IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,484

RAMON LOPEZ

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The petitioner, RAMON LOPEZ, was the appellee/cross-appellant in the District Court of Appeal of Florida, Third District, and the defendant in the Circuit Court in and for Dade County, Florida. The respondent, The State of Florida, was the appellant/cross-appellee in the Third District, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as the petitioner and the respondent or State. The record on appeal is being supplemented by the State to include the pertinent pleadings in this matter. At the time of the decision issued below, the record on appeal had not yet been fully prepared and filed. The supplemental record will be referred to as SR, followed by the particular pleading or transcript. The symbol "R" represents the limited record on appeal that was filed below. All emphasis herein is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The petitioner was charged by indictment with two counts of first degree murder, two counts of armed robbery, and one count of use of a firearm while engaged in a criminal offense. SR-Indictment. Subsequently, petitioner filed a MOTION TO SUPPRESS STATEMENTS (R.6-7), together with a SUPPLEMENT TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS. See SR. Numerous additional memoranda pertaining to the suppression issues were filed in the trial court by the petitioner and the State, and thereafter, the

trial court held several hearings spanning over numerous days.[1]

Thereafter, on March 3, 1993, the trial judge entered an ORDER ON DEFENDANT'S MOTION TO SUPPRESS, in which the judge granted suppression of some of the statements made by the petitioner, and denied suppression as to others. The judge entered a single, unitary, order setting forth his findings and conclusions on all of the suppression issues in that order. (R.10-12).

Thereafter, the State timely appealed from the portion of the trial court's order granting suppression of some of the petitioner's inculpatory statements. The petitioner then filed a cross-appeal from those portions of the same suppression order which denied suppression of some of the petitioner's inculpatory statements. The State filed a motion to dismiss the petitioner's cross-appeal, the petitioner responded thereto, and on August 31, 1993, the Third District issued its decision ON MOTION TO DISMISS CROSS APPEAL, in which the court granted dismissal based upon cited authority from the Third and Fourth Districts, but expressly certifying conflict with decisions from the Second and Fifth Districts, and "stay[ing] the state's interlocutory appeal until the issue is finally resolved by the Florida Supreme Court." State v. Lopez, 18 Fla.L.Weekly D1914 (Fla. 3d DCA Aug. 31, 1993). Petitioner thereafter timely filed his NOTICE TO INVOKE DISCRETIONARY JURISDICTION, and on October 7, 1993, this Court

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[1]The main suppression hearings were held from November 3 through November 6, 1992. See Supplemental Record. Subsequently, several brief hearings were held. See SR-December 18, 1992; February 5, 1993; February 11, 1993. Record references to these various hearings will be made by reference to the particular date of the hearing.

issued its ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE.

Because of the nature of the issue raised herein, petitioner deems it necessary and advisable to set forth some of the facts pertaining to the merits of the suppression issues, with the understanding that these issues are not before this Court for resolution.

The Suppression Hearing

As stated above, the petitioner was charged by indictment with two counts of first degree murder, two counts of armed robbery, and one count of use of a firearm while engaged in a criminal offense. SR-Indictment. Petitioner was first questioned by Metro-Dade Homicide Detective Roland Vas beginning at approximately 10:00 a.m. on the morning of May 3, 1991, continuously through his formal arrest at approximately 6:30 a.m. on May 4, 1991, and thereafter through the taking of a formal transcribed statement beginning at 11:40 a.m. on May 4. See Nov. 3 at 28-9, 76, Nov. 4 at 11, 13-14.[2] Amongst the issues raised below was at what point in time during this more than 24 hour period did the petitioner's presence with the police become custodial for Miranda purposes, at what point it became an arrest, at what point Miranda warnings were administered for purposes of custodial interrogation, and what was the legal effect of any prior Mirandaless statements on the petitioner's

[2]References to the November hearing transcripts will be made by reference to the date of the hearing, followed by the appropriate page number. These transcripts will be contained in the supplemental record, pursuant to the State's MOTION TO SUPPLEMENT.

formal arrest, and the taking of his formal Mirandized statement.

The petitioner was initially asked to accompany Detective Vas from the Secret Service Office (where he was meeting with a Secret Service Agent in connection with an unrelated case) to the Homicide Office of Detective Vas. Nov. 3 at 22, 28-9. Vas first met petitioner at the Secret Service Office at about 10:00 a.m. on May 3, 1991, and thereafter drove the petitioner to the homicide office at approximately noon on that date. Id. Vas was investigating the homicide of two victims and prior to Vas' arrival at the Secret Service Office to speak with the petitioner, Vas had been given information whereby he "really start[ed] to feel that we've got a link between the two murders" and the petitioner. Nov. 3 at 22.

