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State v. Brackett: Does the State Have a Right of Appeal?

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I. INTRODUCTION

In *State v. Brackett*,[1] the defendant was charged with kidnapping, gross sexual assault, burglary, and criminal threatening with the use of a dangerous weapon.[2] The State of Maine filed an in limine motion to exclude any evidence relating to the victim's past sexual behavior, including evidence that the victim may have been a prostitute sometime prior to the incident in dispute.[3] Although evidence of a victim's past sexual behavior is generally inadmissible under Maine Rule of Evidence 412,[4] the trial court nonetheless denied the State's motion.[5] The State appealed[6] pursuant to section 2115-A(1) of Title 15 of the Maine Revised Statutes (the Appeals Statute),[7] which allows for appeals of pre-trial orders that "have a reasonable likelihood of causing either serious impairment to or termination of the prosecution."[8] A divided Maine Supreme Judicial Court, sitting as the Law Court, declined to rule on the merits of the appeal, holding that the appeal was "premature" because the in limine ruling was not a final decision of the trial court.[9] Two justices dissented, arguing that the in limine ruling did pose a reasonable likelihood of causing serious impairment to the prosecution's case, bringing it within the parameters of the Appeals Statute, and making the appeal an appropriate one to be considered.[10]

Though the State appealed under a statute authorizing appeals of pre-trial orders, the Law Court held that it could not rule on the merits of the pre-trial order in question because the order was not final.[11] This Note examines the tension between section 2115-A(1), which provides the State with a right under circumstances such as those presented in *Brackett* to appeal pre-trial orders in criminal cases, and the Law Court's decision that said, in effect, that no such right exists except in very

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1. 2000 ME 54, 754 A.2d 337.
2. *Id.* ¶ 2, 754 A.2d at 337.
3. *Id.*
4. The rule provides, in pertinent part, the following:
   (b) In a criminal case in which a person is accused of rape, gross sexual assault, gross sexual misconduct, unlawful sexual conduct, or sexual abuse of a minor, the only evidence of a victim's past sexual behavior that may be admitted is the following:
      (1) Evidence of specific instances of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
      (2) Evidence of specific instances of sexual behavior with the accused offered by the accused on the issue of whether the alleged victim consented to the sexual behavior with respect to which the accused is charged.

ME. R. EVID. 412.
5. State v. Brackett, 2000 ME 54, ¶ 2, 754 A.2d at 337.
6. *Id.*
7. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).
8. *Id.*
9. State v. Brackett, 2000 ME 54, ¶ 6, 754 A.2d at 339.
10. *Id.* ¶¶ 8-14, 754 A.2d at 339-41.
11. *Id.* ¶ 7, 754 A.2d at 339.

limited situations. This Note traces the Law Court's treatment of the Appeals Statute in general, and interlocutory appeals brought pursuant to the statute. The Note further examines whether or not the *Brackett* decision is consistent with the court's early interpretations of the Appeals Statute, and whether narrowing those early interpretations is consistent with the court's initial reading of the State's rights as afforded by the statute. Finally, this Note will suggest changes to the doctrine allowing appeals of only those interlocutory orders that are final in order to provide for greater predictability, while also simultaneously protecting the State's right to appeal and the court's desire to limit the number of interlocutory appeals brought by the State.

II. MOTIONS IN LIMINE AND INTERLOCUTORY APPEALS

Though an in limine motion may be made any time prior to the introduction of the evidence in question,[12] it is generally used as a pre-trial motion[13] seeking either "a protective order prohibiting the opposing party counsel and witnesses from offering offending evidence at trial, or even mentioning it at trial, without first having its admissibility determined outside the presence of the jury,"[14] or a pre-trial ruling on whether or not evidence is admissible.[15] With either type of ruling, the goal of an in limine motion is to prevent the exposure of the jury to evidence that may be so unfairly prejudicial that a curative instruction would fail to protect the moving party's right to a fair trial.[16] Thus, used as a precautionary measure, the in limine motion can assist the court in avoiding reversible error and, in certain circumstances, preventing a mistrial.[17] In short, in limine motions can serve to avoid any "futile attempt[s] to 'unring the bell'" after the introduction of unfairly prejudicial evidence.[18]

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12. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d 656, 659 (Me. 1979).

