OA 2-28-94

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,884

DCA NO. 93-660

JAMES BLORE,

Petitioner,

-vs-

THE HON. EUGENE J. FIERRO, CIRCUIT COURT JUDGE, and CIRCUIT COURT, APPELLATE DIVISION, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This case comes to the court on discretionary review of a decision of the Third District Court of Appeal. This case arose in the County Court in and for Dade County, where the Respondent, the State of Florida, was the prosecution, and the Petitioner, James Blore, was the defendant. The trial court ordered Blore's breathalyzer result excluded because the State could not establish a necessary evidentiary predicate; the order did not suppress the results on constitutional grounds. The State appealed to the Circuit Court of the Eleventh Judicial Circuit of Florida, sitting in its appellate capacity. That court initially granted, then denied, Blore's motion to dismiss the State's appeal as not authorized by Florida Rule of Appellate Procedure 9.140(c)(1)(b). Blore sought prohibition in the Third District Court of Appeal. The Third District denied the petition, but cited conflict with two decisions of other district courts of appeal. It is this decision that now is before this Court. The parties are referred to in this Reply Brief as Petitioner and Respondent, or the defendant and the State, as appropriate.

ARGUMENT

A PRE-TRIAL ORDER EXCLUDING BREATHALYZER RESULTS ON THE GROUNDS THAT THE RESULTS WERE NOT SCIENTIFICALLY RELIABLE BECAUSE THE BREATHALYZER WAS NOT MAINTAINED IN ACCORDANCE WITH THE APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS, RATHER THAN ON THE GROUND OF UNCONSTITUTIONALITY IN THE OBTAINING, IS NOT AN INTERLOCUTORY ORDER APPEALABLE BY THE STATE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.140(c)(1)(B).

What is at issue in this case is whether the State has a right to interlocutory review *by appeal*[1] of an order that excludes evidence on evidentiary, rather than constitutional, grounds. Petitioner submits that the State has no right to appeal of such an order for the reasons that follow. (The reasons have been divided into two main sections for ease of presentation and comprehension.)

I. Interlocutory appeals by the State in criminal cases from county court to circuit court necessarily are controlled by Florida Rule of Appellate Procedure 9.140(c)(1)(B)

The State has no generic right of appeal of either final or interlocutory orders. As to final orders in criminal cases, the Legislature must specifically provide by statute for the State's right to appeal. *State v. MacLeod*, 600 So. 2d 1096, 1097 (Fla. 1992)("We have repeatedly held that the State's right to appeal is not a matter of right and is purely statutory."); *State v. Creighton*, 469 So. 2d 735, 740 (Fla. 1985)(at common law, no writ of error would lie for the state in a criminal case on either adverse judgments or order, or on questions of law; thus it must be provided by statute). When the State is granted the right of review by statute, the statute is to be narrowly construed. *State v. Jones*, 488 So. 2d 527, 528 (Fla. 1986).

As to non-final orders, the courts of this state have held consistently that the State's right

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[1]Petitioner has never disputed, and indeed, consistently has maintained, that although there exists no State right to *appeal* in this case, the State certainly has available to it the avenue of certiorari review. *State v. Pettis*, 520 So. 2d 250 (Fla. 1988).

to appeal is dependent upon the ability to appeal an adverse final determination in the cause, *State v. C.C.*, 449 So. 2d 280, *adhered to on reh'g en banc*, 449 So. 2d 282 (Fla. 3d DCA 1983), *approved*, 476 So. 2d 144 (Fla. 1985), and the existence of a rule of this Court authorizing an interlocutory appeal, *R.J.B. v. State*, 408 So. 2d 1048 (Fla. 1982); *State v. Smith*, 260 So. 2d 489 (Fla. 1972); *State v. M.G.*, 550 So. 2d 1122 (Fla. 3d DCA), *rev. denied*, 551 So. 2d 462 (Fla. 1989). These decisions have reached this conclusion in the course of addressing Article V, section (4)(b)(1) of the Florida Constitution, which provides:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. **They may review interlocutory orders in such cases to the extent provided by rules adop[ted by the supreme court.**

Art. V § (4)(b)(1), Fla. Const. (emphasis added). Thus, in *State v. Smith*, 260 So. 2d 489 (Fla. 1972), this Court held that section 924.07(8)[2] and section 924.071 were an unconstitutional infringement upon this Court's rule-making authority; it is only this Court and not the Legislature that has authority to prescribe when non-final appeals may be taken.[3]

Though not articulated, an essential doctrinal underpinning of these decisions is the notion that it is the judicial branch --through the authority constitutionally placed in this Court -- of the three branches of government that is best-suited to regulating matters of practice and procedure within the courts. Article V section (2) of the Constitution expressly recognizes this, providing:

> **(a) The supreme court shall rules for the practice and**

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[2]Presently numbered section 924.07(1)(h).

