

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,964

RENE RAMOS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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FILED  
S.D.J. WHITE

OCT 15 1984

CLERK, SUPREME COURT  
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By \_\_\_\_\_  
Chief Deputy Clerk

*pl*

BRIEF OF RESPONDENT ON JURISDICTION

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## INTRODUCTION

Petitioner, RENE RAMOS, was the Appellant in the Third District Court of Appeal and the defendant in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent, THE STATE OF FLORIDA, was the Appellee and prosecution in those same courts. The parties shall be referred to as Petitioner and Respondent in this brief.

## STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below, but reserves the right to argue additional facts in the argument portion of this brief.

POINT ON APPEAL

WHETHER THE DECISION OF THE THIRD  
DISTRICT COURT OF APPEAL IN THE  
PRESENT CASE EXPRESSLY AND DIRECTLY  
CONFLICTS WITH KIRKSEY V. STATE, 433  
SO.2D (FLA. 1ST DCA 1983)?

ARGUMENT

THE DECISION OF THE THIRD DISTRICT  
COURT OF APPEAL IN THE PRESENT CASE  
EXPRESSLY AND DIRECTLY CONFLICTS  
WITH KIRKSEY V. STATE, 433 SO.2D  
(FLA. 1ST DCA 1983).

The Third District Court of Appeal correctly denied the Petitioner's Motion to Dismiss Cross-Appeal. A review of the existing authority clearly demonstrates that the State had an unfettered right to review the trial court's ruling on the motion for judgment of acquittal in the present case.

Both Sections 924.07(4), Fla. Stat. (1983), and Florida Rules of Appellate Procedure 9.140(c)(1)(H) expressly authorize the State to cross-appeal from a "ruling on a question of law" when, as in the present case, the Petitioner appeals his judgment of conviction. When a motion for judgment of acquittal is made pursuant to Florida Rules of Criminal Procedure 3.380 (a), it is the duty of the trial court to determine if the evidence is sufficient to warrant a conviction. In doing so, all facts introduced into evidence are admitted by defendant and the court must draw every conclusion favorable to the State. The motion should not be granted unless there is no legally sufficient evidence on which to base a verdict of guilt. Knight v. State, 392 So.2d 337 (Fla. 3d DCA 1981); Machado v. State, 363 So.2d 1132 (Fla. 3d DCA 1978).

In the present case, the Petitioner was tried and found guilty by the jury for first degree murder. In ruling on the motion for judgment of acquittal,<sup>1</sup> the trial court found the evidence insufficient as a matter of law to support first degree murder and reduced the petitioner's conviction to second degree murder. Under such circumstances, the State was clearly entitled to seek review of the trial court's ruling when the Appellant took an appeal.

This Court was presented with an identical situation in Mixon v. State, 59 So.2d 38 (Fla. 1952). In that case, the trial court had reduced the defendant's conviction to manslaughter after the jury had found the defendant guilty of second degree murder. The defendant appealed his conviction and the State cross-appealed the trial court's reduction of the offense. This Court, rejecting the defendant's issue on appeal and agreeing with the State that the trial court had committed error, held that the State should prevail on cross-appeal:

So, we conclude that the Judge committed no error in rejecting the testimony relative to the appellant's physical condition. For the same reason we think the State should prevail on the cross-appeal, taken under Sec. 924.07(4),

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<sup>1</sup> The trial court had reversed ruling on the motion for judgment of acquittal until after the jury's verdict.

by which its questioned the action of the court in reducing the offense to manslaughter.

Mixon v. State, supra,  
59 So.2d at 40.

Abandoning reliance on State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976), petitioner now suggests that the decision of the Third District Court of Appeal expressly and directly conflicts with Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983). In Kirksey, the State sought review, by cross-appeal, of the trial court's reduction of a verdict pursuant to Florida Rules of Criminal Procedure 3.620. On appeal, the First District Court of Appeal determined that the action of the trial court was a ruling on a question of fact, not of law, and not subjected to cross-appeal under Florida Rules of Appellate Procedure 9.140(c)(1)(H).

Though the decision of the Kirksey court does not conflict with the present case. The ruling in the instant matter derived from a motion for judgment of acquittal pursuant to Florida Rules of Criminal Procedure 3.380, not from a reduction of an offense pursuant to a motion for a new trial under Florida Rules of Criminal Procedure 3.620. Under such circumstances, no express and direct conflict exist.




CONCLUSION

Based upon the foregoing argument and citations of authority, the Respondent respectfully urges that the Petitioner's Petition for Discretionary Review be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to R. JAMES PELSTRING, 305 Coconut Grove Bank Building, 2701 South Bayshore Drive, Miami, Florida 33133, on this 11<sup>th</sup> day of October, 1984.

  
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