

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

Case No.
L.T. 04-CT-14406-SC

CAROLE MAE BJORKLAND,
DAVID MAGDALIK,
SHELBY RAE STEBBINS,
REGAN E. PATON,
MARK DAIL,
TARA BROWN,
THOMAS JANKE,
LISA FREDERICKSON,
MICHAEL ABEL,
CARMEN CARTER,
CARL COURY,
DOUGLAS KREMER,
RONALD LABASKY,
COURTNEY MASSEY,
BELINDA BARNETT,
MARCIA BARNETT,
DAVID BENNETT,
MELISSA BENNETT,
KAREN BURNHAM,
MARTHA BURNS,
WILLIS CHAMBERS,
BARBARA CHANDLER,
ROBERT CORREIA,
GREG COWELL,
JAMES DALE,
MARIO FELIX,
ALMASA FOCO,
JAROLD FRENCH,
JESUS GARCIA,
RYAN GREEN,
JOSHUA HAAG,
CARROLL HARTLOVE,
GEORGES HILARE,
DAWN JORDAN,

JAMES JOYCE,
KURT KRAMER,
BERNARD KILLION,
GARY MICHAEL LEE,
DANIELLE LYNCH,
GARCIA MADDOX,
LESLEY MCGOWAN,
LUIS MONTALVAN,
PATRICIA PATE,
LAURA PEACE,
STEVEN ROSADO,
JASON ROSE,
MOISES SANTIAGO,
DANIEL SAULS,
RANDY SCHLESMAN,
JUSTIN SCHREIBER,
GLENN SEEPLE,
ROBIN SPUNKS,
GRACE SULKOWSKI,
JUAN VASQUEZ,
ANTHONY WOLF,
FRANCES KORKUS,
MARK ELLIS,
MICHAEL GANEY,
MICHAEL GANEY,
MICHAEL GANEY,
WILLIAM HALL,
MICHAEL GRAMIGNA,
WILLIAM ARCHER,
MARY HYNDS,
RICHARD KOSA,
JEFFREY MITCHELL,
LINDA NEACE,
JOHN RICCOTA,
JAMES WARREN,
VITTORIO DELLASALA,
FRANK FARLEY,
JOSE MARES,
LUIS MARTINEZ,
ADAM SMITH,
HORTENSE HARMON,
DONALD OSENGA,
COY GREEN,
DALE DREGER,
DANIEL SCOTT JOHNSON,

PRISCILLE GITHLER,
HOWARD EICHHORST,
MURIEL ASKINS,
FRANCISCO ANGUIANO,
GEREMIAS SEVILLA,
MICHAEL KRADLAK,
RAYMOND RILEY,
FLOYD MILLICAN,
SHAWN DALE PHILLIPS,
DOUGLAS LARSSON,
ERIC BORMAN,
SCOTT PICKERING,
THOMAS SESSA,
ALFRED TESCH,
GARY THOME,
CATHERINE MARSH,
HENRY PLUTA,
DANTE CURTIS,
JUSTIN KING,
DIANE CAHILL,
TOD VANAMAN,
SCOTT RICKERT,

Defendants/Respondents.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI
TO REVIEW ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF
AND ORDER DISMISSING STATE'S PETITION FOR WRIT OF CERTIORARI AND
CONTEMPORANEOUS PETITION FOR WRIT OF MANDAMUS TO COMPEL CIRCUIT
COURT TO CONSIDER THE STATE'S PETITION FOR WRIT OF CERTIORARI
BASED ON A CLAIMED DUE PROCESS VIOLATION

COMES NOW the PETITIONER, the STATE OF FLORIDA, and pursuant to Rule 9.100(a), Fla. R. App. P. (2005), petitions this Honorable Court for a Writ of Certiorari to review the Circuit Court's order granting Respondent's motion to dismiss the petition for writ of certiorari and order dismissing Petitioner's petition for writ of

certiorari as untimely; and contemporaneously petitions this Court to issue a writ of mandamus directing the Circuit Court¹ to consider the State's Petition for Writ of Certiorari on its merits and, as grounds therefor, states:

I.