[3]Despite *Smith*'s clear articulation of the scheme of the division of power between this Court and the Legislature to provide for non-final appeals as compared to final appeals, the Legislature this last year, in Section 14 of ch. 93-37, amended section 924.07 to add subsection (*l*), which provides the State may appeal "[a]n order or ruling suppressing evidence or evidence in limine at trial." While this provision is not directly implicated in the instant case, it is clear from *Smith* that this provision is unconstitutional and ineffective to convey the authority that it purports to do.

> **procedure in all courts including the time for seeking appellate review**, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Art. V § 2, Fla. Const. (emphasis added). The placement in this Court, rather than the Legislature of the determination of "the time for seeking appellate review," is not accidental or superfluous, but rather, rests on the sound notion that this Court is best able to determine appropriate time frames for action by parties.

The State suggests, and one recent case (*State v. Fry*, 621 So. 2d 529 (Fla. 2d DCA 1993)) has held that this structure, that is, that it is this Court which has the authority to decide when interlocutory appeal is appropriate, does not apply when the appeal is one from the county court to the circuit court appellate division; that in fact, it is the Legislature that has the authority to make this decision and the Legislature has done so, providing sections 924.07(1)(h) and 924.071.[4] For this argument, the State relies upon the following statement from Article V, section 5 of the Constitution:

> (b) JURISDICTION. The circuit courts shall have original jurisdiction not vested in the county courts, and **jurisdiction of appeals when provided by general law.**

The State suggests that the absence of a provision parallel to that in Article V, section (4)(b)(1) expressly stating that the circuit court may review interlocutory orders as provided by supreme court means that it is the Legislature that has the authority to provide when the circuit court shall hear interlocutory appeals. Petitioner responds that the State's argument necessarily fails

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[4]Petitioner recognizes that this is not the Respondent's main contention, coming as it does at the end of the State's brief, and only after full discussion of why this case fits within this Court's rule, Rule 9.140; moreover, it was never asserted by the Respondent at any stage of the proceedings below, nor did the district court rely on it in this case. Nevertheless, as Respondent has raised it to this Court and the Second District now has adopted this argument in *State v. Fry*, 621 So. 2d 529 (Fla. 2d DCA 1993), Petitioner believes a response is warranted.

for three reasons.

As an initial matter, it is essential to note that rules of construction also apply to the provisions of the constitution. *Washington v. Dowling*, 92 Fla. 601, 109 So. 588 (1926). Statutory provisions relating to the same or closely related subjects or objects are regarded as *in pari materia* and construed together. *See Ferguson v. State*, 377 So. 2d 709 (Fla. 1979); *Garner v. Ward*, 251 So. 2d 252 (Fla. 1974); *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107 (Fla. 1980).

That the provisions on jurisdiction of the district court's jurisdiction and the circuit court's appellate jurisdiction are related provisions and should be construed *in pari materia* is demonstrated by the parallel relationship between district courts of appeal to circuit courts sitting in their trial court capacity on the one hand, and on the other hand, circuit courts sitting in their appellate capacity to county courts. Moreover, there is no logical or reasonable basis to distinguish between the two for purposes of provision for interlocutory appeals. While substantive rights (in this context, rights of appeal from final orders) are of course, a matter for the Legislature, *see, e.g., State v. Furen*, 118 So. 2d 6 (Fla. 1960), provision for an *interlocutory* appeal may be viewed as the temporal advancement of a pre-existing right to appeal a final order, the matter of advancement (as distinct from creation) being far more appropriate for judicial (i.e., this Court) rule-making rather than legislative determination. Art. V, § 2 (providing it is within the authority of this Court to promulgate rules governing practice and procedure in the courts, including determination of the *time* for seeking appellate review).

