IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,964

RENE RAMOS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

****

ON PETITION FOR DISCRETIONARY REVIEW
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

****

CORRECTED

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE FACTS

Defendant, Rene Ramos, was tried for First Degree Murder for the killing of his long time friend in a dispute over Ramos' wife. At the close of the states' case, defendant moved for judgment of acquittal as to First Degree Murder on the grounds that the state had failed to prove premeditation. (T - 228) The Court reserved ruling on the issue. At the close of all the evidence the defendant renewed his motion and it was denied. (T-348) The jury convicted defendant of First Degree Murder.

The Defendant filed post trial motions in the case for new trial (R-88,App.2), for reduction of judgment pursuant to Rule 3.620 (R.-89,90,App.3-4) and for Judgment of Acquittal pursuant to Rule 3.380 (R-89,90, App. 3-4). The trial Court granted defendant's motion for judgment of acquittal and reduced the conviction to Second Degree Murder.

Defendant then appealed his conviction (R-120), and the State Cross-Appealed trial court rulings on questions of law. (R-122).

Defendant moved to dismiss the State's Cross-Appeal. The Court of Appeals denied the motion with an opinion, (App.5 thru 9). Defendant's motion for rehearing was denied and the instant Petition For Discretionary Review was lodged in this Court.

ARGUMENT

Defendant, by his argument, seeks to have this Court quash the decision of the Third District Court of Appeal and remand the case with instructions to the Third District to dismiss the cross-appeal of the state against the Defendant, RENE RAMOS. The basis of the Defendant's argument is that there is no authority for the state to bring the cross-appeal which is questioned.

Historically, a judgment of acquittal, once obtained by a criminal defendant, has barred any further proceedings on behalf of the state to convict the defendant of the crimes of which he was acquitted. Further proceedings in the common law include a prosecution appeal of the act of the judge or jury in rendering the acquittal. These common law notions are still in effect today in the State of Florida.

The legislature has enacted statutes in derogation of the common law on the subject of the state's right to appeal. These statutes specifically enumerate the types and timing of appeals by the state from adverse rulings to it in the trial courts. Absent from the pertinent Florida statute on the subject is the right to appeal a judgement of acquittal rendered on behalf of a criminal defendant. Having specifically deliniated the state's right to appeal, it can be said that based upon the principle of expressio unius exclusio alterius, and the fundamental importance of a judgment of acquittal in criminal jurisprudence and the common

law, that the legislature did not intend for the state to be permitted to appeal from a judgment of acquittal.

The lower Court has relied upon a section of the statutory authority for the state to appeal which provides that a state may appeal questions of law when a defendant appeals his judgment of conviction. Reading the statute in that manner contravenes all accepted principles of construeing a statute as expressed in the statutes and case law of Florida. Additionally such construction goes directly counter to the express will of the legislature in anacting a statute which called for construction of criminal code and related subjects in a manner favorable to the accused.

All Florida Courts addressing the issue have stated that the state may not appeal from a judgment of acquittal. However, there is a paucity of authority on whether or not that restriction applies to a cross-appeal. The state relies upon Mixon v. State, 59 So.2d 38 (1952), as authority for the proposition that all of the restrictions placed upon the state and all of the importance attributed to the judgment of acquittal and its finality are somehow removed from consideration and obviated by the mere fact that it is a cross-appeal as opposed to an appeal. The defendant believes that Mixon did not consider the issues presented in this brief and because the issues were not raised and determined in that case it should not be a case which serves as binding precedent on the matter before the Court. The court in Mixon pursuant to Florida Statute 924.07(4), reinstated a jury verdict of second degree murder as a result of the state's cross-appeal

after the trial judge had for some reason, unexpressed in the opinion, reduced the charge to manslaughter.