13. *Id.*; *see also* State v. Tate, 265 S.E.2d 223, 225 (N.C. 1980).

14. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 658-59; *see also* Prout v. State, 535 A.2d 445, 448 (Md. 1988) (stating that "the purpose of [motions in limine] is to prevent the jury from hearing certain questions"); State v. Lundy, 535 N.E.2d 664, 668 (Ohio Ct. App. 1987) (stating that motions in limine seek "cautionary instruction to opposing counsel to avoid error or prejudice by limiting his examination of a witness in a specified area until admissibility is determined by the court outside the presence of the jury"); Lundell v. Citrano, 472 N.E.2d 541, 544 (Ill. App. Ct. 1984) (defining a motion in limine as a "pre-trial motion in which the movant seeks an order preventing the presentation of inadmissible evidence").

15. The general view is that motions in limine seek preliminary rulings, with the ultimate question of admissibility to be determined at trial. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 659. However, the motion may be used to seek a more determinative ruling as well. *Id.* at 659-60; *see also* Walton v. Datry, 363 S.E.2d 295, 298 (Ga. Ct. App. 1987). Nonetheless, even these more determinative rulings may not be considered "final" until evidence is offered at trial. State v. Pinkham, 586 A.2d 730, 731 (Me. 1991).

16. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 658-59; *see also* Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 127 (Okla. 1984) (stating that "[a] motion in limine is a pretrial motion requesting the court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to the moving party that curative instructions cannot prevent the predispositional effect on the jury"); 75 AM. JUR. 2D *Trial* § 94 (1991).

17. State v. Grubb, 503 N.E.2d 142, 145 (Ohio 1986) (quoting State v. Spahr, 353 N.E.2d 624, 625 (Ohio App. 1976)); 75 AM. JUR. 2D *Trial* § 94 (1991).

18. Clemens v. American Warranty Corp., 238 Cal. Rptr. 339, 342 (Cal. Ct. App. 1987) (quoting Hyatt v. Sierra Boat Co., 145 Cal. Rptr. 47, 54 (Cal. Ct. App. 1987)); *see generally* 75 AM. JUR. 2D *Trial* § 94 (1991).

In Maine, the Law Court has classified these two types of rulings sought through in limine motions as "preliminary prohibitive," and "absolute prohibitive," respectively.[19] In an "absolute prohibitive" ruling, the court prohibits the opposing party from offering or even mentioning the evidence in the presence of the jury.[20] When a court lacks "sufficient legal and factual information," a "preliminary prohibitive" ruling prohibits the non-moving party from offering the evidence, or mentioning it in the presence of the jury, "unless and until" sufficient information is developed to allow the court to make a definitive ruling on admissibility.[21]

A "preliminary prohibitive" in limine ruling, then, is an interlocutory ruling indicating only the anticipated final disposition of the evidentiary question.[22] As such, the trial court is free to reconsider its ruling once facts are further developed at trial.[23] Whether "absolute prohibitive" rulings may be considered final for the purposes of appeal is unclear, though such a determination may rest on the facts of the case.[24] If it appears that the in limine decision is unlikely to change, such a ruling may be considered final for the purposes of appeal.[25] To the extent that any in limine motion amounts to an interlocutory order, appeal of the matter is generally not permitted until a final order is issued.[26] Such a policy is designed to allow for the development of facts at trial, and to prevent interference with the trial court's discretion to change an in limine ruling once those facts are developed.[27]

Interlocutory appeals are provided for in most states, either by statute or by court rules.[28] Statutes granting a state a right to appeal provide the benefit of protecting a State's right to a fair trial, while also adding to uniformity of decisions within a state because the highest court's rulings serve as a guide for the lower courts.[29] When appeals are brought under such statutes, or court rules, courts

19. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 659.

20. *Id.*

21. *Id.*

22. Indeed all motions in limine are generally considered to be interlocutory in nature. State v. Grubb, 503 N.E.2d at 145; *see also* Simpson v. Smith, 771 S.W.2d 368, 371 (Mo. Ct. App. 1989); Sooter v. Magic Lantern, Inc., 771 S.W.2d 359, 362 (Mo. Ct. App. 1989); State v. Swann, 370 S.E.2d 533, 545 (N.C. 1988).