Basis for Jurisdiction

Jurisdiction to review this petition for writ of certiorari is founded upon Florida Rules of Appellate Procedure 9.030(b)(3), 9.100(c)(1), and Article V, Section 4(b)(3) of the Florida Constitution. The circuit court improperly dismissed the State's petition for writ of certiorari as untimely, erroneously deeming it to be an appeal. As the circuit court departed from the essential requirements of law, and an appeal is not available to the State, certiorari would lie. See State v. J.P.W., 433 So. 2d 616 (Fla. 4th DCA 1983).

This Court has jurisdiction to issue a writ of mandamus in the instant case under Article V, Section 4(b)(3) of the Florida

¹ Pursuant to Rule 9.100(e)(1) and (2), Fla. R. App. P. (2000) a petition for writ of mandamus should not name the judge or lower tribunal in the caption, but should do so in the body of the petition, and should be served upon the judge or lower tribunal.

Constitution and Florida Rule of Appellate Procedure 9.030(b)(3)². Mandamus is the proper remedy to test the correctness of an order determining that a court lacks jurisdiction. If the order is incorrect, the court has jurisdiction and a ministerial duty to hear the case. See Sky Lake Gardens Recreation, Inc. v. District Court of Appeal, Third District, et. al, 511 So.2d 293, 294 (Fla. 1987) ("The district court's dismissal of petitioner's appeal as untimely filed was a determination of lack of jurisdiction. Mandamus is an appropriate remedy to correct a determination of lack of jurisdiction on the part of a district court of appeal."); Accord In Re Estate of Laflin v. District Court of Appeal, Fourth District, 569 So. 2d 1273, 1274 (Fla. 1990) ("Mandamus is a proper vehicle to compel a lower court to exercise its nondiscretionary jurisdiction.")

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This provision provides:

(3) Original Jurisdiction. District Courts of appeal may issue writs of mandamus...to the complete exercise of the courts' jurisdiction....

II.

Standard of Review and Applicable Legal Principles

The standard which this Court must apply in reviewing a petition for writ of certiorari is whether the trial court's order departs from the essential requirements of law, *i.e.*, from a clearly established legal principle, resulting in a miscarriage of justice. Von Goff v. State, 687 So. 2d 926, 927 (Fla. 2d DCA 1997); State v. Cohens, 701 So. 2d 362, 363 (Fla. 2d DCA 1997); See also, Pettis, 520 So. 2d at 254; Combs v. State, 436 So. 2d 93, 96 (Fla. 1983).

The proper inquiry under certiorari review is whether the court afforded procedural due process and whether it applied the correct law. Haines City Cmty. Dev. v. Hegggs, 658 So. 2d 523, 528 (Fla. 1995). The district court should examine the seriousness of the error and use its discretion to correct the error, when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000).

"It has long been established that mandamus lies to compel the performance of a specific imperative ministerial duty. It is not an appropriate vehicle for review of a merely erroneous decision nor is it proper to mandate the doing (or undoing) of a discretionary act." Migliore v. City of Lauderhill, 415 So. 2d 62, 63 (Fla. 4th DCA 1982), approved 431 So. 2d 986 (Fla. 1983), citing Broward

County v. Coral Ridge Properties, Inc., 408 So.2d 625 (Fla. 4th DCA 1981). In this case, it was the specific imperative ministerial duty of the circuit court to address the State's petition for writ of certiorari on its merits. Therefore, mandamus is appropriate to compel the circuit court to execute its required function of reviewing the State's petition.

III.

Statement of the Case and Facts

All the defendants were charged with DUI. Their blood-alcohol levels were tested by law enforcement, using the Intoxilizer 5000. The defense sought to compel the State to produce the EPROM source code from the Intoxilizer 5000, which belonged to a third party, CMI, Inc. (the machine's manufacturer). The defense sought these source codes to attack the viability of the readings law enforcement obtained (Exhibit 01).