Even were the foregoing not so and were not compelling authority for the proposition that it is, and must be, this Court rather than the Legislature that authorizes interlocutory review, the unreasonable or absurd results that would be occasioned by any other reading equally compel the same conclusion. Illogical and arbitrary distinctions would follow among the same categories of interlocutory orders dependent upon in which court entered and to which court appealed. For instance, if interlocutory appeals from county court to circuit court were

concluded to be, unlike those from circuit court to district court of appeal, dependent upon statute, the existence of interlocutory appeal certification provisions for county courts (§ 35.065, Fla. Stat. (1993) and Fla. R. App. P. 9.030(b)(4)(B)) would create a category of interlocutory orders not appealable at all if certified to the district court of appeal, but appealable as of right if in the circuit court.

Startlingly, if the State and the *Fry* court were correct that under Article V, section 5, it is only the Legislature that can authorize an interlocutory appeal from county court to circuit court and not this Court, the argument would prove too much: this would mean that Florida Rule of Appellate Procedure 9.130 is a nullity with respect to non-final civil appeals from the county court to the circuit court; and, as no statute specifically has provided for civil interlocutory appeals to the circuit court, there simply exists no authority for an interlocutory appeal to the circuit court in a civil case.

Plainly, no court ever has held this;[5] indeed, it is to Rule 9.130 that the circuit courts sitting in their appellate capacity always have looked to determine their jurisdiction over a non-final civil appeal. *E.g.*, *Anderson v. Anderson*, 40 Fla. Supp. 2d 46 (Fla. 11th Cir. Ct. App. Div. 1990)(Rule 9.130 does not provide for non-final appeal of order denying motion for disqualification of trial judge; thus, appellate division of circuit court lacked jurisdiction to hear appeal); *Groves v. Southland Power Corp.*, 38 Fla. Supp. 2d 5 (Fla. 17th Cir. Ct. App. Div. 1989)(appellate division of circuit court lacked jurisdiction to hear appeal from order granting motion to set aside default, as not authorized by Rule 9.130). *See also State v. Nessim*, 587 So. 2d 1343 (Fla. 4th DCA 1991)(en banc)(stating "appellate courts lack the jurisdiction to consider appeals from non-final orders other than those cognizable under Florida Rule of Appellate Procedure 9.130(a)," and making no distinction in this regard between the district courts and the circuits sitting in their appellate capacity).

It is thus clear that for all of these reasons, it is Rule 9.140 that governs this case, and

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[5]The *Fry* court undertook no analysis of the implications of its holding whatsoever.

Petitioner now turns to the question of whether the rule authorizes a State appeal in this case.

II. An order that excludes evidence obtained by search and seizure on evidentiary grounds, rather than on the constitutional ground of unconstitutionality in the obtaining, is not an order within the contemplation of rule 9.140(c)(1)(B), and thus is not subject to appeal by the State

Florida Rule of Appellate Procedure 9.140(c)(1)(B) provides that the State, in a criminal case, may appeal an order:

> suppressing before trial confessions, admissions, or **evidence obtained by search and seizure[.]**

Fla. R. App. P. 9.140(c)(1)(B) (emphasis added).

The State's position on the meaning of this provision is that whenever as the evidence originally was obtained by search and seizure, it matters not the ground upon which the trial court excludes it, i.e., whether upon unconstitutionality in the obtaining or upon evidentiary grounds. Thus, the State posits that because under *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), a breathalyzer is a search, the State can appeal any order that excludes a breathalyzer, whether for reasons of unconstitutionality in the obtaining or for purely evidentiary reasons entirely unconnected to and independent of the question of the legality or illegality in the obtaining.

The State's construction of the rule is absurd and untenable because: **a)** It creates a distinction in the types of orders that can be subjected to interlocutory appeal that is without basis in policy or logic; **b)** By viewing the rule in a vacuum and without regard to the provision of the Florida Rules of Criminal Procedure that parallels this Florida Rule of Appellate Procedure, and with which this rule must be taken in pari materia, it renders meaningless both the term "suppressing" and the phrase "obtained by search and seizure," both of which are terms of art obviously intended to impart a specific meaning; and as a result, **c)** It is at odds with what this Court and other courts long have understood, and said, the rule

must mean. Each of these points is discussed more fully below.