Defendant also believes that the function of the trial judge at the point of which he is presented with a motion for judgment of acquittal is to resolve factual issues as they relate to the elements of the offense. This is a resolution of a question of fact. This was the holding in Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983), when the trial court ruled pursuant to Rule 3.620 that the evidence was insufficient to sustain a jury verdict of guilty. The function of the trial court in both a motion for judgment of acquittal and motion for reduction of sentence are essentially the same on the insufficiency question.

Other states and courts have also determined that the trial court is resolving factual questions on motions for judgment of acquittal. Therefore, the act of the trial judge is not a question of law at all and should not be permitted on a cross-appeal.

The recent Federal Legislation which has greatly broadened the federal prosecutors right to appeal in criminal cases has little application to the question at bar. Prior to enactment of this very broad ligislation, the Federal Courts felt constrained by statutory restrictions from addressing a government's right to appeal in the context of the double jeopardy clause. The decisions which appear to permit appeals from judgments of acquittal in the federal system are based upon an expressed legislative intent from the Congress to permit these appeals as long as they do not

violate double jeopardy. Florida still has a very restrictive statute with regard to the right of the state to appeal. Florida has had the opportunity to change the statute to conform with the federal permissiveness if it so chose but had elected not to do so. Because the Florida Statute is much more restrictive on the state, the question before the court must be answered under state law and not under recent federal interpretations of the right of the government to appeal in the context of the double jeopardy clause and the new legislation.

I

THE STATE HAS NO AUTHORITY TO APPEAL FROM A JUDGMENT OF ACQUITTAL.

There is no authority for the State to appeal from a judgment of acquittal either directly or by cross-appeal. Such an appeal is precluded by the historical underpinnings of a judgment of acquittal and the nature of the states appellate rights in criminal matters.

A. THERE IS NO COMMON LAW RIGHT OF APPEAL BY THE STATE FROM JUDGMENTS OF ACQUITTAL.

American jurisprudence has a strong policy disfavoring appeals by the government. This policy was articulated in Arizona v. Manypenny, 451 U.S. 232, 101 S.Ct. 1657, 68 L.Ed. 2d 58 (1981),

> ...[T]his Court has observed on prior occasions that,"'in the federal jurisprudence, at least, appeals by the Government in criminal cases, are something unusual, exceptional, not favored.'" Will v. United States, 389 U.S. 90, 96, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967), quoting Carroll v. United States, 354 U.S. 394, 400, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442 (1957). This federal policy has deep roots in the common law, for it was generally understood, at least in this country, that the sovereign had no right to appeal an adverse criminal judgment unless expressly authorized by statute to do so. Accordingly, from the early days of the Republic, most state courts refused to consider appeals by prosecutors who lacked the requisite statutory authority.

Id., at 451 U.S. at 245, 101 S.Ct. at 1666; (holding that, in

state prosecution removed to federal court, appeal by state prosecutor of adverse decision in latter court is permitted if authorized by state statute).

One of the leading decisions referred to in Manypenny was United States v. Sanges, 144 U.S. 310, 12 S.Ct. 609 (1892), which, in holding that the federal government possessed no appellate right in the absence of express enabling legislation, and, that a general grant of appellate jurisdiction did not suffice, noted:

> [I]t is settled by an overwhelming weight of American authority that the state has no right to sue out of writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

Sanges, 12 S.Ct. at 610.

Florida has announced alignment with this view of the common law in State v. Burns, 18 Fla. 185 (1881), in which this Court held:

> The weight of authority is overwhelming, not only in this country but in England, that the writ [of error] will not lie at the instance of the State, and it is evident from the character of the legislation on the subject in this State that it has never been contemplated that the State could further pursue parties who had obtained judgment in their favor in prosecutions by indictment, whether by the judgment of the court or verdict by a jury.

Id., at 18 Fla. at 187

Given the historical restrictions on the states right to appeal in criminal cases by common law in Florida, any right now possessed must be derived from statute.[1] When the question has arisen, the courts of this state have viewed that right as purely statutory. Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947); Balikes v. Speleos, 173 So.2d 735 (Fla. 3rd DCA 1965); cert. dismissed, 193 So.2d 434 (Fla. 1967); State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976).