23. State v. Grubb, 503 N.E.2d at 145; *see also* State v. Hill, 523 N.E.2d 894, 898 (Ohio Ct. App. 1987) (describing motions in limine as "malleable in the discretion of the trial court").

24 . Though the Law Court requires evidence to be offered at trial for a ruling to be truly final, State v. Pinkham, 586 A.2d 730, 731 (Me. 1991), it has accepted appeals from in limine rulings when the rulings were deemed to be final based on the circumstances of the case, even though evidence was not offered at trial. State v. Patterson, 651 A.2d 362, 366 (Me. 1994). Such circumstances have included instances in which the trial justice made it clear that their decision would stand at trial. *Id.*

25. In *State v. Patterson*, 651 A.2d 362, 366 (Me. 1994), the defendant was told that "he could go to the bank" with the in limine ruling, prompting the Law Court to make an exception to its policy of not hearing appeals of decisions that are not truly final. *See also* State v. Shellhamer 540 A.2d 780, 782 (Me. 1988) (stating that the court would make an exception to the policy of not considering non-final in limine decisions because the decision judge stated on the record that the ruling would stand at trial).

26. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 660 n.10.

27. *Id.* at 658 (stating that "a motion in limine . . . is addressed to the discretion of the court"); State v. Brackett, 2000 ME 54, ¶ 7, 754 A.2d 337, 339 (dismissing appeal of an in limine ruling partially on the ground that facts developed at trial "may influence and change the trial justice's determination").

28. 4 AM. JUR. 2D *Appellate Review* § 117 (1995).

29. David J. Corson, Comment, *The State Right to Appeal: Has Maine Been Too Cautious?*, 21 ME. L. REV. 221, 234 (1969).

typically seek to determine whether the matter appealed is of the type authorized, by statute or rule, to be appealed prior to a final decision on the matter.[30]

In Maine, the right of the State to appeal an interlocutory order in a criminal case is provided for in Maine's interlocutory appeal statute.[31] In *Brackett*, the Law Court acknowledged that this statute authorizes interlocutory appeals;[32] that is, the statute, on its face, applies not just to final orders, but to orders that are not final.[33] Nonetheless, the court declined to consider the merits on the appeal on the grounds that the in limine ruling was not final.[34]

III. DEVELOPMENT OF THE LAW COURT'S APPROACH TO APPEALS BROUGHT PURSUANT TO MAINE'S APPEALS STATUTE

A. The History of the Appeals Statute

In *State v. Fernald*,[35] the Law Court declared that "the State enjoyed no right to appeal" decisions in a criminal case prior to the 1968 enactment of the Appeals Statute.[36] At the time, appeal of interlocutory orders in certain instances was provided for by section 57 of Title 4 of the Maine Revised Statutes, which gave the Law Court jurisdiction to hear appeals of interlocutory orders on "questions of law arising on reports of cases . . . of such importance as to require, in the opinion of the justice, review by the law court before any further proceedings in the action."[37]

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30. Courts generally adhere to the doctrine of not hearing interlocutory appeals unless the appeal falls within exceptions created by statute or court rule. When the appeal does fall within such exceptions, the courts typically will hear the appeal. For examples of how interlocutory appeals statutes and rules are applied by courts, see 4 AM. JUR. 2D *Appellate Review* § 117 n.28 (1995) (collecting cases). *See also* Thompson v. Goetz 455 N.W.2d 580 (N.D. 1990); Chicago *ex rel.* Charles Equip. Co. v. United States Fid. & Guar. Co., 491 N.E.2d 1269 (Ill. App. Ct. 1986); Breuer v. Flynn, 496 A.2d 695 (Md. Ct. Spec. App. 1985); TBS Pac. v. Tamura, 686 P.2d 37 (Haw. Ct. App. 1984); McFadden v. Hartman, 677 S.W.2d 948 (Mo. Ct. App. 1984); Tober v. Turner of Texas, Inc., 668 S.W.2d 831 (Tex. Ct. App. 1984); Payne v. Presley, 311 S.E.2d 849 (Ga. Ct. App. 1983); Urbano v. Meneses, 431 A.2d 308 (Pa. Super. Ct. 1981); Forte v. Schlick, 85 N.W.2d 549 (Iowa 1957); *In re* Gomez, 426 N.E.2d 1084 (Ill. App. Ct. 1981).

31. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980). This section provides:

> An appeal may be taken by the State in criminal cases on questions of law from the District Court and from the Superior Court to the [L]aw [C]ourt: From an order of the court prior to trial which suppresses any evidence, including, but not limited to, physical or identification evidence or evidence of a confession or admission; from an order which prevents the prosecution from obtaining evidence; from a pretrial dismissal of an indictment, information or complaint; or from any other order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution.

Id.

32. State v. Brackett, 2000 ME 54, ¶ 5, 754 A.2d at 338.

33. By definition, interlocutory matters are not final. *See* cases cited *supra* note 22 and accompanying text.

34. State v. Brackett, 2000 ME 54, ¶ 6, 754 A.2d at 339.

35. 381 A.2d 282 (Me. 1978).

36. *Id.* at 285.

37. ME. REV. STAT. ANN. tit. 4, § 57 (West 1989). This statute was in effect at the time of the *Fernald* decision. Pub. L. No. 1981, ch. 356, § 1. However, the statute is a grant of jurisdiction, not a grant to the state of a right to appeal, as was recognized in *Fernald*. Under section 57 of Title 4 of the Maine Revised Statutes, the Court has jurisdiction over the following cases:

However, this statute provided only for appeals brought by or agreed to by the defendant.[38] So, while the jurisdictional grant of section 57 provided a limited avenue for appeal, it conferred no rights upon the State.[39]

Recognizing the primacy of a defendant's rights and the potential policy implications of increasing the State's right to appeal either preliminary orders or final judgments, the Law Court expressly stated in *State v. Kelly*[40] that the question of granting rights of appeal to the State could be decided *only* by the legislature and not the court.[41] As the Law Court further recognized in *Kelly*, such a decision was made by the Maine Legislature when it passed the Appeals Statute, giving the state the right to appeal without the type of prior court approval required by section 57.[42] The State's right to appeal was limited by the statute to bringing appeals only before or after, not during, a trial.[43]

The first version of the Appeals Statute allowed for pre-trial appeals under a narrow set of circumstances in which there was a "strong likelihood" of "termination" of the prosecution.[44] The State could only appeal pre-trial rulings that (1) suppressed evidence, (2) dismissed an indictment, complaint, or information, (3)

> Cases on appeal from the Superior Court or a single Justice of the Supreme Judicial Court or from the probate courts; questions of law arising on reports of cases, including interlocutory orders or rulings of such importance as to require, in the opinion of the justice, review by the law court before any further proceedings in the action; agreed statement of facts; cases presenting a question of law; all questions arising in cases in which equitable relief is sought; motions to dissolve injunctions issued after notice and hearing or continued after a hearing; questions arising on habeas corpus, mandamus and certiorari and questions of state law certified by the federal courts.

ME. REV. STAT. ANN. tit. 4, § 57 (West 1989). This jurisdictional grant, then, differs from the separate grant of a *right* to appeal certain preliminary orders found in section 2115-A(1) of Title 15 of the Maine Revised Statutes, which lacks any mention of judicial discretion as a factor determining whether the appeal should be brought. ME. REV. STAT. ANN. tit. 15, § 2115-A.

38. State v. Kelly, 376 A.2d 840, 843 (Me. 1977).

39. *See supra* note 35, and accompanying text.

40. 376 A.2d 840 (Me. 1977).

41. *Id.* at 843.

42. *Id.* at 844. The Appeals Statute allowed the State to appeal after receiving written permission from the Attorney General; court approval was not required. *See infra* note 45.

43. State v. Hood, 482 A.2d 1268, 1270 (Me. 1984). Subsection 1 of the Appeals Statute allows for appeals prior to trial. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980). Subsection 2 allows for appeals after trial:

> An appeal may be taken by the State from the Superior Court or the District Court to the Supreme Judicial Court after trial and after a finding of guilty by a jury or the court from the granting of a motion for a new trial, from arrest of judgment, from dismissal, or from other orders requiring a new trial or resulting in termination of the prosecution in favor of the accused, when an appeal of the order would be permitted by the double jeopardy provisions of the Constitution of the United States and the Constitution of Maine.