When Vas asked the petitioner to accompany him to the Homicide Office, he did not inform him that he did not have to go there. Nov. 3 at 26-7. The petitioner was taken to an eight foot by eight foot, windowless interrogation room. Id. at 40. At approximately 1:15 p.m. on May 3, Vas commenced a "preinterview" of the petitioner, and did not read him Miranda rights. Id. at 32. During the interrogation that ensued through the next day, May 4, no officer ever advised the petitioner that he was free to go home. Id. at 33. The interview in the early stages was more in the nature of conversation whereby the petitioner was advising the police officer of any information he had with respects to the two murder victims. Id. at 34-5. Petitioner had information more closely related as to when the crime was committed, motivation for the crime, knowledge of the drug trafficking that the victims were involved with, than anyone else. Id.

Petitioner advised Vas that he had spent that Saturday, April 27, 1991, at the Tahiti Motel, but when Vas had another officer check out this information, police could not verify the petitioner's statement. Id. at 36, 51. Detective Vas continued questioning the petitioner until about 5:45 p.m., May 3, when Sergeant Jimenez took over and questioned the petitioner about certain drug smuggling information. Id. at 40. By 6:45 p.m., May 3, petitioner was more of a suspect than anyone else Detective Vas had. Id. at 43-4.

At some point thereafter, Detective Vas made arrangements for the petitioner to take a polygraph examination; for this purpose, Detective Vas brought in a civil employee, Robert Gately. Nov. 3 at 48. Preparation for the polygraph examination began at about 7:00 p.m. by Mr. Gately, and at 8:53 p.m., May 3, Mr. Gately administered Miranda rights to the petitioner for the purpose of taking the polygraph examination. Id. at 48, 53. Prior to bringing petitioner to Gately for the purpose of the polygraph examination, Vas had not read the petitioner his Miranda rights. Id. at 53. It was civilian employee Gately who read the petitioner his Miranda rights. Id. at 55. Vas had determined to ask petitioner at this point during the questioning to take a polygraph examination since petitioner was "a witness that obviously is close to the two victims in this case who last saw them on the day that in all likelihood they had been killed. . .". Id. at 54-5.

Mr. Gately thereafter conducted the pre-test interview, and then concluded the test at about 10:15 p.m. During that time, Detective Vas had no contact with the petitioner at all. Nov. 3 at

56; Nov. 4 at 70. Nor did Detective Vas participate in Gately's reading of the Miranda form to the petitioner. Nov. 3 at 67. Vas himself considered that portion of the Miranda rights wherein Gately advised the petitioner that "you don't have to talk to me" as meaning "the person administering the Miranda." This was Gately, not Detective Vas. Id. at 68.[3]

Immediately after the polygraph examination was concluded, Mr. Gately advised Detective Vas that the polygraph test established that the petitioner was deceptive, and Detective Vas, when he commenced his interrogation of the petitioner at that time, told the petitioner that he had not been truthful. Nov. 3 at 68, 89; Nov. 4 at 69-70. It is at this juncture, approximately 10:16 p.m. on May 3, that Vas' tone with the petitioner changed and Vas, by his own characterization, "really start[ed] to confront him about anything he has told me." Nov. 4 at 70.

According to Vas, it is also at this point that the petitioner "started becoming a suspect. . .". Nov. 3 at 70. Vas still did not read the petitioner his Miranda rights at this point, despite the fact that petitioner had been deceptive in his answers, and

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[3]In the order that is the subject of the State's appeal (and petitioner's cross-appeal), the trial judge expressly found that the "Miranda warnings read to the Defendant by Robert Gately at the time he administered the polygraph examination of May 4, 1991 [sic: May 3], were not prospective in nature. The Court further finds that after the polygraph examination, the Defendant underwent custodial interrogation, in the absence of a valid waiver of his rights as required by Miranda v. Arizona, and therefore all oral statements of the Defendant. . .which were obtained from the Defendant, beginning immediately after the conclusion of the polygraph examination on the evening of May 3, 1991, up to the beginning of the formal statement at approximately 11:40 a.m. on May 4, 1991, although voluntary, are inadmissible in the prosecution's case-in-chief." See R.10-11, ¶2.

that the petitioner had become a suspect. Id. at 75. Vas began "confront[ing]" petitioner with things that others had related to Vas. Id. at 76. And, since Vas had not been able to confirm the petitioner's statement about staying at the Tahiti Motel, Vas made a determination that petitioner was no longer free to go, although Vas did not advise the petitioner of this fact. Nov. 3 at 77. Petitioner had been in Vas' "company" since approximately 10:00 that morning (May 3) and it was now approximately 10:15 p.m. Nov. 3 at 76.

Vas confronted the petitioner with certain facts linking him to a blue pickup truck that had been observed which was linked to the two murder victims. Nov. 3 at 79; Nov. 4 at 45.

