner for the proposition that a court must treat a cause as though the proper remedy had been sought, is not applicable to the case at bar since in Pridgen, the wrong relief was filed in the right court and thus "...the jurisdictional time limit was met when the first petition was filed. ...". Id. at 261 (Dauksch, C.J., concurring specially). In the present case, however, since Petitioner filed the wrong relief (relief should have been a petition for writ of certiorari) in the wrong court (relief should have been filed in the District Court) the District Court's jurisdiction was not timely invoked.

a petition for writ of certiorari, jurisdiction was still lacking to consider the Notice of Appeal:

> ...[A]n improvidently taken appeal from a judgement of the Circuit Court sitting in its review capacity may not be effectively treated as an appropriate petition for writ of certiorari when the notice of appeal is not transmitted to the appellate court--where certiorari must be initiated--within 30 days of the rendition of the lower court order sought to be reviewed. In sum, the appeal does not lie; if considered as a petition for certiorari, it is untimely...".

(R. 15, 16). Since Petitioner filed the wrong relief (See, City of Deerfield Beach v. Vaillant, supra),[2] and since this relief was not filed timely in the District Court, the appeal was properly dismissed.

2. **Petitioner's Failure to Timely File the Proper Remedy in the District Court Deprived that Court of Jurisdiction.**

Florida Rule Appellate Procedure 9.100(b) and (c) state as follows:

> (b) ...The original jurisdiction of the court shall be invoked by filing a petition...with the clerk of the court deemed to have jurisdiction.
>
> (c) ...A petition for common law certiorari shall be filed within thirty days of rendition of the order to be reviewed. ...

In dismissing the action below, the District Court determined that since Petitioner had failed to timely file its Petition for

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[2]Petitioner concedes that "...the appropriate filing should have been labeled a petition for writ of certiorari." (Petitioner's Initial Brief at 5).

Writ of Certiorari in the District Court within Rule 9.100(c)'s thirty day limitation, jurisdiction did not lie; since the thirty day time period is jurisdictional (see, State Department of Highway Safety and Motor Vehicles, etc. v. Adams, 338 So.2d 542 (Fla. 1 DCA 1976); see, also McGee v. McGee, 487 So.2d 412 (Fla. 4 DCA 1986)), and since a reviewing court has no power to waive this jurisdictional defect (see, Wieczorek v. Williams, et al, 71 So.2d 262 (Fla. 1954)), the District Court had no choice but to dismiss the appeal.

As grounds for reversing the dismissal Petitioner argues that since the District Court had a constitutional responsibility under Article V, Section 2(a) of the Florida Constitution to treat the Notice of Appeal (which was timely filed in the Circuit Court) as a Petition for Writ of Certiorari in the District Court (see Petitioner's Initial Brief, Argument 1), said Court also had a responsibility under Florida Rule Appellate Procedure 9.040(b) to hold that the legal effect of filing the Notice of Appeal in the Circuit Court was as though the notice was originally filed in the District Court of Appeal. In this regard, Petitioner maintains that since the Notice of Appeal was timely filed in the Circuit Court, under the transfer provisions of Rule 9.040(b), the Notice was thus timely filed in the District Court.

Petitioner's arguments as outlined above, however, are not supported by any legal authority. Rather, the District Court had full authority to dismiss the appeal in light of Southeast Bank, supra, and Lampkin--Asam v. District Court of Appeal, 364 So.2d

469 (Fla. 1978).

In Southeast, the court held that the failure to file timely a notice of appeal in the lower tribunal deprived the appellate court of jurisdiction, even though the notice was filed in an otherwise timely fashion but in the district court of appeal. In Lampkin-Asam, a notice of appeal was timely filed yet inadvertently sent to the district court of appeal rather than to the circuit court. Upon receipt, the clerk of the district court mailed the notice to the clerk of the circuit court, who in turn filed the notice, seven days after the thirty-day jurisdictional time limit. Subsequently, the district court dismissed the appeal as not timely filed.[3] The untimely filing of the Notice of Appeal, constituted a jurisdictional defect depriving the District Court of jurisdiction to entertain Petitioner's appeal.

> [T]he timely filing of a notice of appeal at the place required by the Rules is essential to confer jurisdiction on the appellate court. ...The court has no power to act in the absence of a jurisdictional foundation for the exercise of the power. State ex rel Diamond Berk Insurance Agency, Inc. v. Carroll, 102 So.2d 129 (Fla. 1958). "Had there been any attempt by adoption of the new appellate rules to authorize indiscriminate filing of notices of appeal in any tribunal, Florida Rule of Appellate Procedure 9.110(b) would not provide that jurisdiction of an appellate court shall be invoked by filing a

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[3]As in Lampkin-Asam, supra, it was not the clerk's responsibility to timely file the proper relief in the proper court. Under Florida Rule Appellate Procedure 9.040(c), "...It shall not be the responsibility of the Court to seek the proper remedy. ..."; thus, Petitioners attempt to place the blame upon the Circuit Court Clerk for the late filing of the Notice of Appeal in the District Court does not relieve Petitioner of the duty to file the proper remedy in the proper court, on a timely basis.

> notice "with the clerk of the lower tribunal." Id. at 130, 131.

