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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,484

RAMON LOPEZ,

Petitioner,

vs.

THE 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

CONFLICT CERTIFIED

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, **RAMON LOPEZ**, was the appellee/cross-appellant in the District Court and the Defendant in the trial court. The Respondent, The State of Florida, was the appellant/cross appellee in the District Court and the State in the trial court. The parties will be referred to as they stood before the trial court. The symbol "R" will designate the Record on Appeal and the symbol "SR" will designate the supplemental record on appeal. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's Statement of the Case and Facts as a substantially accurate account of the proceedings below.

POINTS ON APPEAL

I.

WHETHER A DEFENDANT HAS A RIGHT TO CROSS APPEAL WHEN THE STATE TAKES AN INTERLOCUTORY APPEAL.

II.

WHETHER THIS COURT SHOULD AMEND THE FLORIDA RULES OF APPELLATE PROCEDURE TO EXPRESSLY PROVIDE FOR THE RIGHT OF A CRIMINAL DEFENDANT TO APPEAL FROM ADVERSE PRETRIAL ORDERS PRIOR TO A FINAL JUDGMENT OF CONVICTION AND SENTENCE.

SUMMARY OF THE ARGUMENT

Appellate rights are conferred either by statute of court rule. Since only this Court can authorize interlocutory appeals, the Florida Rules of Appellate Procedure must provide for a criminal defendant to maintain interlocutory appeals in order for a defendant to maintain a cross-appeal of the same order. Since the Rules do not so provide, then a criminal defendant's cross appeal from a State interlocutory appeal is not authorized and therefore not maintainable.

The rationale for the failure of the Rules to provide for interlocutory appeals by criminal defendants is simple. The Defendant has a right to review all pretrial and trial rulings from a final judgment of conviction of sentence. The State, on the other hand, can not appeal from a final judgment of acquittal. Therefore, the difference in treatment by the rules of appellate procedure is justified.

ARGUMENT

I.

A DEFENDANT DOES NOT HAVE A RIGHT TO A CROSS-APPEAL WHEN THE STATE TAKES AN INTERLOCUTORY APPEAL.

Does a Defendant have a right to a cross-appeal when the State takes an interlocutory appeal. The answer is ascertainable only by review of the different provisions which endow parties with rights to appeal. These provisions are found within the Florida Constitution, Florida Statutes, and the Florida Rules of Appellate Procedure. It matters not that the jurisdiction of a District Court of Appeal in timely invoked, but rather if timely invoked, is there a right of review. For if there is no right to review a timely filed action requires dismissal.

Article V, Section 4 (b)(1), Florida Constitution 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 adopted by the supreme court.

This Court has interpreted the foregoing constitutional provision to mean that the right of appeal from a final judgment, both

criminal and civil, is prescribed by statute . State v. Creighton, 469 So. 2d 735, 740 (Fla. 1985). The review of nonfinal orders is controlled by court rule. State v. Smith, 260 So.2d 489 (Fla. 1972).

Appeals in criminal cases by Defendants from final judgments or orders are controlled by Section 924.06, Florida Statutes which provides:

> (1) A defendant may appeal from:
>
> (a) A final judgment of conviction when probation has not been granted under chapter 948, except as provided in subsection (3);
>
> (b) An order granting probation under chapter 948;
>
> (c) An order revoking probation under chapter 948;
>
> (d) A sentence, on the ground that it is illegal; or
>
> (e) A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001.
>
> (2) An appeal of an order granting probation shall proceed in the same manner and have the same effect as an appeal of a judgment of conviction. An appeal of an order revoking probation may review only proceedings after the order of probation. If a judgment of conviction preceded an order of probation, the defendant may appeal from the order or the judgment or both.
>
> (3) A defendant who pleads guilty or nolo contendere with no express

> reservation of the right to appeal shall have no right to a direct appeal. Such a defendant shall obtain review by means of collateral attack.

The State in criminal cases, does not have right to appeal from a final judgment or order entered in a criminal defendants favor. State v. Creighton, supra, at 740. The State, pursuant to Section 924.07(4), has the statutory right to take a cross-appeal from a ruling on a question of law when a criminal defendant is convicted and appeals from the judgment. Ramos v. State, 505 So.2d 418 (Fla. 1987).

Interlocutory criminal appeals are controlled by Rule 9.130(a)(2), Fla.R.App.P., which provided:

> (2) Review of non-final orders in criminal cases shall be as prescribed by rule 9.140.

