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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,811

STATE OF FLORIDA,

Petitioner,

vs.

RENE RAMOS,

Respondent.

\* \* \* \* \*

ON PETITION FOR DISCRETIONARY REVIEW

\* \* \* \* \*

BRIEF OF PETITIONER ON THE MERITS

JIM SMITH  
Attorney General  
Tallahassee, Florida

MICHAEL J. NEIMAND  
Assistant Attorney General  
Ruth Bryan Owen Rohde Building  
Florida Regional Service Center  
401 N.W. 2nd Avenue (Suite 820)  
Miami, Florida 33128  
(305) 377-5441

TABLE OF CITATIONS

<u>CITES</u>	<u>PAGE</u>
Bowen v. Willard, 349 So.2d 110 (Fla. 1976) . . . . .	12
Mark v. Hahn, 177 So.2d 5 (Fla. 1965) . . . . .	8
Ramos v. State, 457 So.2d 492 (Fla. 3d DCA 1984) . . . . .	2
Ramos v. State, 469 So.2d 145 (Fla. 3d DCA 1985) . . . . .	4
State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983) . . . . .	11
Trushin v. State, 425 So.2d 1126 (Fla. 1982) . . . . .	9

OTHER AUTHORITIES

Rule 9.140(c)(1)(H), Florida Rule Appellate Procedure	2
Rule 9.350, Florida Rule Appellate Procedure . . . . .	11
Rule 9.350(b), Florida Rule Appellate Procedure . . . . .	11
The Committee Note to Florida Rule of Criminal Procedure 9.350(b) . . . . .	11

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS . . . . .	ii
INTRODUCTION . . . . .	1
STATEMENT OF THE CASE AND FACTS . . . . .	1-5
QUESTION PRESENTED . . . . .	6
SUMMARY OF ARGUMENT . . . . .	7
ARGUMENT . . . . .	8-13
CONCLUSION . . . . .	14
CERTIFICATE OF SERVICE . . . . .	14

## INTRODUCTION

The Petitioner, the State of Florida, was the Appellee/ Cross Appellant in the District Court of Appeal of Florida, Third District. The Respondent, Rene Ramos, was the Appellant/ Cross Appellee in the Third District. The parties will be referred to as they stand before this Court. The symbol "R" will designate the record on appeal and the symbol "T" will designate the transcript of proceedings.

## STATEMENT OF THE CASE AND FACTS

On October 28, 1982, a Dade County Grand Jury charged the Respondent, Rene Ramos, with first degree murder and aggravated assault. (R. 1-2). A plea of not guilty was subsequently entered on his behalf.

Trial commenced on February 8, 1983. At the close of the State's case, the Respondent moved for a judgment of acquittal on the charge of first degree murder and reduction of that count to second degree murder. The trial court reserved ruling on the motions. The trial court denied the same motions at the close of all evidence.

The jury returned a verdict of guilty on both the first degree murder count and the aggravated assault count.

When the respondent again filed a motion for judgment of acquittal after the jury verdict, the trial court granted the motion and reduced the respondent's conviction for first degree murder to second degree murder. (R. 121).

The respondent timely filed a notice of appeal (R. 120) and the State timely filed a notice of cross-appeal. (R. 122).

On April 16, 1984, the respondent filed his initial brief in the Third District Court of Appeal. At the same time, the respondent submitted a motion to dismiss the cross-appeal of the State. After State response, the Third District Court of Appeal denied the motion. Ramos v. State, 457 So.2d 492 (Fla. 3d DCA 1984). Concluding that the trial court's post-verdict acquittal was a question of law and that consideration of the issue not barred by double jeopardy, the Third District Court of Appeal held that the State was entitled to review pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(H). Ramos v. State, supra, 457 So.2d at 493-494.

After denial of his motion for rehearing, motion for rehearing en banc, and motion for certification to this

court, the respondent filed a notice to invoke discretionary jurisdiction. Because the Third District denied the respondent's motion to stay, matters in the district court of appeal continued. (R. 131).

Oral argument in the Third District Court of Appeal was held on January 15, 1985. During the argument, a new panel questioned both parties about the State's ability to cross-appeal. The chief judge suggested that the respondent contemplate filing a conditional notice of voluntary dismissal, thereby frustrating the State in its effort to obtain appellate review.

Following the chief judge's suggestion, the respondent filed a conditional dismissal of appeal and suggestion of lack of jurisdiction on January 16, 1985. In that pleading, the respondent suggested that he would dismiss his appeal expressly conditioned upon a ruling from the Third District Court of Appeal that dismissal would divest the court of jurisdiction to entertain the State's cross-appeal.

In response, the State moved to strike the notice of conditional dismissal and responded to the suggestion of lack of jurisdiction. The State argued that the Third District Court of Appeal could not render an advisory opinion on the issue. The State further contended that

dismissal would not divest the court of jurisdiction to hear the State's cross-appeal and that the State could have obtained review of the trial court's post-verdict judgment of acquittal through other appellate vehicles.