In questioning that took place during this point in time, at approximately 11:00 p.m. on May 3 (after the conclusion of the polygraph examination), the petitioner told Detective Vas that one of the victims, Kevin McKeon, had two gunshot wounds in the chest and one in the back of the head; Vas knew that there was no way that the petitioner could have known this fact unless he was present at the scene of the homicide or himself did the shooting, and Vas confronted the petitioner with that fact. Nov. 3 at 80-2; Nov. 4 at 46. Although petitioner was not free to leave, Vas still did not read the petitioner his Miranda rights. Nov. 3 at 82. Questioning continued and it was "some time prior to 2:15 a.m. [on May 4 that Vas] consider[ed] him basically under arrest. . .".

Nov. at 83.[4]

At approximately 2:15 a.m., Detective Vas had Sergeant Jimenez continue the interrogation of the petitioner. Nov. 3 at 85. The "accusatory level of questioning increased." Nov. 3 at 87.

At that point when Detective Vas considered the petitioner no longer free to leave, because petitioner had given information about the McKeon homicide, petitioner no longer wanted to talk with Detective Vas, and accused Vas of "twisting his words around in English" and petitioner requested to speak with Sergeant Jimenez. Nov. 4 at 4.[5] During the questioning by Sergeant Jimenez, the petitioner asked for permission to speak with the Secret Service Agent with whom petitioner had been cooperating in the unrelated matter and a telephone call was made from the homicide office to Agent McConnell at approximately 4:00 a.m. on May 4. Nov. 4 at 5-6. Over the speakerphone, Agent McConnell told the petitioner he should tell the truth because "it would be in his best interest. . .". Id. at 6-7. Thereafter, Sergeant Jimenez continued to interrogate the petitioner in the interrogation room. Id. at 7. After the 4:00 a.m. phone call to McConnell, petitioner asked to be permitted to speak with his brother, who was in the police building, and police permitted this, but would not allow

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[4]In the order entered by the trial court, the court expressly rejected the petitioner's claim that petitioner was effectively arrested at approximately 2:15 a.m., and, instead, expressly found that "the Defendant was not under arrest at any time prior to the time the Defendant was formally arrested and charged at approximately 6:30 A.M. on May 4, 1991." (R.11, ¶4).

[5]It was established at the suppression hearing that Sergeant Jimenez is the godfather of victim Danilo D'Armas' children. Nov. 4 at 4.

petitioner to speak with his brother unmonitored. Nov. 4 at 9-10.

At a point in time shortly before 6:00 a.m., on May 4, the petitioner made an admission to Sergeant Jimenez that he had participated in the killings, or that he did them himself. Nov. 5 at 79-80; Nov. 4 at 54-5. It was at that point, after the petitioner's admission of his participation in the killings, that Detective Vas considered that he had probable cause to formally arrest the petitioner, and he did so at 6:30 a.m., by advising the petitioner that he was under arrest and handcuffing him. Nov. 4 at 11; Nov. 5 at 80-1. Although the officers considered that they had probable cause to arrest the petitioner for first degree murder, no Miranda warnings were, at that time, or at any time previously, read to the petitioner by either Detective Vas or Sergeant Jimenez. Nov. 5 at 80-1.

After the petitioner was formally arrested, at 6:30 a.m., Detective Vas and Sergeant Jimenez took the petitioner to another location in the building for booking and fingerprinting. Nov. 4 at 11, 54-5. At some point as the petitioner was being led to the fingerprinting section by Sergeant Jimenez, there was a conversation in Spanish. As they were walking to the fingerprinting section, the petitioner said, "Jimenez, I did it, I killed him. I am going to tell you the truth." Nov. 5 at 102-3.[6]

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[6]In the trial court's order, the court expressly found that this conversation in Spanish between the petitioner and Sergeant Jimenez "during the fingerprinting process that took place between 6:30 a.m. and 7:30 a.m. on May 4, 1991, was initiated by the Defendant, that the statements made by the Defendant at that time were volunteered. . .and that the aforesaid statements are therefore admissible." (R.11, ¶3). It should be noted that the petitioner had made the very same admission to Sergeant Jimenez and

After the fingerprinting process was completed, the officers brought the petitioner back to the homicide office and the interrogation room where they had previously conducted the questioning. Nov. 5 at 83. Still, no police officer had advised the petitioner of his Miranda rights. Nov. 5 at 83.

After the fingerprinting process, and the petitioner was returned to the interrogation room, Detective Vas, still without advising the petitioner of his Miranda rights, continued questioning the petitioner and the petitioner described all the events of the homicide in detail. Nov. 4 at 13, 57; Nov. 5 at 83-4, 103. This interrogation continued for approximately another two hours. Nov. 5 at 84.