On October 21, 2005, a hearing was held on the motion to compel the evidence (Exhibit 02). At that hearing, only Respondents were allowed to present testimony and evidence to establish materiality and reasonable necessity in their EPROM request. The trial court, however, denied the State an opportunity to be heard (Exhibit 03). On November 2, 2005, the trial court issued an order compelling the State to produce the EPROM source code. Despite numerous requests, the trial court would not allow the State to present any evidence.

On December 2, 2005, the State filed a Petition for Writ of Certiorari in the Twelfth Judicial Circuit (Exhibit 04). The Petition asserted that the State was denied procedural due process and fundamental fairness by the county court in not allowing the State an opportunity to be heard, in response to the defense motion to compel.

The Circuit Court dismissed the State's Petition for Writ of Certiorari, on December 8, 2005. The Circuit Court dismissed the Petition as untimely, considering the Petition an appeal, which requires the filing of a notice of appeal within fifteen days. The Circuit Court never addressed the merits of the Petition for Writ of Certiorari (Exhibit 05). On December 15, 2005, the State filed a Motion for Reconsideration (Exhibit 06). The motion was denied on December 20, 2005 (Exhibit 07).

IV.

Argument

The State properly filed its Petition for Writ of Certiorari, under the original jurisdiction of the circuit court, pursuant to Fla. R. App. P. 9.030(c)(3). The State had thirty days from the rendition of the county court's order to file its Petition for Writ of Certiorari. Fla. R. App. P. 9.100(c). The trial court issued its order compelling Petitioner to produce the source code, on November 2, 2005; and, the State filed its Petition for Writ of Certiorari, on December 2, 2005, which was within the thirty day period.

The circuit court erroneously considered the Petition for Writ of Certiorari an appeal, which requires the notice of appeal to be filed within fifteen days. The filing of a Petition for Writ of Certiorari is not an appeal, as provided for in Fla. R. App. P. 9.130 and 9.140, but a proceeding invoking the original jurisdiction of the circuit court. Therefore, the trial court improperly dismissed the Petition for Writ of Certiorari as untimely.

Pursuant to Florida Rules of Appellate Procedure 9.140(c), the State may only appeal the following orders:

- (A) dismissing an indictment or information or any count thereof or dismissing an affidavit charging the commission of a criminal offense, the violation of probation, the violation of

- community control, or the violation of any supervised correctional release;
- (B) suppressing before trial confessions, admissions, or evidence obtained by search and seizure;
 - (C) granting a new trial;
 - (D) arresting judgment;
 - (E) granting a motion for judgment of acquittal after a jury verdict;
 - (F) discharging a defendant under Florida Rule of Criminal Procedure 3.191;
 - (G) discharging a prisoner on habeas corpus;
 - (H) finding a defendant incompetent or insane;
 - (I) finding a defendant mentally retarded under Florida Rule of Criminal Procedure 3.203;
 - (J) granting relief under Florida Rule of Criminal Procedure 3.853;
 - (K) ruling on a question of law if a convicted defendant appeals the judgment of conviction;
 - (L) withholding adjudication of guilt in violation of general law;
 - (M) imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines;
 - (N) imposing a sentence outside the range recommended by the sentencing guidelines;
 - (O) denying restitution; or
 - (P) as otherwise provided by general law for final orders.

The trial court's order compelling the State to produce the source code is not one of the enumerated orders that the State may

appeal.³ Thus, the State's Petition for Writ of Certiorari was the only appropriate remedy, since an appeal under Rule 9.140(c) was not an option. A Petition for Writ of Certiorari is the appropriate remedy to review pretrial evidentiary rulings which are clearly erroneous, where no remedy is available upon appeal of the final disposition. See e.g. State v. Busciglio, 426 So.2d 1233 (Fla. 2d DCA 1983); State v. Horvatch, 413 So.2d 469 (Fla. 4th DCA 1982).