a) The creation of a groundless distinction

First, the necessary result of the State's construction is to create a senseless distinction between orders from which the State may take a direct appeal prior to trial and those that the State may not. Under the State's construction, so long as the order excludes evidence that was originally obtained by search and seizure, the order excluding the evidence is directly appealable by interlocutory appeal. This construction necessarily means that a virtual plethora of pre-trial rulings now will be subject to interlocutory appellate review by the courts. One can envision the State exercising this right to interlocutorily appeal every one of the following orders: 1) an order excluding a firearm seized from a defendant, for the reason that the court finds it is unrelated to the offense; 2) an order excluding contraband seized from a defendant, on the basis that the State could not show proper chain of custody; 3) an order excluding written documents seized from a corporation, on the basis that the documents do not meet the business records exception to the hearsay rule; 4) an order excluding physical evidence seized from a defendant on the grounds that it is more prejudicial than probative;[6] 5) any other order excluding evidence that was the direct or indirect fruit of a search and seizure even though lawful, on the grounds that the evidence is inherently unreliable. Under the State's theory, all of these purely evidentiary rulings which are the common stuff of thousands of daily rulings by trial courts all over this state, would be appealable by the State, simply because the evidence originally was gotten by the State through a search and seizure.

Of course, not all evidence that the State uses in a given case is obtained by search and

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[6]Just a few of the many examples of evidence that could be excluded because more prejudicial than probative would be: a) In a situation where a defendant is charged with a capital sexual battery, the exclusion of a magazine seized from the defendant's possession which magazine contains in part depictions of sexual activity among or with children; b) In a situation where a defendant is charged with interfering with a railroad crossing a device, a commonly-available public railroad train schedule seized from the defendant; c) In a case where a defendant is charged with armed robbery where the weapon is alleged to be a kitchen knife, the exclusion of a small pocket knife seized from the defendant. As set forth in the text, all of these evidentiary rulings would be appealable interlocutorily under the State's construction.

seizure -- in some cases, evidence comes to the State as a result of an anonymous tip; some evidence is seized from third parties, whose Fourth Amendment and Article I, section 12 rights a criminal defendant has no standing to assert; some evidence is abandoned by defendants who, resultingly, no longer have a Fourth Amendment claim as to that evidence, and some evidence simply comes to the State from independent sources. Every one of these types of evidence is subject to exclusion on the very same bases as outlined in the paragraph above; yet, because the evidence was not obtained by search and seizure, its exclusion for the same reason as the evidence was excluded in the previous paragraph, would not be appealable interlocutorily by the State. One is left to ask: what possible basis in policy or logic is there that would sanction a State interlocutory appeal of all of the evidentiary rulings described in the previous paragraph and yet not permit an appeal of the *same* ruling when it is applied to evidence obtained by a way described in this paragraph? The State has offered none, the text of the Rule suggests none, and Petitioner asserts that none exists.

b) The critical words of the rule are rendered meaningless

Because there is no logical basis for this distinction, the State's construction renders the term "suppressing" and the phrase "obtained by search and seizure" meaningless. Petitioner respectfully suggests that this Court, when drafting Rule 9.140(c)(1)(B), meaningfully chose its words, and that the words "suppressing evidence obtained by search and seizure" unmistakably convey, and were meant to convey, to the court or practitioner reading them the notion of Fourth Amendment/Article I, section 12 illegality. "Suppression" connotes implication of the Fourth Amendment's exclusionary rule, or that of the Fifth or Sixth Amendments, or a statutory counterpart.[7] Similarly, "motion in limine" connotes any pretrial motion to exclude

[7]Although not directly relevant to this analysis, consistent with it is *State v. Kepke*, 596 So. 2d 715 (Fla. 4th DCA 1992), the Fourth District concluded that it did not have jurisdiction over a certified order from the county court because the order at issue was not an appealable order -- it merely required the State to lay a traditional evidentiary predicate for the admission of a breathalyzer result; because its result was not to absolutely bar the State from bringing the evidence in, it was not an actual suppression, in the Fourth District's reasoning.

evidence on evidentiary grounds such as irrelevance and prejudice.