At approximately 11:40 a.m., a stenographer was brought to the room and a formal statement was commenced. Nov. 4 at 13, 58. It is at this time, 11:40 a.m. on May 4, 1991, that a police officer first administered the Miranda warnings to the petitioner. Nov. 4 at 59; Nov. 5 at 85. At no time, from the commencement of the petitioner's contact with Vas at approximately 10:00 a.m. on May 3, through the taking of his formal transcribed statement at 11:40 a.m. on May 4, did the petitioner ever sleep. Nov. 4 at 14.

The Trial Court's ORDER ON DEFENDANT'S MOTION TO SUPPRESS

In petitioner's motion to suppress statements, petitioner raised several grounds, including that when he was taken to the Metro-Dade Homicide Office, he was effectively under arrest without

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Detective Vas previously, in the interrogation room, during that portion of the questioning that the trial court ruled was conducted without Miranda warnings. (See R.10-11, ¶2). And see Nov. 4 at 54-5; Nov. 5 at 79-80.

probable cause, that that arrest was illegal, and that all statements obtained thereafter were inadmissible; that when petitioner was at the homicide office, regardless of whether he was legally or illegally arrested, he was in custody for a double homicide and any statements he made to police officers without those officers reading him his Miranda rights were inadmissible; petitioner's motion further alleged that the Miranda warnings administered to him by civilian employee Robert Gately were limited to statements petitioner gave during his polygraph examination only; petitioner further alleged that statements made to the police officers after the polygraph examination was concluded were made in the absence of proper Miranda warnings and were inadmissible; and the statements made by the petitioner were involuntary based upon the overbearing police conduct which included some sixteen hours of continuous and confrontational police questioning.

The trial court's ORDER ON DEFENDANT'S MOTION TO SUPPRESS appears at R.10-12. The court first finds that all oral statements made by the petitioner on May 3 up to and including the commencement of the polygraph examination administered by Robert Gately at approximately 9:00 p.m. [8:53 p.m.] are voluntary since the petitioner was not subjected to custodial interrogation during that time period, "thus not triggering the requirements of Miranda v. Arizona and therefore the said statements are admissible." (R.10, ¶1).

Next, the court finds that the Miranda warnings read by Robert Gately during the administration of the polygraph examination "were not prospective in nature," and that after the

polygraph examination, "the Defendant underwent custodial interrogation, in the absence of a valid waiver of his rights as required by Miranda v. Arizona, and therefore all oral statements of the Defendant. . .which were obtained from the Defendant, beginning immediately after the conclusion of the polygraph examination on the evening of May 3, 1991, up the beginning of the formal statement at approximately 11:40 a.m. on May 4, 1991, although voluntary, are inadmissible in the prosecution's case-in-chief." (R.10-11, ¶2).

Next, the court finds that the conversation between the petitioner and Sergeant Jimenez "during the fingerprinting process that took place between 6:30 a.m. and 7:30 a.m. on May 4, 1991, was initiated by the Defendant, that the statements made by the Defendant at that time were volunteered, that Rhode Island v. Innis, and its progeny are inapplicable to the instant case and that the aforesaid statements are therefore admissible." (R.11, ¶3).

Next, the court finds that the petitioner was not placed under arrest "at any time prior to the time the Defendant was formally arrested and charged at approximately 6:30 A.M. on May 4, 1991." (R.11, ¶4).

Next, the court finds that the "oral statements deemed inadmissible under paragraph two (2) herein, because they were obtained in violation of a valid waiver of Miranda, were properly used to establish probable cause to arrest the Defendant and were

the basis of the arrest of the Defendant."[7] (R.11, ¶5).

Finally, the court finds, with respect to the formal transcribed statement taken from the petitioner at approximately 11:50 a.m., on May 4, 1991, that said formal transcribed statement "was obtained after a valid waiver of Miranda rights, that it was the voluntary statement of the Defendant and that therefore it is admissible." (R.12, ¶6).[8]

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[7]The court thus found that, notwithstanding the fact that the statements made by the petitioner to police after the polygraph examination was concluded were inadmissible because they were obtained in the absence of any valid Miranda waiver, those same statements could be, and actually were, properly used as the basis to establish probable cause for the arrest of the petitioner. It is this ruling, as well as that contained in paragraph three of the trial court's order concerning the "volunteered" statements, that petitioner seeks to challenge in his cross-appeal in this case.

[8]The petitioner, in this formal written statement, repeated in detail the suppressed oral statements he had made between his "formal arrest" and the commencement of the written statement. The petitioner also seeks review in his cross-appeal of this portion of the trial court's suppression order.

STATEMENT OF THE ISSUES

POINT I

WHETHER A CRIMINAL DEFENDANT MAY CROSS-APPEAL FROM THOSE PORTIONS OF AN ORDER ON HIS MOTION TO SUPPRESS STATEMENTS DENYING SUPPRESSION WHERE THE STATE PERFECTS A NON-FINAL APPEAL OF THOSE PORTIONS OF THE VERY SAME ORDER GRANTING SUPPRESSION OF STATEMENTS MADE BY THE DEFENDANT.