B. THE STATE'S RIGHT TO APPEAL OBTAINED IN F.S. 924.07 DOES NOT PROVIDE FOR APPEAL FROM JUDGMENTS OF ACQUITTAL.

The State's right of appeal in a criminal case is derived from F.S. 924.07 [2] and 924.071.

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1 The lower court, in footnote 3 to the opinion, noted the divergence of opinion among the districts in Florida on the issue of the states right to appeal under the Florida Constitution. This court currently has that issue under review in State v. J.M., Case No. 64,395-403. The lower courts opinion in this case did not rely upon an independent Constitutional right on the part of the state in denying defendant's motion to dismiss the cross-appeal, and the issue is not briefed. But, even if there is a right granted by the Florida Constitution, the legislature has defined the states power to appeal in criminal case in F.S. 924.07 and F.S. 924.071 and the legislature unquestionably has the authority to do so. Ervin v. Collins, 85 So.2d 852 (Fla. 1956); State ex rel. Landis v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); State of Florida ex rel. Chevron v. Exxon Corporation, 526 F.2d 266 (Fla. 5th Cir. 1976); State v. Harris, 136 So.2d 633 (Fla. 1962).

2 F.S. 924.07 provides:
924.07 Appeal by State
The state may appeal from:
(1) An order dismissing an indictment or information or any count thereof;
(2) An order granting a new trial;
(3) An order arresting judgment;
(Cont.)

Nowhere in the statutes does the legislature permit the state to appeal a final judgment of acquittal, and the courts of this state have recognized this limitation when the issue presented. Watson v. State, 410 So.2d 207 (Fla. 1st DCA 1982); State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976); State v. Harris, 439 So.2d 265 (Fla. 2d DCA 1983); State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 2d DCA 1981); State v. Bale, 345 So.2d 862 (Fla. 2d DCA 1977); State v. Budnick, 237 So.2d 825 (Fla. 1st DCA 1970) Cert. denied 240 So.2d 638 (Fla. 1970). Given the common law prohibition against state appeals from a judgment of acquittal, and the principle expressio unius exclusio alterius- the mention of one thing in a statute implies the exclusion of another-Thayer v. State, 355 So.2d 815 (Fla. 1976), as well as the fundamental importance of the judgment of acquittal in criminal jurisprudence, it can be said that the failure to include that grant to the state was intentional.

In the present case, notwithstanding the above, the lower court determined:

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(4) A ruling on a question of law when the defendant is convicted and appeals from the judgment;
(5) The sentence, on the grounds that it is illegal;
(6) A judgment discharging a prisoner on habeas corpus;
(7) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure;
(8) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case; or
(9) A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001.

Such appeal shall embody all assignments or error in each pretrial order that the state seeks to have reviewed. The state shall pay all costs of such appeal except for the defendant's attorney's fee.

> "The short answer to Ramos Motion [to dismiss] is that a trial courts determination that the evidence is insufficient to sustain the jury's verdict is a ruling on a question of law, and Section 924.07(4), Florida Statute (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 here, the defendant appeals his judgment of conviction."
> (Slip opinion filed June 12, 1984, Case No. 83,949 (Appendix 6))

The lower court's determination is erroneous for several reasons. It is incongruous to interpret F.S. 924.07 in a manner which would grant a right indirectly which had been withheld directly, especially concerning such an important subject. It has been stated by this Court in Garner v. Ward, 251 So.2d 252 (Fla. 1971)

> "Without question, the statutes here under examination are capable of more than one construction when applied to factual situations such as occur in the case sub judice. It is an accepted rule of law that if a statute is susceptible of more than one construction, it should be given the construction which will effectuate or carry out its purpose. (citations omitted) This is true even though the construction given is not within the literal, strict application of the language. (citations omitted). A statute should be construed to give effect to the evident legislative intent, even if the result seems contradictory to the rules of construction and the strict letter of the statute; the spirit of the law prevails over the letter. Beebe v. Richardson, supra. The intent prevails where strict application of the letter of the law would defeat its purpose, or be absured. (citations omitted).