As a result, the conclusion is compelled that the State's position strips the words "suppressing" and "evidence obtained by search and seizure" of meaning. The necessary result of the State's construction is to create a distinction between evidence obtained by search and seizure and evidence not so obtained, and to permit interlocutory appeal of *evidentiary* rulings as to evidence obtained by search and seizure but not as to evidence obtained by other means,2 without any reason for this difference in treatment. In essence, then, the State can appeal orders in limine without logical regard to their basis. The term "suppressing" and the phrase "search and seizure" are thus deprived of any significance in terms of constitutional or statutory illegality, and, correspondingly, any meaningful significance under Rule 9.140(c)(1)(B).

Rejection of this unfounded proposition is warranted by the parallel tenets of statutory construction that: every provision of a statute is to be treated as if it has meaning and purpose, for "in construing legislation, courts should not assume that the legislature acted pointlessly." *City of North Miami v. Miami Herald Pub. Co.*, 468 So.2d 218, 219-20 (Fla. 1985)(citation omitted); "[s]tatutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.'" *Johnson v. Feder*, 485 So.2d 409, 411 (Fla. 1986)(citation omitted). *See also D.P. v. Capri*, 399 So.2d 1030 (Fla. 3d DCA 1981)(impermissible to construe statute in such a way that explicit language following introductory clause would be nullified).

Second, even if the foregoing did not compel the conclusion that the term "suppressing" coupled with the phrase "evidence obtained by search and seizure" necessarily means suppression on Fourth Amendment/Article I, section 12 grounds, the conclusion nevertheless would be compelled by the parallel provision of Florida Rule of Criminal Procedure 3.190 which gives Rule 9.140(c)(1)(B) meaning, and which Petitioner therefore asserts must be taken *in pari materia* with it.[8] As a matter of common sense, of course, an appeal is not an entity

[8]The primary failure of the State's argument in this regard is that it construes Rule 9.140(c)(1)(B) in a vacuum, entirely without regard to its analog in the rules of criminal procedure or any real-world context.

that springs to life of itself; rather, an appeal, by nature, arises from some action of the trial court taken upon motion by a party or by the court. As Rule 9.140(c)(1)(B) provides that the State may appeal an order suppressing before trial evidence obtained by search and seizure, it is only appropriate, indeed *necessary*, to see upon what bases a defendant in a criminal case can move to suppress such evidence, for provisions relating to the same or closely related subjects or objects are regarded as *in pari materia* and construed together. *Cf. Ferguson v. State*, 377 So. 2d 709 (Fla. 1979); *Garner v. Ward*, 251 So. 2d 252 (Fla. 1974); *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107 (Fla. 1980).[9] Florida Rule of Criminal Procedure 3.190 provides:[10]

> **(h) Motion to Suppress Evidence in Unlawful Search.**
>
> (1) *Grounds*. A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:
>
> (A) the property was illegally seized without a warrant;
> (B) the warrant is insufficient on its face;
> (C) the property seized is not that described in the warrant;
> (D) there was no probable cause for believing the existence of the grounds on which the warrant was issued; or
> (E) the warrant was illegally executed.

This rule specifically refers to moving to *suppress* in the title. This is not accidental; in, and by, this rule, the concept of suppression is specifically, inextricably tied to the notion of

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[9]Florida Rules of Court previously have been construed as *in pari materia* so as to achieve harmony and give meaning. *E.g,, J.B. v. Korda*, 436 So. 2d 1109 (Fla. 4th DCA 1983), where the Fourth District Court of Appeal construed *in pari materia* the speedy trial provision under the Florida Rules of Criminal Procedure and the speedy trial provision under the Florida Rules of Juvenile Procedure. The Fourth District stated:

> We have treated the juvenile rule and the criminal rule as though together they formed a continuum within which all aspects of speedy trial lay in neat relationship. Because courts, like nature, abhor a vacuum, we adopt the continuum so postulated and read these rules as in pari materia . . . .

Id. at 1110.

