IN THE SUPREME COURT OF FLORIDA

Case No. 82,484

RAMON LOPEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS - MIAMI CHAPTER

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Introduction

The parties in this cause have filed with the Court their written consent to an appearance by the Florida Association of Criminal Defense Lawyers-Miami Chapter as an *amicus curiae* in this matter. The Florida Association of Criminal Defense Lawyers-Miami Chapter (FACDL-Miami), which was founded in 1963, is a voluntary bar association of attorneys who practice before the state and federal criminal courts in Dade County. FACDL-Miami seeks to give criminal law practitioners an active voice in issues involving the quality of justice in the criminal courts, and, through its Amicus Committee, to brief as *amicus curiae* important substantive and procedural legal issues affecting the practice of criminal law in the Florida courts.

Statement of the Case and Facts

FACDL-Miami adopts the Statement of the Case and Facts set forth in the brief filed on behalf of petitioner Lopez.

Argument

A Reasonable Construction of the Florida Rules of Appellate Procedure Allows for a Cross-Appeal by a Criminal Defendant When the State Takes a Non-final Appeal Under Rule 9.140 and the Defendant's Cross-Appeal is Directed to the Same Order Appealed by the State.

In *State v. McInnes,* 133 So. 2d 581 (Fla. 1st DCA 1961), the court ruled that a defendant's cross-appeal of an interlocutory ruling was permitted, despite the absence of specific rule authority therefor under the former Florida Appellate Rules, "since [the cross-appeal] relates to the same order from which the State's appeal is taken" and there was no *prohibition* in the rules against cross-appeals by criminal defendants. *Id.* at 583. This Court

adopted the *McInnes* holding in *State v. McKinney,* 212 So. 2d 761 (Fla. 1968), holding that a defendant could cross-appeal when the state sought review of an order which suppressed some, but not all, of the evidence which the defendant claimed had been seized illegally from him. These decisions indisputably set forth the controlling law at the time that the Florida Rules of Appellate Procedure were adopted in 1977.

Rule 9.140 of the Florida Rules of Appellate Procedure, which governs appeals by the state and defendants in criminal cases, is silent on the right of cross-appeal by either party. In *State v. Williams,* 444 So. 2d 434 (Fla. 3d DCA 1983), the Third District Court of Appeal addressed the question whether *McInnes* and *McKinney* survived the promulgation of Rule 9.140. The court gave great weight to the silence of the rule:

> Since nothing in Rule 9.140 prohibits a cross-appeal in a criminal case, and since the need for specific authorization for such a cross-appeal was directly rejected in *State v. McInnes,* approved in *State v McKinney,* it seems clear that a criminal defendant does have a right to cross-appeal ....

Id. at 437-38 (citations omitted).

The order sought to be reviewed by the state in *Williams* granted the defendant a new trial, and the court limited its holding to cross-appeals taken when the state appeals new trial orders. Despite its reliance upon the absence of prohibitory language in Rule 9.140, the court nonetheless found it necessary to look to Rule 9.110(g) of the Florida Rules of Appellate Procedure, the rule which authorizes cross-appeals when an adverse party

appeals a final order. *Id.* at 437-38.[1/] Because Rule 9.110(g) applies only to cross-appeals of final orders, the court reasoned as follows:

> [T]his right of cross-appeal, provided for solely in Rule 9.110(g), is thereby limited to the appeals contemplated by Rule 9.110(a), that is, in the criminal case, appeals from final orders or orders granting a new trial. In contrast, the appellate rules in existence when *McKinney* was decided contained no such limitation. Thus, while *McKinney* still stands as controlling authority for the proposition that a criminal defendant is permitted to cross-appeal a portion of an order adverse to him even though no rule or statute would authorize a direct appeal by the defendant from the order, *McKinney* is no longer authority for the proposition that a defendant is permitted to cross-appeal an order granting in part his motion to suppress, since such an order is not final.

Id. at 438 (footnotes omitted).