In State v. Pettis, 520 So. 2d 250 (Fla. 1988), the trial court denied the State's motion in limine to prevent the defense from questioning an officer about his prior reprimands. The Fourth District granted certiorari and quashed the order denying the State's motion in limine. Pettis filed a motion for rehearing, which was granted, contending that since the State could not appeal the order denying the motion in limine, it had no authority to seek review by a petition for Writ of Certiorari. The Florida Supreme Court noted that in many other cases, the district courts have granted certiorari to quash non-appealable interlocutory orders,

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It is presumable that the circuit court mistakenly believed the order was a suppression under subsection (b); however, it was not a product of search and seizure. For example, had defense counsel filed a motion to suppress the breath samples and was granted it, then the State could have filed an appeal under that subsection. Here, no evidence was suppressed, but actually compelled, and it was not obtained by search and seizure.

which departed from the essential requirements of law. The Supreme Court further opined that:

The ability of district court of appeals to entertain certain petitions for certiorari to review pretrial orders in criminal cases is important to the fair administration of criminal justice in this state. Otherwise, there will be some circumstances in which the state is totally deprived of the right of appellate review of orders which effectively negate its ability to prosecute. If a nonfinal order does not involve one of the subjects enumerated in Florida Rule of Appellate Procedure 9.140(c)(1), the state would not be able to correct an erroneous and highly prejudicial ruling. Under such circumstances, the state could only proceed to trial with its ability to present the case significantly impaired. Should the defendant be acquitted, the principles of double jeopardy prevent the state from seeking review; thus, the prejudice resulting from the earlier order would be irreparable. The filing of a petition for certiorari is an apt remedy under these circumstances. Only those are granted in which the error is serious. Very little delay is involved because the petitions are usually denied on their face as not demonstrating a departure from the essential requirements of law. In fact, it would be counterproductive for the state to have a full right of interlocutory appeal from all pretrial orders because this would mean the district court of appeal would have to

entertain the appeal on its merits which would often result in unnecessary delay.

Id., at 253. Thus, certiorari is appropriate where the State has demonstrated irreparable harm. As in Pettis, the State could not appeal the county court's order to compel pursuant to Rule 9.140(c)(1); therefore, its only avenue to correct the erroneous and highly prejudicial ruling was through a petition for Writ of Certiorari.

In an analogous case, State v. Lasley, 507 So. 2d 711 (Fla. 2d DCA 1987), the defendants moved to dismiss the State's appeal from a final order under Fla. R. Crim. P. 3.850 as untimely. Rule 3.850 specifically provided that "an appeal may be taken to the appropriate appellate court from the order entered upon the motion as from a final judgment on application for writ of habeas corpus." This Honorable Court reasoned that a habeas corpus proceeding is like an action under Rule 3.850, which is "considered civil in nature and collateral to the criminal prosecution." Lasley, 507 So. 2d at 711. Since Fla. R. App. P. 9.110(b), not 9.140(c)(2), controlled, the State had thirty days to file its notice of appeal. Similarly, in this case, the State's Petition for Writ of Certiorari is civil in nature and collateral to the criminal prosecution. Therefore, Fla. R. App. P. 9.100(c) and 9.030(c)(3) apply, not Rule 9.140, and the Petition was timely filed.

In Smith v. State, 895 So. 2d 488 (Fla. 2d DCA 2005), this court ruled that the trial court departed from the essential requirements of law when it dismissed as untimely Smith's Rule 3.800(c) motion, which had been filed sixty days after the mandate issued in his direct appeal. This court reasoned, "In dismissing the motion because it was not filed within sixty days from sentencing, the court failed to appreciate that rule 3.800(c) allowed a second opportunity for mitigation during the sixty days after issuance of the mandate that concluded Smith's direct appeal." Id., at 489. Therefore, this Court quashed the order that dismissed Smith's motion as untimely and remanded for the trial court to consider the motion on its merits.