[10]*In re Amendments To Florida Rules of Criminal Procedure*, 606 So. 2d 227, 267 (Fla. 1992).

illegality in the obtaining of evidence, in violation of a defendant's rights under the Fourth Amendment; Article I, section 12; the Fifth and Sixth Amendments or statutory counterparts.[11] Thus, it is entirely appropriate for this Court to have stated in the analogous rule of appellate procedure that the State may appeal an order "suppressing" "evidence obtained by search and seizure," and the scope and intent of the rule provision is clear.

c) The caselaw is in opposition to the State's construction

It has long been held, including by this Court, that for the State to have a right to appeal interlocutorily appeal the suppression of evidence obtained by search and seizure under Rule 9.140(c)(1)(B), the suppression must have been on the basis that there was unconstitutionality in the obtaining. In *McPhadder v. State*, 475 So. 2d 1215 (Fla. 1985), this Court reviewed a district court decision holding that there was jurisdiction under Rule 9.140(c)(1)(B) for a State appeal of an order excluding a tape recording made by an informant, on the grounds that the informant was not available to testify at trial. The district court had held there was jurisdiction

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[11]Petitioner recognizes that in interpreting what constitutes an order suppressing "confessions" or "admissions" for purposes of giving this rule meaning, this Court seemingly has held that the interlocutory appeal right recognized by the rule extends beyond orders *suppressing confessions* or *admissions* on grounds of illegality in the obtaining. *State v. Brea*, 530 So. 2d 924 (Fla. 1988)(Rule 9.140(c)(1)(B) permits an appeal from an order excluding admissions of a codefendant on hearsay grounds); *State v. Palmore*, 495 So. 2d 1170, 1171 (Fla. 1986)(holding that rule permits appeal of order "suppressing" admission, implying, without discussing, that reason for exclusion or suppression was not illegality of the obtaining). Although Rule 3.190 provides that confessions and admissions may be suppressed on the grounds of illegality (albeit necessarily these provisions are drafted more broadly than the provision on evidence, for confessions and admissions implicate other interests beyond the Fourth Amendment, such as the Fifth Amendment), nowhere in the *Brea* or *Palmore* opinions did this Court discuss, cite, or relate its analysis to Rule 3.190. Petitioner most respectfully suggests that *Brea* and *Palmore* may have been in error in this regard. However, this Court certainly does not need to address that issue in the instant case, for we are not concerned with either confessions or admissions here; however, Petitioner points out that for this reason, *Brea* and *Palmore*, and cases following them such as *State v. Kleinfeld*, 587 So. 2d 592 (Fla. 4th DCA 1991)(admissions of defendant), and *State v. Lamar*, 538 So. 2d 548 (Fla. 3d DCA 1989)(same), would be an inappropriate doctrinal basis upon which to rest the decision in this case. Accordingly, although in *Palmore* this Court cited *State v. Segura*, 378 So. 2d 1240 (Fla. 2d DCA 1979), which held that the State could appeal an order that excluded marijuana on evidentiary grounds because the marijuana had been seized through a search and seizure, *Palmore* involved the "confessions or admissions" prong of the rule, and so this Court's citation of *Segura* is not dispositive of the issue before the Court in this case.

because the evidence was obtained by search and seizure even though there was no search and seizure issue present. This Court reversed on the basis that the evidence was not obtained by search and seizure. In so holding, the Court expressly stated:

> The district court reasoned that "[a]lthough the question on appeal is not one involving a search and seizure issue, the evidence which was the subject of the order appealed was 'obtained by search and seizure' and was suppressed before trial." We do not agree that the evidence was obtained by search and seizure. The evidence at issue consisted of statements made by an informant on electronic recorded tapes which were suppressed because the informant was unavailable and could not be called at trial. *We see no search and seizure issue.*

475 So. 2d at 1216 (citation omitted)(emphasis added). Decisions consistent with the *McPhadder* analysis include *State v. Hancock*, 584 So. 2d 221, 222 (Fla. 4th DCA 1991)(holding that there exists jurisdiction under Rule 9.140(c)(1)(B) to review order suppressing "on constitutional grounds" the results of a field sobriety test); *State v. Townsend*, 479 So. 2d 306 (Fla. 2d DCA 1985)(order granting motion in limine to exclude breathalyzer results, on ground that excessive time had elapsed before drawing of blood and results therefore not reliable, not appealable under the rule, but might be treated by certiorari); *State v. Gemignani*, 545 So. 2d 929 (Fla. 2d DCA 1989)(order excluding evidence of refusal and videotape depicting defendant's post-arrest demeanor and conduct not appealable, but might be treated by certiorari); *State v. Stevens*, 35 Fla. Supp. 2d 72, 73, 74 (Fla. 13th Cir. Ct. 1989)(on basis of *Townsend*, refusing to treat as appeal State's sought review of order suppressing DUI videotape; order not appealable "because there was no implication of those constitutional rights provided for in the Fourth and Fifth Amendments to the United States Constitution.").