Prior to a ruling on this issue, this court on January 28, 1985, accepted jurisdiction of respondent's initial Petition for Discretionary Review.

Even though jurisdiction lay in this court, the Third District Court of Appeal on March 12, 1985 dismissed the case. Ramos v. State 469 So.2d 145, (Fla. 3d DCA 1985). The Third District Court of Appeal held that the State, as cross-appellant, had no right to independently appeal the ruling that the evidence was insufficient to sustain the jury's verdict of first degree murder and was only authorized to cross-appeal the ruling. Ramos v. State, supra at 147.

Thereafter, the State filed a motion to withdraw the March 12, 1985 opinion on the ground the Third District was without jurisdiction since this court by accepting jurisdiction became the only court with jurisdiction over this cause. Therefore, the Third District was without jurisdiction to enter an order relating to the inability of the State to maintain cross appeal. Said motion was denied, but the proceedings were stayed pending review by this Court.

A notice to invoke this Court jurisdiction was timely filed and jurisdiction was ultimately accepted.



QUESTION PRESENTED

WHETHER THIS COURTS ACCEPTANCE, ON  
JANURARY 28, 1985, OF JURISDICTION  
OF Ramos v. State, CASE NO. 65,964,  
DIVESTED THE THIRD DISTRICT OF  
JURISDICTION TO ISSUE ITS ORDER OF  
MARCH 12, 1985 DISMISSING PETITIONER'S  
CROSS APPEAL, WHERE THE ISSUE PRE-  
SENTED IN BOTH CASES WAS THE STATE'S  
RIGHT TO CROSS APPEAL A POST JUDGMENT  
VERDICT OF ACQUITTAL?

## SUMMARY OF ARGUMENT

In Ramos v. State, Case No. 65,964, this Court accepted conflict jurisdiction to determine if the State had a right to cross appeal a post verdict judgment of acquittal. The acceptance of jurisdiction was exclusive as it pretains to all issues concerning the State's cross appeal. However after this Court accepted jurisdiction the Third District acting outside the scope of its jurisdiction dismissed the State's cross appeal. Such action was erroneous and should be reversed by order to avoid precemeal litigation and to allow this court the opportunity to consider the issue.

As to the merits, once the State perfected it's cross appeal, it had a vested right concerning jurisdiction. As such no action by respondent could have divested the Third District from its jurisdiciton over the cross appeal.

## ARGUMENT

THIS COURTS ACCEPTANCE ON JANUARY 28, 1985, OF JURISDICTION OF RAMOS V. State, CASE NO. 65,964, DIVESTED THE THIRD DISTRICT OF JURISDICTION TO ISSUE ITS ORDER OF MARCH 12, 1985 DISMISSING PETITIONER'S CROSS APPEAL, WHERE THE ISSUE PRESENTED IN BOTH CASES WAS THE STATE'S RIGHT TO CROSS APPEAL A POST JUDGEMENT VERDICT OF ACQUITTAL.

In Mark v. Hahn, 177 So.2d 5 (Fla. 1965), this Court accepted review on the basis of conflict jurisdiction. On rehearing, it was argued that this Court should have returned the case to the District Court of Appeal, Third District, because two questions presented to this Court were not considered or decided by the Third District. Based on the distaste for piecemeal litigation, this Court rejected the foregoing contention.

There can be no doubt that once the Supreme Court takes jurisdiction of a case upon a petition for writ of certiorari directed to one of the District Courts of Appeal such jurisdiction is complete and exclusive until the case is decided or jurisdiction relinquished for some specific reason. In other words, it is not a matter of jurisdiction with which we are dealing but it is solely a question of the exercise of judicial discretion.

177 So.2d at p. 9.

This Court then exercised it's discretion and reviewed all claims within it's jurisdiction. See also Trushin v. State, 425 So.2d 1126 (Fla. 1982)(While Florida Supreme Court has the authority to entertain issues ancillary to those in a certified question, said court will refrain from using that authority unless those issues affect the outcome of the petition after review of the certified question).

The foregoing rule of law controls the instant case. In Ramos v. State, Case No. 65,964 this Court accepted conflict certiorari jurisdiction of the cause on the issue of whether the State can cross appeal on the grounds that the trial court erred as a matter of law by granting a post verdict judgment of acquittal and reducing the charges from first degree murder to second degree murder. When the issue of the State's right to cross appeal was accepted by this Court, jurisdiction on that issue was exclusive with this Court. Therefore the Third District did not have jurisdiction over this question and could only have decided Respondent's direct appeal from his conviction and sentence.