251 So.2d 252 at 255, 256 (construction of a wrongful death statute to effectuate purpose over literal reading.) Defendant submits that the lower court interpretation of the statute defeats the legislative purpose.

Interpreting such statutes in the context of a judgment of acquittal has occurred in other jurisdictions. The Supreme Court of Kansas has addressed the problem before the Court today. In State v. Crozier, 587 P.2d 331 (Kansas 1978), a trial judge granted a defense motion for acquittal after a jury verdict of guilty. The State sought appellate review under a Kansas Statute which permitted reviews directly, "(3) Upon a question reserved by the prosecution." K.S.A. 22-3602(b). The Court noted:

> "...No formal procedural steps are required by K.S.A. 1977 Supp. 22-3602 (b) to appeal on a question reserved. All that is necessary for the state to do to reserve a question for presentation on appeal to the Supreme Court is to make proper objections or exceptions at the time the order complained of is made or the action objected to is taken. (Citations omitted). 587 P.2d 331 at 335

A literal reading of the statute would ostensibly permit a state appeal of an alleged erroneous ruling of law pursuant to a motion for judgment of acquittal. However, after noting that the statute did not authorize an appeal by the state from an order granting a motion for judgment of acquittal, the Court explained:

> "Under the statute, entry of a judgment of acquittal may be made only "if the

> evidence is insufficient to sustain a conviction" of the crime or crimes charged. By its very nature, a motion for a judgment of acquittal under Kansas criminal procedure is a ruling based on the sufficiency of the evidence to sustain a conviction of the defendant in the particular case. That motion is not concerned with questions involving the jurisdiction of the court or the sufficiency of the information to state a public offense or any other questions of law other than the sufficiency of the evidence to support a conviction." 587 P.2d 331 at 335.

As to the scope of the rights conferred by the statute relied upon by the state in Crozier, the Court noted that it had been held that the question reserved must be one which will aid in the correct and uniform administration of the law.[3]

Petitioner submits that a proper construction of F.S. 924.07(4) would permit the state to resolve evidentary rulings, jury instruction rulings and other matters which should be addressed in the event of retrial of the defendant on the conviction appealed. (2d. degree murder). This restricted interpretation serves well the principle that the statute is

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3 In State v. Glaze, 436 P.2d 377 (Kansas 1968) the court reviewed the instances where the right was exercised by the state, including legal questions and then observed:

> "Others could be cited but in the the decisions have been of such natures as to be of general benefit to the bench and bar or to serve as a guide in future trials likely to arise again." 436 P.2d 377 at 378

Although F.S. 924.07(4) and K.S.A. 22-3602(b) are worded differently, the Kansas statute is a vehicle for answering questions of law in that state. State v. Glaze supra.

in derogation of the finality of a judgment of acquittal expressed in the common law and must be strictly construed in favor of the defendant. State ex rel. Williams v. Coleman, 180 So. 357 (Fla. 1938);

Additionally, the subject matter of F.S. 924.07 is Criminal Appeals. The legislature has addressed construction of Criminal Statutes in F.S. 775.021(1).

> "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptable of differing constructions, it shall be construed most favorably to the accused."

In Garner v. Ward, 251 So.2d 252 (Fla. 1971), this court noted:

> It is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statutes were not enacted at the same time. (Citations omitted).

It would be incongruous not to assume that the legislature intended that constructions relating to criminal appeals statutes be guided by F.S. 775.021(1).

Nothing in the Rules of Appellate Procedure indicates a different analysis. The Committee notes to Rule 9.140(c)(1) indicates that Rule 9.140(c)(1)(H) simply tracks the statute and further cautions that the Rule is not intended to conflict with a defendants constitutional right to not be placed twice in jeopardy, and should be interpreted accordingly.