The State has cited the recent decision *State v. Fry*, 621 So. 2d 529 (Fla. 2d DCA 1993), for the proposition that circuit court appellate jurisdiction over nonfinal appeals is controlled by statute rather than by court rule. *Fry* holds that jurisdiction exists to review an order "suppressing the results of intoxilyzer tests," and apparently (mis)reads *Townsend* and

Gemignani as forbidding such an appeal. *Id.* at 529, 530.[12] Why the *Fry* court went to significant lengths to find that it had jurisdiction under section 927.071(1), which provides that an appeal may be had from any pretrial order suppressing evidence "however obtained," rather than relying on Rule 9.140(c)(1)(b) is explainable only by two means: either the court somehow thought that a breathalyzer was not a search, in which case its conclusion is nothing short of anomalous in light of, or uninformed despite its citation of, both *Townsend* and *Gemignani*, and the existence of *Skinner*; or, the order at issue there did not actually "suppress" as the opinion states, but rather merely excluded on evidentiary grounds, in which case it is obvious why the court had to find a basis for jurisdiction other than Rule 9.140, i.e., the Second District agrees that Rule 9.140(c)(1)(B) applies only to evidence that is actually suppressed on Fourth

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[12]The lower court in this case concluded that *Townsend* and *Gemignani* were decided wrongly, taking them together to represent the proposition that a breathalyzer test is not a search. The Third District has misread or misapprehended these cases. First, neither case involved breathalyzer results at all. Second, what the district court in *Townsend* reasoned was:

> An order "otherwise appealable" by the state, and hence, within Rule 9.140(c)(1)(B) must suppress "before trial confessions, admissions, or evidence obtained by search and seizure." The standard set forth in that rule is not met in this instance. *In the face of section 316.1932, Florida Statutes, the taking of the appellee's blood and the subsequent result* were neither "pretrial confessions" or "admissions" shielded by the Fifth Amendment, South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983), *nor were they "evidence obtained by search and seizure" requiring our intervention to preserve a Fourth Amendment right. See Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).*

479 So. 2d at 307 (emphasis added). Even the most cursory reading of *Schmerber* proves that case to stand for two propositions relevant to the instant case: first, the taking of blood is most definitely a search within the meaning of the Fourth Amendment, 384 U.S. at 1834, 86 S. Ct. at 767; and second, the search in *Schmerber* was reasonable under the circumstances and thus not violative of the Fourth Amendment. The Second District's language highlighted thus can mean only *one* thing: the provisions of section 316.1932 render the taking of blood in accordance therewith a *reasonable* search (but a search nonetheless), and so the evidence in *Townsend* cannot have been "suppressed" but rather was excluded for evidentiary reasons. The State, in an attempt to escape the obvious conclusion, has focused only on an excerpt from the *Townsend* opinion, and argues the court there held that "the taking of a blood sample is not 'evidence obtained by search and seizure,'" Ans. Brief at 13. Misreading or ignoring the court's holding, however, does not change it into a case favorable to the State's conclusion, nor that of the Third District in the instant case.

Amendment grounds.

The State's final plea is for this Court to accord the State what it asserts is its broadly-construed right to appeal. There are two appropriate responses: first, while this Court did hold in *Palmore* that the district court's construction of Rule 9.140(b)(1)(C) was too narrow, this certainly is not the equivalent of a statement that the State's right to interlocutory appeal ought be construed broadly;[13] and second, the rule should not be so construed, for as this Court said in *State v. Jones*, 488 So. 2d 527 (Fla. 1986):

> We decline the State's invitation to recede from these cases and from our adherence to the general principle that *statutes which afford the government the right to appeal in criminal cases should be construed narrowly.*

Id. at 528 (emphasis added). Accordingly, the rule should be construed to require unconstitutionality or illegality in the obtaining for the State to have an authority to appeal, on an interlocutory basis, a suppression order.

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[13]The State cites favorable language from *State v. Hancock*, 584 So. 2d 221, 222 (Fla. 4th DCA 1991), stating that the "state correctly points out that rule 9.140(c)(1)(B) has been broadly construed to give the state direct appellate review of pretrial orders which suppress, on constitutional grounds, evidence obtained by search and seizure," and cites *Palmore* and *Segura*. The statement regarding the broad construction is, for the reasons asserted in the text, simply incorrect, and in any event is merely dicta, as the lower court decision in *Hancock* expressly suppressed the evidence on constitutional grounds, so it fit classically within the interpretation of the rule that Petitioner has posited and there was no reason to decide whether a broad construction was appropriate.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Court quash the decision of the Third District Court of Appeal and remand with instructions to direct the Circuit Court Appellate Division to dismiss the State's appeal.