Similarly, in the instant case, the circuit court departed from the essential requirements of the law when it ruled that the State's Petition for Writ of Certiorari was untimely. In dismissing the petition because it was not filed within fifteen days of rendition of the county court's order compelling production, the circuit court failed to appreciate that a petition for Writ of Certiorari is governed by Rule 9.100(c). The rule provides that petitions for Writ of Certiorari must be filed within thirty days of rendition of the order to be reviewed. Here, the State filed its petition within thirty days of the county court's order compelling production. Therefore, since the circuit court

departed from the essential requirements of the law, as in Smith, this Court should quash the order that dismissed the State's petition as untimely, and remand for the circuit court to consider the Petition for Writ of Certiorari on its merits.

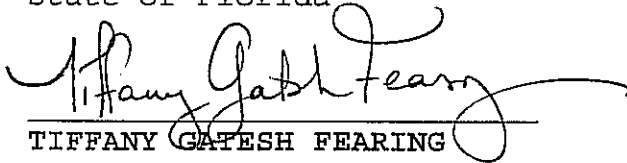
By dismissing the State's Petition for Writ of Certiorari as untimely, the circuit court is suggesting that the State file notices of appeals in lieu of certiorari petitions. To ensure it is timely, especially in certain questionable cases, the State would be compelled to file notices of appeal when a petition for writ of certiorari is actually the appropriate vehicle. Since appeals under Rule 9.140 take significantly longer than a petition for Writ of Certiorari, proceedings in the lower court would be unduly delayed.

The State's Petition for Writ of Certiorari should not have been dismissed as untimely, as it could not validly be considered an appeal. This Honorable Court should quash the circuit court order and remand for the circuit court to consider the petition on its merits. Moreover, since the circuit court departed from its imperative ministerial duty, this Honorable Court should issue a writ of mandamus directing the Circuit Court to consider the State's Petition for Writ of Certiorari on the merits.

WHEREFORE, the State respectfully requests that this Honorable Court grant Petitioner's Petition for Writ of Certiorari and/or grant the writ of mandamus compelling the circuit court to address the State's petition for writ of certiorari on the merits.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
State of Florida

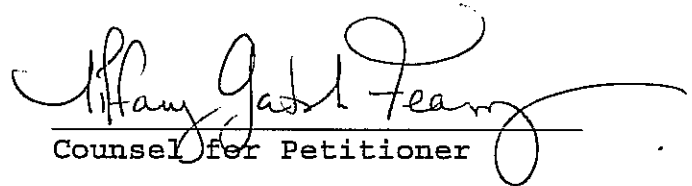


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari and/or Writ of Mandamus, including Appendix, has been furnished by regular U.S. mail to Robert Harrison, Esquire, 825 South Tamiami Trail, Suite 2, Venice, Florida 34285; and to Jason M. Miller, Assistant State Attorney, 2071 Ringling Blvd., Suite 400, Sarasota, Florida 34237 (without appendix), this 4th day of January 2006.


Counsel for Petitioner

IN THE DISTRICT COURT OF APPEAL
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STATE OF FLORIDA

STATE OF FLORIDA,

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L.T. 04-CT-14406-SC

CAROLE BJORKLAND, ET AL.,

Defendant/Respondent.

PETITIONER'S INDEX TO APPENDIX

<u>Exhibit 01</u>	State's Notice of Inability to Comply with Court's Order
<u>Exhibit 02</u>	Transcript of Hearing held on October 21, 2005
<u>Exhibit 03</u>	State's Request for a Response Hearing
<u>Exhibit 04</u>	State's Petition for Writ of Certiorari filed in the Twelfth Judicial Circuit with Exhibits
<u>Exhibit 05</u>	Circuit Court Order Granting Motion to Dismiss Petition for Writ of Certiorari and Order Dismissing Petition for Writ of Certiorari
<u>Exhibit 06</u>	State's Motion for Reconsideration
<u>Exhibit 07</u>	Circuit Court Order Denying State's Motion for Reconsideration