Florida Rules Appellate Procedure, Rule 9.140.[4]

C. A JUDGMENT OF ACQUITTAL IS A RULING ON A QUESTION OF FACT, AND AN APPEAL THEREON IS NOT CONTEMPLATED IN F.S. 924.07(4).

When a Court rules, pursuant to a motion filed under Rule 3.380 for judgment of acquittal, it is resolving questions of fact.

Rule 3.380 provides:

> (a) If, at the close of the evidence for the State or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant, shall, enter a judgment of acquittal.

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4 Defendant disagrees with the lower courts suggestion in footnote 4 to the opinion to the effect that State v. Williams, 444 So.2d 434 (Fla. 3rd DCA 1983) is alternate authority for the states cross-appeal. First, defendant has argued that the right to appeal cannot be broadened on a cross-appeal where it involves a ruling on a judgment of acquittal. (See Argument I a thru c) Second, defendants appeal involved trial errors whichlead to his conviction. Defendant has not appealed the trial courts action in ruling upon his Motion for Judgment of Acquittal of first degree murder. State v. McKinney, 212 So.2d 761 (Fla. 1968). Third, a ruling upon a motion for judgment of acquittal is a matter unique to criminal law, therefore, Williams rational does not apply. This does nothing to diminish the relief granted to the defendant in that case because of F.S. 775.021(1) where the legislature ordered the statute to be construed in favor of the accused.

Additionally, a distinction should be made between a courts power to accept an appeal and the executive branch's power to prosecute an appeal. F.S. 924.07 limits the executive power to bring an appeal, and the courts should not confer additional power on the executive by Rules governing its own jurisdiction.

> (b) A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.
>
> (c) If the jury returns a verdict of guilty or is discharged without having returned a verdict, the defendant's motion may be made or renewed within ten days after the reception of a verdict, and the jury is discharged or such further time as the court may allow.

When a trial judge undertakes to review the evidence, he must necessarily determine whether, in his opinion, the evidence is sufficient to warrant a conviction. Factual elements must be resolved as either proven or not proven. The duty of a trial judge under Rule 3.620 in determining a motion for reduction of a conviction is set forth in the rule.

> "When the offense is divided into degrees or necessarily includes lesser offenses, and the court, on a motion for new trial, is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilt of a lesser degree or of a lesser offense necessarily included in the one charged, the court shall not grant a new trial but shall find or adjudge the defendant guilty of such lesser degree or lesser offense necessarily included in the charge, unless a new trial is granted by reason of some other prejudicial error."
>
> Rule 3.620

Under Rule 3.380, the court must determine whether it is "of the opinion that the evidence is insufficient to warrant a conviction". Under Rule 3.620, the trial court must determine whether it "is of the opinion that the evidence does

not sustain the verdict but is sufficient to sustain a finding of guilt of a lesser degree..." Defendant submits that there is virtually no difference in the function of the trial judge at this juncture of the two Rules. The First District Court of Appeal has considered the states right to appeal the judges findings pursuant to Rule 3.620 and F.S. 924.07(4). In Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983), the court dismissed the states appeal, stating:

> "We turn now to the state's cross-appeal. Pursuant to Rule 3.620, Florida Rules of Criminal Procedure, the trial court ruled at sentencing, in lieu of a new trial, that the evidence did not sustain the verdict of kidnapping but was sufficient to sustain a finding of the lesser offense of false imprisonment. The state would now appeal that ruling on the basis of Rule 9.140(c)(1)(H), Florida Rules of Appellate Procedure, which permits the state to appeal an order, "[r]uling on a question of law when a convicted defendant appeals his judgment of conviction..." We hold, however, that a ruling pursuant to Rule 3.620 is one of fact, not of law, and from which the state has no right of appeal under the rules. Accordingly, we now grant appellant's motion to dismiss the cross-appeal, which motion was earlier ordered to be carried with the merits. The state's cross-appeal is dismissed; as hereinabove recited, the other points raised on appeal are affirmed. (emphasis supplied)