Respectfully submitted,

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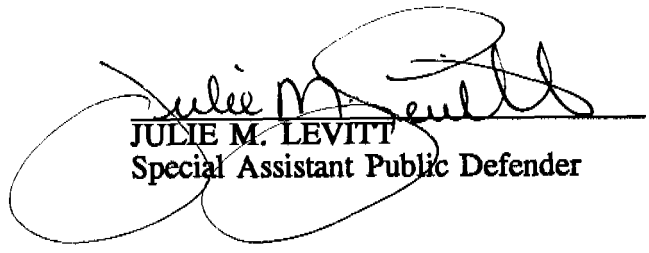
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by fax and by mail to Assistant Attorney General Marc E. Brandes, Department of Legal Affairs, 4000 Hollywood Boulevard, Suite 505S, Hollywood, Florida, 33021, this 22nd day of February, 1994.



JULIE M. LEVITT
Special Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,884

DCA NO. 93-660

JAMES BLORE,

Petitioner,

-vs-

THE HON. EUGENE J. FIERRO, JUDGE, ETC., et al.,

Respondents.

APPENDIX

INDEX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1993

JAMES BLORE, **

Petitioner, **

vs. ** CASE NO. 93-660

HON. EUGENE J. FIERRO, **
Circuit Court Judge, and
CIRCUIT COURT, APPELLATE **
DIVISION, ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA IN AND **
FOR DADE COUNTY,
**

Respondents, **

Opinion filed May 11, 1993.

A petition for writ of prohibition from Circuit Court for Dade County, Eugene J. Fierro, Judge.

Bennett H. Brummer, Public Defender, and Julie M. Levitt, Special Assistant Public Defender, for petitioner.

Robert A. Butterworth, Attorney General, and Marc Brandes, Assistant Attorney General, for respondent.

Before JORGENSON, GERSTEN, and GODERICH, JJ.

PER CURIAM.

Petitioner, James Blore, seeks a writ of prohibition restraining the Appellate Division of the Circuit Court from exercising jurisdiction over this appeal. We deny the writ of prohibition.

The underlying issue is whether the State has the right to appeal an order suppressing breath test results under Rule 9.140(c)(1)(B), of the Florida Rules of Appellate Procedure. Because this issue frequently arises in driving under the influence cases, it is necessary to explain our reasons for denying the writ.

Petitioner contends that the State's appeal of an order suppressing breath test results, because the breath testing device was not maintained in compliance with H.R.S. regulations, is not authorized by law under Rule 9.140(c)(1)(B). Respondent asserts that the state's appeal is authorized by Rule 9.140(c)(1)(B), because the petitioner's breath test results were obtained by "search and seizure." We agree with respondent.

Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, provides:

> (1) Appeals permitted. The State may appeal an order
> ...
> (B) suppressing before trial confessions, admissions, or evidence obtained by search and seizure.

In Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the Supreme Court noted that where government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels. "Obtaining and examining the evidence may also be a search, (citations omitted) if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable." Id., 489 U.S. at 616.

The Skinner court stated "[W]e have long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search." See Schmerber v. California, 384 U.S. 757, 767-768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The court then found this rationale was equally applicable to breath tests and stated:

> Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, see, e.g., California v. Trombetta, 467 U.S. 479, 481, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search.

Skinner, 489 U.S. at 616-617.

Based upon the above analysis, we disagree with the Second District's holdings in State v. Townsend, 479 So. 2d 306 (Fla. 2d DCA 1985), and State v. Gemignani, 545 So. 2d 929 (Fla. 2d DCA 1989), that a breath test was not "evidence obtained by search and seizure" and certify conflict. Because petitioner's suppressed breath test result was evidence obtained by a search, the Circuit Court, Appellate Division has jurisdiction to entertain a state appeal pursuant to Rule 9.140(c)(1)(B). Accordingly, the petition for writ of prohibition is denied.

Prohibition denied; conflict certified.

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