

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,  
v.  
FREDERICK K. JONES,  
Respondent.

CASE NO. 67,084

**FILED**  
SID J. WHITE  
JUL 8 1985  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts (PB-2-5).

### III SUMMARY OF ARGUMENT

The first certified question has already been answered in respondent's favor by the recent decision of this Court in State v. Creighton, 10 FLW 257 (Fla. May 2, 1985) (No. 64,471) and, accordingly, respondent relies upon Creighton. The second certified question should also be answered in the negative on authority of State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983).

#### IV ARGUMENT

##### ISSUE I

THE PROVISIONS OF ARTICLE V, SECTION 4(b)(1) OF THE FLORIDA CONSTITUTION (1980) ARE NOT SELF-EXECUTED AND THE STATE HAS NO RIGHT TO APPEAL FROM A FINAL JUDGMENT IN A CRIMINAL CASE EXCEPT THAT CONFERRED BY STATUTE OR RULE, AND NO STATUTE OR RULE AUTHORIZES A STATE APPEAL FROM A TRIAL COURT ORDER DISMISSING AN AFFIDAVIT ALLEGING A VIOLATION OF PROBATION.

Respondent requests this Court to answer the first certified question in the negative, and points out that this Court has already so ruled in State v. Creighton, 10 FLW 257 (Fla. May 2, 1985) (No. 64,471). Interestingly, the bulk of petitioner's argument made here was also made on rehearing in Creighton, supra, which, by this Court's order of June 20, 1985, was considered and denied. This Court, of course, may judicially notice its own record.

Pursuant to Creighton, the question becomes whether the state's appeal here was authorized by rule or statute. Sub judice, the only argument, not already made and rejected in Creighton, is that Section 924.37, Florida Statutes (1983) authorizes the state to appeal a circuit court order dismissing an affidavit. It is quite clear, however, that when Section 924.37 is read in conjunction with Sections 924.07 and 924.071, Florida Statutes (1983), that Section 924.37, Florida Statutes (1983) does not in itself grant a right to appeal but rather directs the

appellate court what to do with respect to the trial court's order in the event of affirmance or reversal. It is submitted, therefore, that the state's statutory appellate rights are granted solely by reference to Sections 924.07 and 924.071, Florida Statutes (1983), which does not authorize appeals of dismissals of affidavits. Indeed, Section 924.37, Florida Statutes (1983) does not govern the situation presented to the district court here, namely, the state attempting to appeal a non-appealable order. The district court did the proper thing by dismissing the state's appeal.

ISSUE II

THE DISTRICT COURT OF APPEAL MAY  
NOT UTILIZE A COMMON LAW WRIT OF  
CERTIORARI TO REVIEW A TRIAL  
COURT ORDER DISMISSING AN AFFIDAVIT.

Respondent requests this Court to answer the second certified question in the negative. In State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983), presently pending before this Court, the district court concluded that the district court's review by certiorari a final judgment is limited to supervisory review of a decision of a lower court sitting in its appellate capacity. Sub judice, the circuit court was functioning as a trial court, not in its appellate capacity. G.P., supra, also held that where the district court has a jurisdictional limitation to consideration of the appeal from a final judgment; certiorari may not be used to circumvent that limitation. For the reasons so well articulated in G.P. supra, respondent requests this Court to answer the second certified question in the negative.

Respondent also points out that the state, on rehearing in State v. Creighton, supra, specifically argued that jurisdiction could be had by certiorari, which argument was considered and rejected by this Court's order dated June 20, 1985.

V CONCLUSION

For the reasons advanced herein respondent requests this Court to approve the decision issued in this case by the District Court of Appeal, First District.

Respectfully submitted,

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT



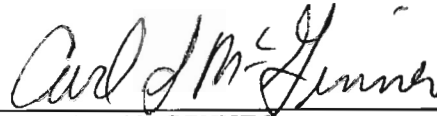
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Ms. Andrea Smith Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Petitioner; and, a copy has been mailed to respondent, Mr. Frederick K. Jones, 556 Ogram Street, Jacksonville, Florida, 32204, this 8th day of July, 1985.



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CARL S. MCGINNES