Rule 9.140, Fla.R.App.P. only gives the State the right to appeal pretrial orders in criminal cases. State v. Pierce, 269 So.2d 664 (Fla. 1972).[1] See Rule 9.140 (c)(1)(A-J), Fla.R.App.P. In

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[1] Although State v. Pierce, 269 So. 2d 664 (Fla. 1972) was decided under the old appellate rules, it is still valid herein. The Pierce court relied on Rule 6.3(b), which rule gave the State the right to appeal those orders enumerated in Sec. 924.071, Florida Statutes. This statute, the present version which was in effect in 1972, permits State appeals from pretrial orders suppressing confession or admissions made by a defendant. The failure of Rule 6.3(b) to refer to Section 927.07, Florida Statutes is of no moment since review of orders listed in said section were permitted since the Courts heard the appeals as petitions for writ of certiorari. State v. Smith, supra, State v. Redden, 269 So. 2d 415 (Fla. 2d DCA 1972).

addition to the appealable orders listed in Rule 9.140(c)(1), the State, pursuant to Rule 9.130(b)(2) has the right to petition the district court for a writ of certiorari to review pretrial orders which are not listed in Rule 9.140(c)(1). This review is contingent upon the State's showing that the pretrial ruling would effectively negate the State's ability to prosecute; that there is no adequate remedy of law; and that the ruling is a departure from the essential requirements of law. State v. Pettis, 520 So.2d 250 (Fla. 1988).

This Court has not authorized interlocutory appeals by defendants in criminal cases. State v. Pierce, supra. Further, this Court has not authorized criminal defendants to seek the certiorari jurisdiction of the district courts to review adverse pretrial orders. This right has not been granted to a criminal defendant because he cannot show prejudice because he always has the right of appeal from a conviction in which he can attack any erroneous interlocutory order. State v. Pettis, supra, at 253, n2.

Based on the foregoing statutes and rules, the right to appellate review in criminal cases is strictly controlled. The State's only statutory right to appeal is on rulings on questions of law only after a conviction is obtained and the defendant appeals therefrom. The State, pursuant to rules of court, has the right to file interlocutory appeals as enumerated in Rule

9.140(c)(1)(A-J), Fla.R.App.P. and petition for a writ of certiorari on all other pretrial rulings. The Defendant, on the other hand, only has a statutory right to appeal from adverse final judgments, as enumerated by Section 924.06, Florida Statutes. This Court has not promulgated any rule of court which gives criminal defendants the right to take interlocutory appeals and this Court explicitly refused to give a criminal defendant the right to take a petition for certiorari.

Except for Section 924.07(4), Florida Statutes, both the statutes and court rules are silent as to the parties rights to cross-appeal. This silence, the State submits, is intentional since, as established hereinafter, the only cross-appeals that are permissible are those cross appeals which can be maintained independently of the main appeal.

In Ramos v. State, 469 So. 2d 145 (Fla. 3d DCA 1985), approved, 505 So. 2d 418 (Fla. 1987) the Third District held, and this Court approved that a State's cross appeal filed pursuant to Section 924.07(4), Florida Statutes does not survive the dismissal of the Defendants main appeal. This is so because the statutory right authorizing the cross appeal, only authorized it when the defendant appealed from a judgment of conviction. This rule does not apply when the cross appellant had a right to have initially appealed the adverse ruling encompassed in the judgment of conviction and sentence. Therefore, the State's cross-appeal

of an illegal sentence of one imposed outside of the recommended range of the guidelines, survives the defendant's dismissal of the main appeal.

The rationale of Ramos supports the State's position that cross appeals are only authorized when the action can be maintained independently from the main appeal. According to Ramos there must be an independent right to appeal in order for a cross appeal to be maintained. As this Court stated in Ramos, "[s]ubstantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court." Id. at 421. Applying this principle herein, establishes that without a substantive rule of court authorizing interlocutory appeals by criminal defendants, a cross appeal of such an order is not permissible. The fact that Rule 9.110(g), Fla.R.App.P. only deals with the time to file a cross appeal, is further support since said rule merely allocates jurisdiction rather than conferring appeal rights. Therefore, authorization for a cross appeal must exist, not under the cross appeal, but rather for review of the order under consideration. The determining factor is whether there is a right to review the order, not the type of action in which it can be maintained.