POINT II

WHETHER THIS COURT SHOULD AMEND THE FLORIDA RULES OF APPELLATE PROCEDURE TO EXPRESSLY PROVIDE FOR THE RIGHT OF A CRIMINAL APPELLANT TO CROSS-APPEAL.

SUMMARY OF THE ARGUMENT

A criminal appellant may cross-appeal from those portions of a suppression order denying suppression of statements where the State timely perfects a non-final appeal from those portions of the very same order granting suppression. The existing Florida Rules of Appellate Procedure clearly provide jurisdiction of such cross-appeals, most notably Rule 9.040(a), Fla.R.App.P., entitled "Complete Determination," which provides that "[i]n all proceedings the court shall have such jurisdiction as may be necessary for a complete determination of the cause." Moreover, this Court, a quarter of a century ago, expressly held that a criminal appellant may cross-appeal in precisely the same circumstances that exist in the case at bar, and no principled reason has been demonstrated by the Third and Fourth Districts, the only courts to hold otherwise, for refusing to follow this Court's dispositive ruling. The criminal appeal rule, Rule 9.140(f), Fla.R.Crim.P., provides that the Scope of Review "shall" include all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interests of justice, the court may grant any relief to which any party is entitled." Moreover, the interests of justice and judicial economy clearly compel resolution of all suppression issues when the State appeals from a partial granting of suppression. The very case at bar clearly demonstrates the impracticality and impossibility of proceeding piecemeal by reviewing the portions of the order suppressing statements and ignoring those portions of the very same order denying suppression. Where, as here, the facts are so inextricably interwoven that

resolution of only those issues pertinent to the portion of the order suppressing evidence is impossible, a cross-appeal by the criminal defendant is both proper and practical.

Finally, while the existing appellate rules allow for a cross-appeal, this Court should amend the rules to expressly provide for such cross-appeals.

ARGUMENT

POINT I

A CRIMINAL DEFENDANT MAY CROSS-APPEAL FROM THOSE PORTIONS OF AN ORDER ON HIS MOTION TO SUPPRESS STATEMENTS DENYING SUPPRESSION WHERE THE STATE PERFECTS A NON-FINAL APPEAL OF THOSE PORTIONS OF THE VERY SAME ORDER GRANTING SUPPRESSION OF STATEMENTS MADE BY THE DEFENDANT.

Petitioner submits that the existing structure of Florida's Rules of Appellate Procedure afford a criminal appellant the right to cross appeal in the circumstances presented in this case. The petitioner adopts the excellent arguments contained in the briefs of Amici[9] and will not repeat in any detail those well reasoned and fully supported arguments.

This Court has already determined, albeit under the former Rules of Appellate Procedure, that a defendant in these circumstances does indeed have the right to cross-appeal from those portions of an order denying suppression of evidence where the State perfects a timely non-final appeal. State v. McKinney, 212 So.2d 761 (Fla. 1968). No principled reason is demonstrated by those courts which have either ignored or refused to follow McKinney.[10] As ably demonstrated in the amicus brief of FACDL,

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[9]Petitioner wishes to extend thanks to counsel for the Florida Association of Criminal Defense Lawyers, Statewide and Miami Chapters, and the Florida Public Defender's Association, for their time and considerable effort in submitting these briefs of amicus curiae on behalf of the petitioner.

[10]Since McKinney, supra, this Court has not directly spoken on this issue. In State v. Suco, 521 So.2d 1100, 1101 (Fla. 1988), the criminal appellant abandoned his attempted cross-appeal of a suppression order. See State v. Suco, 502 So.2d 446, 448 (Fla. 3d DCA 1986). This Court agreed in dictum, without any analysis, that this portion of the trial judge's ruling was "not ripe for

Miami Chapter, the Third District's reasoning in State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), for not following McKinney is unpersuasive. Williams finds that McKinney authorizes a cross-appeal of an order granting a new trial since that order is "final," 444 So.2d at 437-8, but would restrict McKinney to those situations and not rely upon it as authority for a cross-appeal of "an order granting in part [a defendant's] motion to suppress, since such an order is not final." Id. at 438. Of course, that portion of Williams is obiter dictum since the issue presented in that case was whether a criminal appellant may cross-appeal where the State perfects a non-final appeal from an order granting a new trial. In any event, the Third District appears to have overlooked several controlling provisions of the existing appellate rules which, it is submitted, do indeed permit a cross-appeal in suppression cases such as the one at bar.