Id at 471. Similarly, an examination of Florida Rule of Appellate Procedure 9.100(b)and (c) evidences a clear intent on the part of the State Legislature that for a party to invoke the original jurisdiction of the District Court, a Petition for Writ of Certiorari must be filed with the Clerk of the District Court within thirty days of rendition of the Order to be reviewed.

In Lampkin-Asam, Petitioner also maintained that Florida Rule of Appellate Procedure 9.040(b) authorized the transfer of the notice of appeal (which was timely filed in the district court) to the circuit court--in dismissing this argument, this court explained why Florida Rule of Appellate Procedure 9.040(b) was inapplicable:

> 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 where life imprisonment 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. The necessity for such Rule was the result of the creation of the district court of appeal in revised Article 5 of the Florida Constitution in 1957, and the prescribed [sic] jurisdiction of the courts of the appellate system in the Constitution.

Id at 470. Rule 9.040 was not intended to blanketly right the wrongs of Counsel who invoke improper remedies in improper forms, yet was intended to allow the transfer to the appropriate court of remedies (otherwise proper) yet filed in the wrong appellate court. Petitioner herein filed its remedy not with the Appellate Court, yet with the Circuit Court which had entered the Order sought to be reviewed. The transfer provisions of Rule 9.040(b) do not apply to the present case because this is not a situation wherein the remedy was filed in the wrong appellate court. As such, Petitioner's statement that: "...The present case and Johnson, are akin to the exceptions in Southeast, (Petitioner's Brief at 16, 17) is simply incorrect. In the Johnson case and in the case at bar, we are not simply faced with the right remedy sought in the wrong court as in Southeast and its noted exceptions, yet we have the wrong relief sought in the wrong court. The District Court below held that even if the improper pleading (Notice of Appeal) was treated as the correct pleading (Petition for Writ of Certiorari), it could not stand since it was not timely filed in the District Court. Petitioner's argument that the procedural situs rule (Florida Rule Appellate Procedure 9.100(c)) is nonconstitutional, giving weight to "the second constitutional protection of having a cause transferred from an inappropriate forum to the correct court (Petitioner's Brief at 18), is not persuasive since, as stated above, the transfer provision of Florida Appellate Rules does not even apply to this case; as such, the District Court had no choice but to

recognize the lack of jurisdiction and dismiss the case.

As further support for its argument that the failure to timely file the Notice of Appeal in the District Court is not grounds to dismiss its appeal, Petitioner theorizes that "...the jurisdictional notification requirement [Florida Rule Appellate Procedure 9.100(b)(c)] is unnecessary because the adverse party is already a litigant in the lower Court and knows, if there is a timely filing in the lower tribunal, the decision is not final because it has been taken to an appellate court for review ...". (Petitioner's Initial Brief at 11 through 12.) The City maintains that Petitioner's emphasis on the notice requirements of the Florida Appellate Rules is misplaced. The procedure set forth in the Rules governing situs filings of notices of appeal and of petitions for writ of certiorari were established with both of these distinct remedies in mind. Contrary to Petitioner's statement that "no purpose is served by demanding a citing of the filing [of the petition for writ of certiorari] in the Appellate Court" (Id. at 12), the reasons for so filing are indeed quite logical. The purpose of requiring that a notice of appeal be filed in the lower court is in part so that a record may be compiled by the lower court clerk; contrast this situation with the filing of a petition for writ of certiorari with the district court wherein no lower court record need be compiled by the clerk. For Petitioner to imply that in a certiorari situation the parties would be sufficiently notified upon receipt of a notice of appeal filed in the lower court, does not

sufficiently address the purpose of the situs filing requirements dealing with the clerk's responsibilities (and also does not sufficiently address why the Rules need not be strictly adhered to). Rather, the jurisdictional notification requirement that a petition for writ of certiorari be filed timely in the district court of appeals serves a valid public purpose in ensuring efficient court administration, as well as notifying the parties.

Conclusion

Petitioner's Brief contains no authority which would warrant a finding that the District Court erred in dismissing the appeal below. Petitioner filed the wrong relief in the wrong court, resulting in a proper dismissal of the appeal. Even if the Notice of Appeal was treated as a Petition for Writ of Certiorari, the Order below was too old for review since the Notice of Appeal was not filed in the Third District Court of Appeal within thirty days from the Order's rendition. The Brief filed by Petitioner contains no caselaw warranting that the appeal be reinstated, yet merely theorizes on reasons why a petition for writ of certiorari need not be timely filed in the District Court. Petitioner cannot avoid the fact that the time period for filing a petition for writ of certiorari is jurisdictional. Jurisdiction is imperative to the cause herein, for without it the case cannot stand. The Petition for Writ of Certiorari below was not received timely, as such the District Court had no jurisdiction to consider the appeal. Petitioner's

attempt to shift the blame for the late filing of the Petition for Writ of Certiorari to the Court Clerk (when Counsel has the responsibility to timely file the right relief in the right court) is not a reliable ground upon which this Court can grant the requested relief. In fact, the question of who is at fault in failing to timely file the Notice with the District Court is not truly relevant--rather, the relevant issue is only whether or not the Notice (albeit Petition for Writ of Certiorari) was timely filed with the District Court. Since the Notice was not timely filed, the District Court lacked jurisdiction. Respondent, City of Miami Beach, thus respectfully requests that this Court affirm the District Court's decision in dismissing the Appeal.

RESPECTIVELY SUBMITTED,

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Certificate of Service

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