Simply stated, when a criminal defendant has a right to appeal adverse interlocutory orders prior to a final judgment of conviction, then it can be filed as a cross-appeal as well. When

a criminal defendant does not have right to appeal adverse interlocutory order's prior to a final judgment of conviction, then it can not be filed as a cross appeal since by so doing it would confer substantive rights through a procedural rule.

The Third District in State v. Williams, 444 So. 2d 434 (Fla. 3d DCA 1983) in a similar situation, reached the conclusion as the State's posits herein. In Williams, the State, pursuant to Rule 9.140 (c)(1)(c), filed an interlocutory appeal from an order which granted the defendant a new trial. The defendant cross-appealed challenging that part of the same order which denied the defendants motion for new trial on other grounds and from an order denying this motion for judgment of acquittal. The Third District denied the State's motion to dismiss the cross appeal on the ground that the orders sought to be reviewed through the cross appeals were, in reality, final orders in which the defendant could have maintained an independent appeal. The Third District found support in Rule 9.110(a)(1) and (3), Fla.R.App.P. which permits appeals from final orders and from orders granting a new trial, in criminal cases and in Rule 9.110(g), Fla.R.App.P. which permits cross appeals in actions taken pursuant to Rule 9.110, Fla.R.App.P. The Third District strictly limited a defendants right to maintain a cross appeal to appeals taken from final orders or orders granting a new trial. This holding was based on the fact that there is both statutory and court rules authorizing the maintenance of an independent appeal from said orders.

The Third District distinguished this Court's decision in State v. McKinney, 212 So.2d 761 (Fla. 1968) as follows:

> We point out, however, that this 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. However, the fact that the present appellate rules have abrogated the defendant's right to cross-appeal from an interlocutory suppression order has no effect on the case before us. Here the order from which the State has appealed is an order granting a new trial, an appeal to which the right of cross-appeal attaches under Rule 9.110(g).

Id. at 438 (footnotes omitted).

A reading of the old rules of appellate procedure bears out the Third Districts distinguishment of McKinney. The old

appellate rules are similar to the present rules. Part VI[2] of the old rules dealt with criminal appeals and, pursuant to Rule 6.1 criminal appeals were to be prosecuted in accordance with Part VI and with such other provisions of the rules not inconsistent with Part 6. Rule 6.7, the rule relating to assignments and cross-assignments of error, pertained only to appeals taken from final judgments or sentences, except when appeal is taken by the State pursuant to Section 924.07(4), Florida Statutes.[3] Part VI did not specifically prohibit a defendant from taking a cross-appeal in those instances when the main appeal has been taken by the State from an interlocutory order. Part IV, Rule 4.2 dealt with interlocutory appeals in civil action. Said rule, in subsection (b) provided only for assignments of errors. Subsection (g) of Rule 4.2 stated that unless modified by this rule, other appellate rules shall apply to interlocutory appeals. Rule 3.5(b) permitted cross appeals by the appellee in civil actions.

Based upon a reading of these rules, this Court in McKinney, approved the right of a defendant to maintain a cross appeal from a State appeal of an interlocutory order. The

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[2] A copy of old rules relied upon herein are attached hereto, for the Courts convenience, as an appendix to this brief.

[3] This Statute is the same one that was approved by this Court in Ramos v. State, 505 So. 2d 448 (Fla. 1987).

approval was based on the following rationale stated in State v. McInnes, 133 So. 2d 581 (Fla. 1st DCA 1961).

> [1,2] It is generally held that cross-assignments of error are allowable only when they could have supported a separate and distinct appeal, unless they relate to the same judgment from which the main appeal is taken. Under this general principle, as well as under our rules of appellate procedure, the appellee in this case would not have the right to maintain a separate and distinct appeal from the order denying his motion to quash the information. This is for the reason that appeals from interlocutory orders entered in criminal cases may not be the subject of an interlocutory appeal unless specifically authorized by statute or rule of the Supreme Court. He does, however, have the right to maintain his cross-appeal in this case since it relates to the same order from which the State's appeal is taken. For the foregoing reasons the State's motion to dismiss the cross-appeal taken by appellee herein is denied.

Id. at 583. (footnote omitted).