The Fifth District, in its en banc decision in State v. McAdams, 559 So.2d 601, 602-3 (Fla. 5th DCA 1990), discusses one such existing provision, Rule 9.140(f), and quotes from that portion of subsection (f), which provides that "[i]n the interest of justice, the court may grant any relief to which any party is entitled." McAdams, supra at 603 [Fifth District's emphasis]. Actually, the first sentence of subsection (f) also provides a

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appellate review." 521 So.2d at 1101. Suco is not dispositive of the matter since the criminal defendant there abandoned any cross-appeal and this Court engaged in no jurisdictional analysis. This Court did not determine whether an appellate court has jurisdiction to entertain a cross-appeal in these circumstances. And, most significantly, the Suco Court did not cite to its earlier McKinney decision.

jurisdictional basis for a cross appeal in these types of cases. The rule provides in pertinent part:

> **Rule 9.140(f) Scope of Review.** The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled.

The 1977 Committee Notes to this subsection state that "Subdivision (f) interacts with rule 9.110(h) to allow review of multiple judgments. . .in 1 proceeding."

Rule 9.110(h), Fla.R.App.P, to which the 1977 Committee Note to Rule 9.140(f), refers, provides:

> **(h) Scope of Review.** The court may review any ruling or matter occurring before filing of the notice.

The choice of "shall" in the criminal appeals rule and "may" in the general direct appeal rule cannot be ignored. Certainly there is a public policy consideration favoring expeditious resolution of criminal appellate matters, especially where, as here, a presumably innocent criminal defendant is incarcerated pretrial during the resolution of the State's authorized appeal of the partial suppression order. And, the 1977 Committee Note providing that the criminal appeals "Scope of Review" provision is intended to interact with the direct appeal "Scope of Review" provision so as "to allow review of multiple judgments" in a single proceeding, lends further support for the right of the criminal defendant in the case at bar to cross appeal under the existing Rules of Appellate Procedures. Certainly the order here under review contains "multiple judgments" in the sense that the court

passes upon several legal issues and factual contexts in order to arrive at its ultimate legal conclusion.

Of course, the Florida Constitution bestows upon this Court an organic grant of authority to promulgate rules of procedure. Article V, Section 2(a), provides "the supreme court shall adopt rules for the practice and procedure in all courts. . .". In accordance with this grant of authority, this Court promulgated the "Scope of Review" provisions quoted above. In addition, this Court promulgated Rule 9.130, Fla.R.App.P., the rule governing PROCEEDINGS TO REVIEW NON-FINAL ORDERS. In particular, Rule 9.130(a)(2), Fla.R.App.P., provides that "[r]eview of non-final orders in criminal cases shall be as prescribed by rule 9.140." Rule 9.140, governing APPEAL PROCEEDINGS IN CRIMINAL CASES, provides in subsection (a) that "[a]ppeal proceedings in criminal cases shall be as in civil cases except as modified by this rule." As noted in the amicus brief filed by FACDL - Miami Chapter, this directive is intended as a source for procedural guidance. There is utterly no indication that the criminal appeal rule is indicative of any intent by this Court to limit a criminal appellant's right to cross appeal to final orders only. Indeed, Rule 9.140(a), Fla.R.App.P., expressly notes that criminal appellate proceedings shall be as in civil cases "except as modified by this rule," and reference to Rule 9.140(f), Fla.R.App.P., as indicated above, the "Scope of Review" provision, contains a mandatory directive that the appellate court "shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal." To the extent that the civil

"Scope of Review" provision of Rule 9.110(h), Fla.R.App.P., utilizes the discretionary "may" the criminal provision is, if anything, more expansive.

The petitioner thus submits that the Third District's analysis in State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), far from defeating a criminal appellant's rights to cross-appeal from partial suppression orders, demonstrates the right of a criminal appellant to do so. Except for the non sequitur, obiter dictum, appearing in Williams, petitioner adopts the very reasoning of the court in that case to support his right to cross-appeal here.

Yet another provision in the existing rules lends support to this analysis. Rule 9.040(a), under the General Provisions section of this Court's Rules of Appellate Procedure provides:

> **(a) Complete Determination.** In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause.

As observed in the amicus brief of the Florida Public Defender's Association, once an appellate court takes jurisdiction, it appears logical that such jurisdiction should be over the entire case. As will be demonstrated, were a cross-appeal not to be permitted in this very case, the provision of Rule 9.040(a), Fla.R.App.P., would be meaningless and held for naught.

Indeed, this very case presents perhaps the best possible vehicle to demonstrate why a criminal appellant must be afforded the opportunity to cross-appeal when the State timely perfects an appeal of a non-final suppression order, where that order grants in part and denies in part suppression of inculpatory statements. The

petitioner has set forth at some length the pertinent facts developed at the suppression hearing, not, as stated above, for the purpose of this Court's passing upon the merits of those issues, but, for the purpose of demonstrating the total impracticality (indeed impossibility) of the Third District's reviewing only those portions of the trial court's order suppressing statements. The facts show a continuing series of events, each relevant to a determination of the admissibility of the petitioner's various statements. These facts are inextricably interwoven into each other and cannot, and should not, be logically separated or viewed in isolation. Indeed, it would be impractical, if not impossible, to segregate these facts or to parse them out in order to determine the admissibility of the petitioner's various statements. There is, in fact, a "domino effect" of one event upon another.