This view is supported by other jurisdictions in the context of motions for judgment of acquittal. See, State v. Crozier, 587 P.2d 331 (Kansas 1978), (after jury verdict of guilty, trial court resolved factual issue as to whether or

or not there had been an actual agreement to commit murder)[5] People v. Wallerstedt, 396 N.E. 2d 568 (Illinois 1979),(trial court resolved factual elements on armed robbery charged in favor of the defendant after jury verdict of guilty therefore holding the states evidence insufficient to support the conviction).[6]

Even if this Court were to determine that the state may bring the cross-appeal pursuant to F.S. 924.07(4), the scope of the relief permissable should not be to reinstate the jury verdict. The hard choice to a defendant on exercising the right to appeal in such a case is of constitutional significance.[7]

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5 The concurring opinion felt the trial judge was in error on the resolution of facts.

6 In U.S. v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) the majority held:

> "....a defendant is acquitted only when "the ruling of the judge, whatever its label, actually presents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."

7 The interpretation of F.S. 924.07(4) by the lower court in the present case, grants the state a broader right of appeal than is afforded on a direct appeal. While there is no constitutional significance to this right in the context of resolving evidentiary disputes and jury instruction questions, where the construction involves the right to review of an acquittal obtained, the effect is to chill the rights granted to a defendant to appeal in the first instance. It places the defendant in the hard choice of appealing trial errors which ultimately secure a new trial while risking a partial victory in the form of a judgment of acquittal on a higher charge. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Furthermore, the finality of a judgment of acquittal in the common law, and the legislatutes' failure to permit appeal of such a significant ruling directly, compel the conclusion that no change in the result should occur if the matter is reserved. Other states have construed similar statutes to mean that the appeal is for the purpose of correct and uniform administrations of the criminal law; matter of statewide interest; for precedential value, in essence, for guidance of the bench and bar.[8]

D. MIXON v. STATE, 59 So.2d 38 (Fla. 1952), SHOULD NOT SERVE AS BINDING PRECEDENT ON THE ISSUES PRESENTED.

The state lower court relied upon this Courts fuling in Mixon v. State, 59 So.2d 38 (Fla. 1952), as authority to accept the state's cross-appeal on the judgment of acquittal. Mixon does not explore the issues raised by defendant here and it is submitted that there is no indication the defendant in that case challenged the state's right to cross-appeal or that the issue was ever considered by this Court.[9] A case should not be considered as authoritative on a point unless the issues presented by the case at bar were raised, considered, and determined in the former case. Twyman v. Roell, 166 So.215 (1936). Additionally, Mixon was decided before the enactment of F.S. 775.021 (1), which should now be considered.

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8 See State v. Glaze, 436 P.2d 377 (Kansas 1968).

9 The only discussion of F.S. 924.07(4) was:
"For the same reason we think the state should prevail on the cross-appeal, taken under F.S. 924.07(4), by which is questioned the action of the court in reducing the offense to manslaughter." 59 So.2d 38 at 40

The anomaly is complete in the present case. Defendant counsel moved for judgment of acquittal on first degree murder at the close of the states case. The court reserved ruling on the issue. This was error.[10] Hitchcock v. State, 413 So. 2d 741 (Fla. 1982); Adams v. State, 102 So.2d 47 (Fla. 1st. DCA 1958). Following the jury verdict of guilty of first degree murder, defense counsel filed a motion for new trial, motion for reduction of sentence, and motion for judgment of acquittal. The trial court granted the motion for judgment of acquittal.(App.1) Had the trial court granted the motion for acquittal at the close of the states case, as it properly should have, the state would not now be permitted to appeal because double jeopardy would bar retrial. The result is that the trial court error is the foundation for the states cross-appeal. This procedure could lead to abuses in that a trial judge could always trigger the states right to appeal by withholding a ruling on judgment of acquittal until all aspects of the trial are completed. In fact, the trial judge in this case did just that.