The Third District, in distinguishing McKinney, compared the old rules with the new and found there was a significant change in the language of the new rules. The new rules under Rule 9.140(a) continued to treat criminal appeals as civil appeals except as modified by Rule 9.140. Since Rule 9.140, the rule relating to criminal appeals, did not mention cross appeals,

except those taken by the State pursuant to Rule 9.140(c)(1)(H)[4] the Third District looked to Rule 9.110 to determine if criminal defendant had a right to cross appeal. Said rule applies to appeals from final orders, and orders granting new trials in both civil and criminal cases. Subsection (g) of Rule 9.110 provides, without distinguishing between civil and criminal cases, for cross appeals from appeals from final judgments only. The new rule thus strictly limited cross appeals to those emanating from final judgments. However, with Old Rule 3.5 contained no restriction on the right to cross-appeal. Therefore, the Third District, held that under the new rules, a defendant was only authorized to take cross appeals from appeals from final judgments and there was no authorization for criminal defendants to maintain cross appeals from State interlocutory appeals.

The holding in Williams is totally consistent with the State's position that there must be either a specific statute or rule of court which creates a right to maintain an independent appeal in order for a cross appeal to be maintained on the same order. Since a defendant has a statutory right to appeal form a final judgment, he must also have a right to cross appeal issues unfavorable to him on the final judgment, when the State takes its interlocutory appeal, pursuant to court rule, to challenge those portions of the order granting relief to the defendant. On

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[4] This is the same right given to the State to cross appeal in Old Rule 6.7(a) under Section 924.07(4), Florida Statutes.

the other hand, since, this Court has chosen not to permit a criminal defendant the right to maintain an interlocutory appeal, he also does not have a right to cross appeal when the State appeals that portion of the interlocutory order that granted relief to the defendant.

The holding in Williams, and its resultant support for the States position, is also supported by principles of statutory construction, which principles apply when construing court rules. Rowe v. State, 394 So. 2d 1059 (Fla. 1st DCA 1981). The principle of statutory construction that requires this instant interpretation is that where there is a significant change in the language of a statute, it is to be presumed that the change was intentional and was intended to have a different effect from the prior language. Swartz v. State, 316 So. 2d 618 (Fla. 1st DCA 1975). The change in Rule 9.110(g) which permits only cross appeals from appeals from final judgments is substantial change from old Rule 3.5(b) which contained no restriction on the right to cross-assign errors. Therefore, this change must have been intended to do away with the right of the defendant to cross-appeal from a State appeal from an interlocutory order. To hold otherwise would defeat the effect of the change of the language contained in the similar rules.

The Fourth District implicitly recognized the foregoing in State v. Clark, 384 So. 2d 689 (Fla. 4th DCA 1980). In Clark,

the State appealed from an order partially granting a motion to suppress and the defendant cross-appealed portions of the same order which declined to suppress other evidence. In dismissing the cross appeal, the Court held:

> . . . We conclude we are without jurisdiction and grant the motion. Review of non-final orders in criminal cases is limited by Florida Rule of Appellate Procedure 9.130(a)(2) to those prescribed by Rule 9.140. Rule 9.140(c)(1)(B) in turn authorizes appeal by the State from an order suppressing before trial confessions, admissions or evidence obtained by search and seizure. Rule 9.140(b)(1) provides that a defendant may appeal from final judgments. Defendant thus may appeal denial of a motion to suppress after final judgment assuming it is properly preserved at trial. The Rules do not provide for appeals by defendant from pre-trial orders denying a motion to suppress. Defendant argues that once the State has appealed a pre-trial order of suppression this opens the way for a cross-appeal by defendant of any unfavorable portion of the order. We find no authority directly answering this question.

Id. at 689-690. The emphasized sentence was determined by the Williams court to mean that the Clark court overlooked State v. McKinney, supra, and State v. McInnes, supra. State v. Williams, supra, at 436. The State submits, that the Fourth District did not overlook McKinney or McInnes, but rather implicitly found that the new Rules of Appellate Procedure, in Rule 9.110(g) repudiated the holding in McKinney, as it related to interlocutory cross-appeals by a criminal defendant.

The Fourth District in Clark also found that policy concerns also supported its interpretation of cross appeals under the new appellate rules:

> Defendant argues it is more efficient to determine all suppression issues in a single appeal before trial. This is not necessarily so and in any event would not confer jurisdiction. The trial court may decide to exclude the evidence at trial despite its previous order denying suppression. Alternatively defendant may be acquitted despite admission of the evidence at trial, thus dispensing with any appeal. Obviously, the State must be able to appeal the suppression of evidence before trial because double jeopardy would prevent any effective appeal by the State after final judgment. Defendant, of course, may appeal after judgment all prejudicial error. . .