For instance, the trial court found that the petitioner was not in custody prior to the end of the polygraph examination, which commenced at approximately 9:00 p.m. on May 3, 1991, but that "immediately after" the polygraph examination, petitioner "underwent custodial interrogation, in the absence of a valid waiver of his rights as required by Miranda v. Arizona. . .", but that much later, he validly waived his Miranda rights at 11:50 a.m., on May 4, when a transcribed statement was taken, and that he was not "formally arrested" until 6:30 p.m., May 4, but that petitioner's inadmissible statements obtained in violation of any valid Miranda waiver "were properly used to establish probable cause to arrest the Defendant and [the illegally obtained statements] were the basis of the arrest of the Defendant." (R.10-

12). The judge, accordingly, entered a single ORDER ON DEFENDANT'S MOTION TO SUPPRESS which granted in part and denied in part the suppression of the petitioner's various statements to police, all made during this continuum of events.

Under the rationale of the Third and Fourth Districts, that a criminal appellant may not cross-appeal from a suppression order, the petitioner in the case at bar is precluded from litigating on appeal the trial judge's ruling that he was not arrested "at any time prior to the time the Defendant was formally arrested and charged at approximately 6:30 A.M. on May 4, 1991." (R.11, ¶4). Thus, the true propriety of the trial judge's ruling as to the suppressed statements, which will be addressed by the Third District in the State's appeal, cannot be fully assessed by that court, absent a review and determination of the lawfulness of the police conduct in eliciting statements from the petitioner both before and after 6:30 a.m., when the trial judge ruled that the defendant was "formally arrested." If, as the petitioner will claim in a cross-appeal (if allowed), he was "formally arrested" under the law much earlier, an entirely different legal analysis will apply to his post-illegal-arrest statements under such cases as Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975), and Taylor v. Alabama, 457 U.S. 687, 102 S.ct. 2664 (1982).

Moreover, the validity of the trial court's ruling that petitioner's "formal statement" taken at 11:50 a.m. was lawfully obtained and is admissible cannot be fully assessed by the Third District during the State's appeal absent a review and determination of the trial court's ruling that petitioner's booking

statement at 6:30 a.m. was "volunteered" by the petitioner. Yet that very "determination" is what Rule 9.040(a), Fla.R.App.P., compels. Again, that rule provides for "Complete Determination," and mandates that "[i]n all proceedings the court shall have such jurisdiction as may be necessary for a complete determination of the cause."

It is submitted that the legal consequence of an illegally obtained confession or inculpatory statement on a subsequent arrest that results from that very tainted statement cannot and ought not be viewed apart from any appellate analysis of the suppression issues.

Moreover, if the petitioner is precluded from litigating all of the suppression issues presently joined in the proceedings already held and in the unified order entered below, a needless trial (not to mention another appeal) may be required in order to fully present the issues now ripe for review. Certainly, such cumbersome and needless proceedings are neither in the "interests of justice," Rule 9.140(f), Fla.R.App.P., nor are they in the interests of judicial economy. See State v. McAdams, 559 So.2d 601, 603 (Fla. 5th DCA 1990)(en banc). The question of judicial economy has been fully and ably briefed in the briefs of Amici and will not be reiterated herein. See, especially, Amicus Brief of FACDL, Statewide, at pages 11-12.

In short, the existing Florida Rules of Appellate Procedure bestow jurisdiction over the petitioner's cross-appeal in this case. Petitioner therefore urges this Court to uphold its ruling in State v. McKinney, 212 So.2d 761 (Fla. 1968), approve the

decisions in State v. McAdams, 559 So.2d 601 (Fla. 5th DCA 1990) (en banc), and State v. Waterman, 613 So.2d 565 (Fla. 2d DCA 1993), and disapprove the decision rendered by the Third District below, and by the courts in State v. Clark, 384 So.2d 687 (Fla. 4th DCA), rev. denied, 392 So.2d 1372 (Fla. 1980); State v. Ferguson, 405 So.2d 294 (Fla. 4th DCA 1981); State v. DeConingh, 396 So.2d 858 (Fla. 3d DCA 1981).

POINT II

THIS COURT SHOULD AMEND THE FLORIDA RULES OF APPELLATE PROCEDURE TO EXPRESSLY PROVIDE FOR THE RIGHT OF A CRIMINAL APPELLANT TO CROSS-APPEAL.