Instead the Third District, without a specific relinquishment of jurisdiction by this Court, entertained and decided the issue of the State's right to cross appeal on a question of law after the direct appeal was voluntarily dismissed. It is clear that the Third District's decision on

this issue has affected the outcome of the case after review of Case No. 65,964, has been completed by this Court inasmuch as the Third District decision has rendered Case No. 65,964 moot. Said cause is now moot because if the State's permitted to cross appeal a post verdict judgment of acquittal, it will be an illusionary right in the present case since the Third District has dismissed the State's cross appeal. Further, it is also clear that the issue of the State's right to maintain a cross appeal after the Appellant voluntarily dismiss it direct appeal is an ancillary issue to the question accepted for review in Case No. 65,964. Therefore, the Third District did not have jurisdiction to dismiss the cross appeal on the ground that the voluntary dismissal divested the Third District of jurisdiction to consider the cross appeal since the cross appeal only lived through the direct appeal until either this Court relinquished jurisdiction for that purpose or until review on the merits in Case No. 65,964 was completed and the matter returned to the Third District.

Inasmuch as jurisdiction over the question of the State's right to maintain a cross appeal rests in this Court, the State submits that this Court exercise it's discretion and determine the merits of the issue of the States right to maintain it's cross appeal after the direct appeal is voluntarily dismissed. Said discretion should be exercised in order to

avoid piecemeal litigation and to have a final determination on all issues concerning the State's right to cross appeal.

Florida Rule of Appellate Procedure 9.350 provides in pertinent part:

(b) Voluntary Dismissal. A proceeding of an appellant or petitioner may be dismissed prior to a decision on the merits by filing a notice of dismissal with the clerk of the court without effecting the proceedings filed by joinder or cross-appeal[.]

The Committee Note to Florida Rule of Criminal Procedure 9.350(b) clearly states that the rule is intended to allow an appellant to dismiss his appeal, but a timely perfected cross - appeal would continue. The rule states that voluntary dismissals are not effected until after the time for cross-appeal so that an opposing party desiring to have adverse rulings reviewed by a cross-appeal cannot be trapped by a voluntary dismissal by the appellant.

In State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), this court recognized criminal cases are to be treated the same as civil cases under the Rules of Appellate Procedure:

Rule 9.140(a) provides that "[a]ppel proceedings in criminal cases shall be as in civil cases

except as modified by this rule."  
This section, according to the  
Committee Notes,

"makes clear the policy of  
these rules that procedures  
be standardized to the maxi-  
mum extent possible.  
Criminal appeals are to be  
governed by the same rules  
as other cases, except for  
those matters unique to  
criminal law which are  
identified and controlled  
by this rule."

State v. Williams, supra,  
444 So.2d at 437.

As such, no argument can be made that Florida Rule of  
Appellate 9.350(b) relates only to civil cases.

Once the Appellant invoked the jurisdiction of the  
court and the State perfected its cross-appeal, the cross-  
appellant was entitled to review as a matter of right.  
State v. Williams, 444 So.2d 434, 438 (Fla. 3d DCA 1983);  
Bowen v. Willard, 340 So.2d 110 (Fla. 1976).

As soon as the State perfected it's appeal by invoking  
the jurisdiction of the Third District to hear the cross appeal,  
the State had a vested right <sup>1</sup> to have the Third District  
determine the merits thereof. Since the jurisdiction of the

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<sup>1</sup>

Black's Law Dictionary 5th Ed. 1979 defines vested rights as  
follows. **Vested rights.** In constitutional law, rights which

Third District became a vested right of the State, the State's right to cross appeal no longer was derivative of the Respondent's direct appeal. Therefore any action taken by Respondent could not divest the Third District from hearing the cross appeal.

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have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves and settled according to the then current rules of law and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Such interests as cannot be interfered with by retrospective laws; interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice.

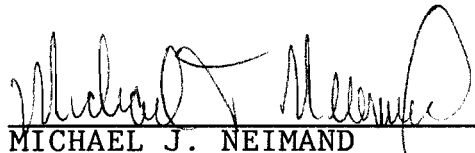


**CONCLUSION**

Based upon the points and authorities contained herein, the State respectfully request that this Court reverse the Third District in the instant case and reinstate the State's cross appeal.

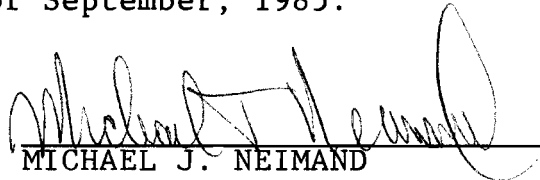
Respectfully submitted,

JIM SMITH  
Attorney General

  
MICHAEL J. NEIMAND  
Assistant Attorney General  
Department of Legal Affairs  
401 N.W. 2nd Avenue (Suite 820)  
Miami, Florida 33128  
(305) 377-5441

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF ON THE MERITS** was furnished by mail to **R. JAMES PELSTRING**, Attorney for Respondent, 305 Coconut Grove Bank Building, 2701 South Bayshore Drive, Miami, Florida 33133 on this 10 day of September, 1985.

  
MICHAEL J. NEIMAND  
Assistant Attorney General

MJN/dm