Id, at 690. These are the same policy reasons why this Court has not granted a criminal defendant the right to petition for a writ of certiorari to challenge the correctness of a pre-trial order. State v. Pettis, supra, 520 So. 2d at 253, n2.

The Fifth District in State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990) and the Second District in State v. Waterman, 613 So. 2d 565 (Fla. 2d DCA 1993) both permit a defendant to cross appeal from a State interlocutory appeal, only when the cross-appeal is confined to matters arising wholly out of the order that is under review in the direct appeal. The McAdams

decision, which was adopted by the Waterman court, found authorization under Rule 9.140(f). Said rule states in pertinent part:

> . . . 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 Fifth District found that allowing a cross appeal pursuant to the foregoing provision would be consistent with the decision in State v. McInnes, supra. It also found that policy reasons favored the allowance of the cross appeal since an adverse decision at trial could trigger the appeal of the same order before a different panel and therefore the cross-appeal, the interest of justice and judicial economy, was justified.

The McAdams decision is erroneous on both the legal and policy grounds. First, by assuming that the new rules did not change the old rules, the Court clearly violated the principle of statutory construction that substantial changes in the language of rules are intended to have a different effect from the prior rule. Therefore, the McAdams Court erroneously attempted to reconcile the new rules with the McInnes decision under the old rules.

Second, the McAdams court's reliance on Rule 9.140(f) to confer an appellate right is also misplaced. The language relied

upon "to grant any relief to which any party is entitled", does not confer a new right to appeal, but rather permits the Court which has already obtained jurisdiction of a cause on some independent basis to completely exercise that jurisdiction, e.g. to grant a party a stay pending resolution of the appeal. See Shevin ex rel. State v. Public Service Commission, 333 So.2d 9 (Fla. 1976)(State constitutional provision conferring jurisdiction on Supreme Court to issue "all writs necessary to the complete exercise of its jurisdiction" only contemplates situation in which Court has acquired jurisdiction of a cause on some independent basis and does not confer original appellate jurisdiction in any case).

Even McAdams Court's policy reasons are misplaced. Both the interest of justice and judicial economy of having the same panel here the case at the same time have been rejected as reasons for giving interlocutory rights to review the criminal defendants. In State v. Pettis, supra, 520 So.2d at 253, n2, this Court held that a writ of certiorari is not available to a criminal defendant "because he always has the right of appeal from a conviction in which he can attack any erroneous interlocutory orders."

The Defendant also finds his right to cross appeal in Rule 9.140 (f), Fla.R.App.P. He states that Rule 9.140(f), pursuant to the 1977 Committee Notes, is to be read in conjunction with

Rule 9.110(b), Fla.R.App.P. Said rules provide for review of all rulings occurring before the filing of the notice. However, the 1977 Committee Notes to Rule 9.140(f) state that the purpose of the relationship between the rules is to allow review of multiple judgments in one proceeding. Under this theory, Defendant contends that his cross appeal is permitted since that part of the order denying his motion to dismiss qualifies as a judgment and therefore multiple judgments are before the Court when a defendant files a cross appeal from the same order from which the State is maintaining its authorized appeal.

This position, the State submits is based on faulty legal analysis. Rule 9.110, deals with appeals from final orders and orders granting a new trial. It pertains to final orders in both civil and criminal matters. Rule 9.140 deals with appeals in criminal cases, both from final orders by the defendant and from interlocutory orders by the State. Clearly then the interaction between Rules 9.140(f) and 9.110 (h) applies only to final judgments from convictions. This is evident since the new rules do not require assignments of error to obtain appellate review. Rather the present rules only require that the matter be preserved below in order for the issue to be reviewed on appeal. Therefore, any ruling occurring before or during trial, can be raised in by a criminal defendant from final judgment of

conviction and sentence.[5] Any other interpretation would erroneously allow a procedural rule to create a substantive right.