Not only is such a procedure unfair, it circumvents the express will of the legislature in enacting the rule on judgment of acquittal and on denying the state the right to appeal a judgment of acquittal.

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Defendant did not waive his motion for judgment of acquittal by proceeding with his defense. See, Wagner v. State, 421 So.2d 826 (Fla. 1st DCA 1982).

ARGUMENT

II

FEDERAL LEGISLATION AND DOUBLE JEOPARDY DECISIONS HAVE ONLY LIMITED APPLICATION TO THE PRESENT CASE AND FLOIRDA LEGISLATION AND COMMON LAW.

Recent decisions of the U.S. Supreme Court have revisited and clarified the Federal Constitutional prohibition against placing a criminal defendant twice in jeopardy for the same offense. Assuming arguendo, that if this case were governed by the Federal Statute [11] permitting appeals by the government, and were being considered only in light of the U.S. Constitution, then double jeopardy considerations would not bar an appeal by the government, and such an appeal would be permitted under the Federal Statute [12], the case under consideration is governed by F.S. 924.07, and unlike the Federal Statute, F.S. 924.07 contains limitations imposed by the legislature on the states right to appeal.

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11 The statute provides in 18 U.S.C. § 1371 (as amended 1971)

12 An appeal by the United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order or a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. (Cont.)

The Supreme Court of the United States, in U.S. v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) began its analysis of constitutional limitations on prosecution appeals by stating:

> "The statutory restrictions on Government appeals long made it unnecessary for this Court to consider the constitutional limitations on the appeal rights of the prosecution except in unusual circumstances. Even in the few relevant cases, the discussion of the question has been brief. Now that Congress has removed the statutory limitations and the Double Jeopardy Clause has been held to apply to the States, see Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), it is necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Geovernment's appeal rights in criminal cases."

The Court went on to explain the new statute and its very broad grant of appellate rights to the federal prosecution.

(Cont). The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instance, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

See footnote 11, supra.

In spite of the analysis in Wilson, supra and other cases [13] dealing with constitutional limitations on the government right to appeal, it is clear that the Wilson court would not have reached the question under F.S. 924.07, as it had not reached the question under the former Federal Appeals Statute, 18 U.S.C. 3731.[14]

13

U.S. v. Scott, 437 U.S. 82, S.Ct. 2187, 57 L.Ed.2d 65 (1978)

U.S. v. Wilson, 420 U.S. 332, S.Ct. 1013, 43 L.Ed.2d 232 (1975)

U.S. v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

14

The former Federal Statute provided in pertinent part:

§ 3731. Appeal by United States.

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decisions or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district court to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United

(Cont.)

In essence then, because the Florida Legislation is for more restrictive than the Federal Statute and the expressed policies of the State are far more restrictive towards prosecution appeals, (See argument 1 supra), the Wilson decision is of limited value in analysis of this case. With respect to these decisions, the Court in State v. Crozier, 587 P.2d 331 (Kansas 1978), observed:

> "We have concluded that these recent federal decisions have no application to the case before us. In the first place, K.S.A. 1977 Supp. 22-3602 is more restrictive on the right of the prosecution to appeal than the federal appeals statute, 18 U.S.C. § 3731, as amended in 1970. Furthermore, as noted above, under the Kansas procedure the motion for a judgment of acquittal is based solely upon the insufficiency of the evidence to sustain a conviction of the defendant for the crime charged. It follows that the disposition of this case is controlled by Gustin and the appeal by the State must be dismissed." 587 P.2d 331 at 336

(Cont.)

States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

From an order, granting a motion for return of seized proeprty or a motion to suppress evidence, made before the trial of a person charged with violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is substantial proof of the charge pending against the defendant.