Notwithstanding the petitioner's assertion that the present Rules of Appellate Procedure indeed provide for the right of a criminal appellant to cross-appeal, petitioner submits that the rules should be expressly amended by this Court to so provide.[11] Pursuant to Article V, Section 2(a), Florida Constitution, this Court has the authority to promulgate rules of practice and procedure. This Court has not hesitated to do so even in the

[11]Undersigned counsel, along with counsel for respondent, serve on a subcommittee of the Appellate Rules Committee, a subcommittee that met in Tampa on March 26, 1993, to consider, inter alia, the proposal of an amendment to Rule 9.140, Fla.R.App.P., to either expressly provide for or prohibit cross-appeals in the identical situation now presented to this Court. It was the decision of the subcommittee to table any proposed amendment pending resolution of the existing conflict amongst the district courts of appeal by this Court. The order which is the subject of the very case at bar had recently been entered by the trial court only three weeks prior to this subcommittee meeting, and the undersigned and counsel for the State were aware of the possibility that it would present the vehicle for resolution of a conflict by this Court. The fortuitous events have now presented this Court with the opportunity, not only to resolve the conflict, but to amend the Rules of Appellate Procedure in the process.

course of issuing decisions in cases demonstrating the need for clarification or correction of existing rules. See, e.g., State v. Whitfield, 487 So.2d 1045, 1047 (Fla. 1986)(amending Rule 3.800(a), Fla.R.Crim.P., so as to include in the types of sentences that may be corrected at any time an incorrect calculation made by a court in a sentencing guidelines scoresheet); State v. Smith, 573 So.2d 306, 311-12 (Fla. 1990)(amending the Standard Jury Instructions in Criminal Cases on excusable homicide).

Accordingly, petitioner requests this Court to amend Rule 9.140(b)(1), by including new subsection (F), providing that a defendant may cross-appeal from that portion of a suppression order denying suppression of statements or evidence where the State has filed an appeal from those portions of the order granting suppression, where the matters to be raised in the cross-appeal arise wholly out of the order that is under review in the direct appeal.

CONCLUSION

Based upon the above and foregoing arguments and policy, petitioner respectfully requests this Court to quash the decision of the Third District below, to approve the decisions of the Second and Fifth Districts, to disapprove the decisions of the Third and Fourth Districts, to amend the Florida Rules of Appellate Procedure as stated herein, and to remand this cause with directions that the Third District reinstate the petitioner's cross-appeal, and proceed accordingly.

Respectfully submitted,

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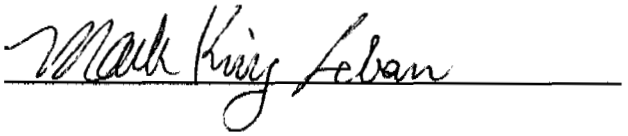
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon 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; Elliot H. Scherker, Esquire, Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131, Counsel for Amicus, Florida Association of Criminal Defense Lawyers (Miami Chapter), this 15th day of November, 1993.



IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,484

RAMON LOPEZ

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 93-621
RAMON LOPEZ,	**	
Appellee.	**	

Opinion filed August 31, 1993.

An appeal from the Circuit Court of Dade County, Joseph P. Farina, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Mark King Leban, for appellee.

Before SCHWARTZ, C.J. and BARKDULL and HUBBART, JJ.

ON MOTION TO DISMISS CROSS APPEAL

PER CURIAM.

Based on the authority of State v. DeConingh, 396 So. 2d 858 (Fla. 3d DCA 1981); State v. Clark, 384 So. 2d 687 (Fla. 4th DCA), rev. denied, 392 So. 2d 1372 (Fla. 1980); and State v. Ferguson, 405 So. 2d 294 (Fla. 4th DCA 1981), we grant the state's motion to

dismiss the defendant's cross appeal and hold that where, as here, the state takes an interlocutory appeal from an order granting in part a defendant's motion to suppress certain statements made by the defendant to the police, Art. V, § 4(b)(1), Fla. Const.; Fla.R.Crim.P. 9.140(c)(1)(B), this court has no jurisdiction to entertain a cross appeal by the defendant from that portion of the order under review which denies in part the defendant's above-stated motion to suppress. See also State v. Williams, 444 So. 2d 434, 438 n. 6 (Fla. 3d DCA 1983); State v. Roberts, 415 So. 2d 796 n.3 (Fla. 3d DCA 1982). We certify, however, that this decision is in conflict with State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990)(en banc), and State v. Waterman, 613 So. 2d 565 (Fla. 2d DCA 1993), so as to permit further review of this decision by the Florida Supreme Court pursuant to Article V, Section 3(b)(4) of the Florida Constitution. Upon the defendant's representation that such review will be sought, we stay the state's interlocutory appeal until the issue is finally resolved by the Florida Supreme Court.

Cross appeal dismissed; conflict certified; appeal stayed.