The Defendant next contends that Rules 9.130(a)(2), and 9.140, Fla.R.App.P. when read together creates a right to cross appeal. Specifically he contends that since Rule 9.130(c)(2) provides that review of non-final orders in criminal case shall be proscribed by Rule 9.140 and that Rule 9.140(a) provides that non-final appeals proceeding in criminal cases will be the same as in civil cases, then he has a right to cross appeal in criminal cases because all parties have the right to appeal interlocutory orders in civil cases and therefore they all have the ability to cross appeal. This position was properly rejected in State v. Clark, supra. Clearly by terms of rules 9.140(a) the rules in civil appeals apply except as modified by the entire Rule 9.140. Reading the whole rule establishes that interlocutory criminal appeals are modified by said Rule. The modification is that in criminal cases only the State has the right to appeal interlocutory orders. The Rule does not provide for a criminal defendant to file an appeal form pretrial orders. As such he has no right to maintain a cross appeal. That is the modification referred to in Rule 9.140(a) and it is a major one

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[5] This includes the right of the State to file a cross appeal on a question of law, when a convicted defendant appeals the judgment of conviction. Section 924.07(4), Florida Statutes.

clearly denying a criminal defendant any right to have a adverse pretrial ruling reviewed prior to final judgment. Any other interpretation would render the terms "except as modified by this rule", meaningless and therefore contrary to principles of statutory construction.

His next contention is that Rule 9.140 (f), Fla.R.App.P. is mandatory since it provides that the appellate court "shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal." First by its very terms, it applies only to those rulings necessary to pass upon the grounds of an appeal, which in State appeals is only that portion of the pretrial ruling that was adverse to the State and only rulings necessary to determine that correctness of that ruling is what that portion of the rule pertains to. It does not confer on an appellate court the right to review, by way of a cross appeal, a pretrial ruling that was adverse to a criminal defendant.

Finally, Defendant relies on Rule 9.040(a), Fla.R.App.P. which provides, under the General Provisions that, a court shall have such jurisdiction as may be necessary for a complete determination of the cause. He argues that the emphasized part of the rule allows an appellate court, once it obtains jurisdiction over a portion of the case, to assume jurisdiction over the entire case. This is a total misreading of this provision. Rather, the State submits, the provision is similar

to the All Writs provisions of the Florida Constitution, which this Court has interpreted, not to create a new right, but rather allows the appellate court to issue ancillary orders to insure that the exercise of their jurisdiction would not be defeated by an inferior court. Shevin ex rel. State v. Public Service Commission, supra.

The Defendant next shows how his issues are interwoven with the State appeal and therefore is makes it even more compelling to allow a cross appeal herein. The State submits that the facts are irrelevant because without authorization from this Court to permit criminal defendants to maintain interlocutory appeals, a cross appeal cannot be maintained. Further, the fact that judicial economy would be strained by possibly having another or the same panel to rule on the same order twice, has already been rejected as a reason for allowing such a cross appeal. State v. Pettis, supra, State v. Clark, supra.

II.

THIS COURT SHOULD NOT AMEND THE FLORIDA RULES OF APPELLATE PROCEDURE TO EXPRESSLY PROVIDE FOR THE RIGHT OF A CRIMINAL APPELLANT TO APPEAL FROM ADVERSE PRETRIAL ORDERS PRIOR TO A FINAL JUDGMENT OF CONVICTION AND SENTENCE.

Based on the States analysis in Point I as to why a defendant is not authorized to file a cross appeal, the State submits to rule permitting the same should not be made.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully prays that this Court affirm the Third District's Order dismissing the Defendant's Cross Appeal and hold that the same is not authorized by either the Florida Statutes or the Florida Rules of Appellate Procedure.

Respectfully submitted,

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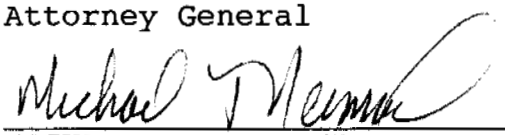

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **MARK KING LEBAN**, Attorney for Petitioner, 2920 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; **ELIZABETH WHITE**, Attorney for Amicus, Florida Association of Criminal Defense Lawyers (Statewide), 215 N. Washington Street, Jacksonville, Florida 32202; **DEBORAH BRUECKHEIMER**, Attorney for Amicus, Florida Public Defender's Association, Polk County Courthouse, P.O. Box 9000 Drawer D, Bartow, Florida 33830 and **ELLIOT H. SCHERKER**, Attorney for Amicus, Florida Association of Criminal Defense Lawyers (Miami Chapter), 1221 Brickell Avenue, Miami, Florida 33131 on this 10 day of December, 1993.

Michael J. Neimand

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ss/