* * * * "

The matters permitted to be appealed by the federal prosecutors in the former statute appear to coincide with F.S. 924.07 (1),(3) and (8).

Unless or until the legislature of Florida removes the restrictions placed on the states right to appeal, Defendant submits that the recent federal decisions are of limited application.[15]

The Federal Statute in its current form has been in force since 1971. The Federal decisions delineating the scope of double jeopardy considerations in government appeals have been law since at least 1975, when Wilson was decided. While it is clear under these decisions that there would be no Federal Constitutional bar to enacting similar statutes, the Florida legislature has elected not to do so, even though the opportunity presented itself when F.S. 924.07 was reviewed by the legislature and amended in 1983 to add F.S. 924.07(9).

In practice, U.S. v.Scott, and its predecessors have had only limited applications to Florida cases, E.g. Watson v. State, 140 So.2d 209 (Fla. 1st DCA 1982) (where defendants jury conviction was reversed when court granted of a motion for judgment of acquittal, mid-trial, and subsequently reversed himself, requiring the defendant to proceed with his case), and State v. C.C., 449 So.2d 280 (Fla. 3rd DCA 1983).

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See footnote 9 supra, the court in State v. Crozier, 587 P.2d 331 (Kansas 1975) observed that neither U.S. v. Wilson not U.S. v. Scott, were concerned with a judgment of acquittal pursuant to a statute. Both of those cases involved a dismissal by the trial judge because of pre-indictment delay. In Florida, these questions would fall under F.S. 924.07(1).

In State v. C.C. 449 So.2d 280 (Fla. 3rd DCA 1983), the Third District, setting en banc on rehearing adopted the concurring opinion of Judge Schwartz, which, in commenting on the notion that the state has no Florida constitutional right to appeal, stated:

> "This is demonstrated both by the express statements of our courts that effect, e.g., State v, Harris, 136 So. 2d 633, 634 (Fla. 1962) ("[W]e have no doubt that [the legislature] can restrict the state in seeking review by certiorari or adverse decisions in criminal cases just as it has limited its right to appeal through Sec. 924.07."); State v. Matera, 378 So.2d 1283, 1286-87 (Fla. 3rd DCA 1979), cert. denied, 386 So.2d 639 (Fla. 1980) ("[T]hose doors open to the State in initiating appellate review are limited to a specific set of circumstances, see Sections 924.07 and 924.071 Florida Statutes (1977), and Fla. R. App.P.9.140(c)"), and by the obvious unacceptability of the logical extension, indeed the precise content of the contrary rule announced in W.A.M., under which the state would have the right to appeal from a final judgment of acquittal in a criminal case."

In footnote 2, to the opinion, Judge Schwartz observed:

> 2. This presents more than an ephemeral threat which would dissipate in the face of the double jeopardy clause. First, under United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978), there is no longer a per se federal constitutional double jeopardy rule which would invalidate a state appeal from a judgment of acquittal. Second, even if such an appeal were moot. the court could still entertain it if, as might often be the case, the well-recognized exceptions to the mootness doctrine were satisfied. 3 Fla.Jur.2d Appellate Review § 289 (1978)

Defendant submits that the questions before the Court today are primarily state law questions and, except to the

extent they may run afoul of Federal due process notions, should be answered in the context of state law. A less stringent Federal Statute is not authority to ignore or rewrite Florida Statutes and law.

CONCLUSION

Based upon the foregoing authorities and arguments, Defendant submits that the lower court erred in denying defendant's motion to dismiss the cross-appeal of the state and requests this court quash the opinion and remand to the Third District with insturctions to dismiss the state's cross-appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing CORRECTED BRIEF OF PETITIONER ON THE MERITS was mailed this 25th day of February, 1985 to: G. BART BILLBROUGH, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, FL 33128; Express Mailed on the above mentioned date to the Clerk of the Supreme Court, Tallahassee, FL 32301.

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