The decision in *State v. Clark,* 384 So. 2d 687 (Fla. 4th DCA 1980), had addressed the issue squarely, holding that, because Rule 9.140(b)(1) provides only for appeals from final judgments, a defendant "may not cross-appeal unfavorable rulings in a pre-trial suppression order." *Id.* at 690. *Clark* came in for strong criticism from the court in *State v. Williams*:

> The reasoning in *State v. Clark* that the limitations on the defendant's right to take a direct appeal found in Rule 9.140(b)(1) are to be read as limitations on his right to cross-appeal is directly contrary to *McInnes* and *McKinney.* Since we are bound by *McKinney,* we must reject *Clark* on this point.

1/ The court adverted to Rule 9.110(g) on the authority of Rule 9.140(a) of the Florida Rules of Appellate Procedure (appeals in criminal cases "shall be as in civil cases except as modified by this rule"). As will be set forth, a proper reliance on Rule 9.140(a) compels a very different conclusion from that reached in *Williams.*

444 So. 2d at 437 n.4 (citations omitted).[2/] Nonetheless, insofar as *Clark* dismissed a cross-appeal of a non-final order, *Williams* holds that it was "correctly decided." *Id.* at 438 n.6.

The *Williams* decision thus finds (1) that a right of cross-appeal may exist, even absent express rule authority, (2) that the silence of Rule 9.140 on the right of a defendant to take a cross-appeal is not a limitation on that right, but (3) that because the rules acknowledge a right to a cross-appeals in civil cases only in Rule 9.110, which rule governs the right to appeals from *final* orders in *civil* cases, the non-rule based right of a criminal defendant to a cross-appeal is thereby limited to cases in which the state seeks an appeal of an order granting a new trial. The underlying rationale for much of the court's holding is sturdy and sound – but its ultimate holding is untenably restricted.

Rule 9.140(a) of the Florida Rules of Appellate Procedure states that "[a]ppeal proceedings in criminal cases shall be as in civil cases except as modified by this rule." The commentary to the rule states:

> Subdivision (a) makes clear the policy of these rules that procedures be standardized to the maximum extent possible. Criminal appeals are to be governed by the same rules as other cases, except for those matters unique to criminal law that are identified and controlled by this rule.

Committee Notes, Fla. R. App. P. 9.140(a) (1977). What is noteworthy, for the purposes of the present case, is the unitary treatment of the phrase "criminal appeals," *i.e.*, neither the commentary nor subsection (a) itself draws any distinction between final and non-final criminal appeals.

[2/] *State v. Ferguson*, 405 So. 2d 294 (Fla. 4th DCA 1981), which relies upon Rule 9.140 as establishing a limitation on a defendant's right to cross-appeal, is similarly a misinterpretation of the rule.

This is so, it would seem, because Rule 9.140, in enforcing a right of appeal in criminal cases, draws no such distinctions: subsection (b)(1) lists the orders from which a defendant may appeal, and subsection (c)(1) those from which the state may appeal; and neither subsection labels which appeals are deemed final or non-final. Fla. R. App. P. 9.140(b)(1), (c)(1). The rule thus does not direct attention to Rule 9.110 for guidance in final criminal appeals or to Rule 9.130 for non-final criminal appeals.

It is certain that the drafters and this Court could not have intended to send an attorney to Rule 9.130 of the Florida Rules of Appellate Procedure for guidance on non-final appeals. Rule 9.130 is *sui generis*: it sets forth a narrow class of civil orders which are subject to non-final appellate review, establishes a procedure found nowhere else in the appellate rules (and directly contrary to that established in Rule 9.140), and does not admit of the slightest pertinence to criminal appeals. Fla. R. App. P. 9.130(a)(3), (4)-(6), (d), (e), (f). Thus, it is not surprising that a lawyer or judge looking for guidance on non-final appeals would be sent directly back to Rule 9.140 by the directive in Rule 9.130 that "[r]eview of non-final orders in criminal cases shall be as prescribed by rule 9.140." Fla. R. App. P. 9.130(a)(2).

Unless Rule 9.140(a) is to be read as utterly meaningless, the directive to refer to the civil appellate rules *must* be read as a reference to Rule 9.110. And, while that rule plainly governs only *final* appeals in civil cases, Rule 9.140(a), the Committee Notes do not refer to Rule 9.110 as setting forth the types of orders which may be subject to review – but as a source for *procedural* guidance. From this perspective, it is plain that the Third District overread the rules in finding that the substantive limitation on the right to a cross-appeal

in civil cases translates into a similar limitation in criminal cases, particularly when the heart of the decision in *Williams* is the holding that a defendant's right to take a cross-appeal in the first instance rests primarily upon non-rule common law authority.

Finally, even if support is found for the approach taken in *Williams,* fundamental principles of statutory construction would compel the reading urged by FACDL-Miami.[3/] There is first the rudimentary canon that, when a statute's meaning is in doubt, a rational construction which avoids unreasonable consequences is favored. *E.g., Wakulla County v. Davis,* 395 So. 2d 540 (Fla. 1981). It is simply not reasonable to presume that the drafters of Rule 9.140 intended to reference Rule 9.130 (and silently so) solely for the purpose of sending the reader directly back to the starting point. Moreover, the eminently practical reasons for holding that a defendant has a right of cross-appeal from non-final orders, as set forth by the Fifth District in *State v. McAdams,* 559 So. 2d 601, 603 & n.2 (Fla. 5th DCA 1990) (*en banc*), make it entirely appropriate to presume that the drafters intended that result.

Second, the flat holding of *State v. McKinney* requires application of the axiom that statutes must be construed in harmony with the common law. *E.g., Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990); *State v. Egan*, 287 So. 2d 1, 6 (Fla. 1973). As this Court has cautioned,

> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law

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3/ Principles of statutory construction are fully applicable to procedural rules. *E.g., Rowe v. State,* 394 So. 2d 1059 (Fla. 1st DCA 1981), *aff'd,* 417 So. 2d 981 (Fla. 1982).

that the two cannot coexist, the statute will not be held to have changed the common law.

Thornber, 568 So.2d at 918 (citations omitted). There is nothing in Rule 9.140 or the history thereof which reflects *any* intent to overrule or abrogate *State v. McKinney.*[4/]

Conclusion

As set forth in Mr. Lopez's brief and the amicus brief filed on behalf of the Florida Public Defender Association, an amended rule of procedure that would make plain the otherwise-tacit right of a criminal defendant to take cross-appeals would do much to simplify the matter. It is, however, confidently submitted by FACDL-Miami that the rules – as they now stand – fully authorize Mr. Lopez's cross-appeal. The Court should vacate the decision of the Third District with directions to reinstate the dismissed cross-appeal.

Respectfully submitted,

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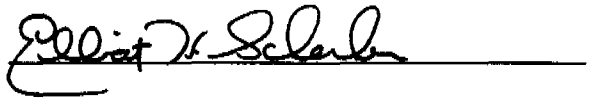
4/ Indeed, the *Williams* decision recognizes as much, *State v. Williams,* 444 So. 2d at 436, although the court inexplicably finds a basis for limiting those cross-appeals which survive the adoption of Rule 9.140. Since the appellate rules are completely silent on whether *McKinney* remains valid, there simply is no basis for the careful parsing of rights engaged in by the court in *Williams.*

Certificate of Service

I hereby certify that a true and correct copy of the foregoing appellants' reply brief was mailed on November 12, 1993 to Michael Neimand, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128; Elizabeth White, Esquire, Sheppard & White, 215 N. Washington Street, Jacksonville, Florida 32202, Counsel for Amicus, Florida Association of Criminal Defense Lawyers (Statewide); Deborah Brueckheimer, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, Counsel for Amicus, Florida Public Defenders' Association; and Mark King Leban, Esquire, Law Offices of Mark King Leban, P.A., 200 S. Biscayne Boulevard, Suite 2920, Miami, Florida 33131-5302.



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