Id. § 2115-A(2). As the statute indicates, appeals after trial are permitted when double jeopardy is not a factor. For example, the State may appeal a court's decision setting aside a jury verdict to convict because a successful appeal would merely reinstate the jury's guilty verdict rather than require a new trial. In such an instance, there is no risk of double jeopardy. State v. Howes, 432 A.2d 419, 421-24 (Me. 1981).

44. State v. Fernald, 381 A.2d 282, 287 (Me. 1978).

quashed an arrest or search warrant, or (4) suppressed a confession or admission.[45] The Appeals Statute was amended in 1971 to give the State the additional right to appeal "any pretrial order."[46] However, in *Fernald*, the Law Court, while declining to define the scope of what amounted to a "pretrial order,"[47] limited the scope of the State's right to appeal pretrial rulings to the parameters of the original statute—only pretrial rulings that threatened to "terminate" the prosecution could be appealed under the statute.[48]

Though the *Fernald* decision limited the scope of the State's rights under the Appeals Statute, the court, in another decision, determined that the statute amounted to a grant of substantive rights to the State, not merely an expansion of the court's jurisdiction, holding in *Kelly* that the statute granted "substantive, rather than procedural" rights to appeal "final judgment[s] *or* the interlocutory facets of a criminal prosecution."[49] This explicit distinction between final judgments and interlocutory matters indicated that the court recognized that the Appeals Statute gave the State a substantive right to appeal, and that such a right applied, at least to some extent, to interlocutory matters that were not final. Furthermore, the court at that time viewed the grant of "substantive" rights to appeal interlocutory matters without court approval as equal to those possessed by a defendant to appeal an adverse verdict, declaring in *Kelly* that "the legislature conferred upon the state a substantive right to appeal interlocutory orders or rulings in a criminal prosecution which the legislature intended to be as 'absolute' . . . as is the right of the defendant to appeal from a final judgment of conviction."[50] The importance of such substantive rights was recognized in *State v. Smith*,[51] in which the court noted that "justice demands that the State be allowed to litigate on issues important to its case."[52] As such, the Appeals Statute was not merely a grant of jurisdiction to the Law Court, but a grant of rights to the State.

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45. *Id.* at 286. The original version of the statute read, in relevant part, as follows:

> An appeal may be taken by the State in criminal cases on questions of law, with the written approval of the Attorney General, from the District Court and from the Superior Court to the [L]aw [C]ourt from a decision, order or judgment of the court suppressing evidence prior to trial, allowing a motion to dismiss an indictment, complaint, or information, quashing an arrest or search warrant or suppressing a confession or admission . . . [a]ny appeal which may be taken under this section shall be diligently prosecuted.

Pub. L. No. 1967, ch. 547, § 1.

46. Pub. L. No. 1971, ch. 215. Section 2115-A of Title 15 of the Maine Revised Statutes followed the 1968 version verbatim, with the sole exception that "ruling[s] against the State in any pretrial order" were added as orders that could be appealed by the State. Pub. L. No. 1971, ch. 215.

47. State v. Fernald, 381 A.2d at 286.

48. *Id.* at 287.

49. *Id.* (emphasis added).

50. *Id.* at 844. The court used the term "absolute" to refer to the fact that, under the Appeals Statute, the State would have similar rights as the defendant in that it would not need to seek approval from the trial court in order to proceed with an appeal. *Id.* The important point here is that the Appeals Statute was viewed as a grant of substantive rights to the State, not merely a grant of jurisdiction to the Law Court.

51. 400 A.2d 749 (Me. 1979).

52. *Id.* at 753 (citing United States v. Jackson, 508 F.2d 1001, 1005 (7th Cir. 1975)). The court did not specifically address the Appeal Statute in this decision, but considered the defendant's claim that the prior appeal brought by the State pursuant to that statute contributed to delay that denied him his right to a speedy trial. It was in this context that the court held that an appeal brought by the State for proper purposes was an acceptable reason for delay. *Id.* at 754.

The next amendment to the Appeals Statute relating to interlocutory orders came in 1979, when the statute was modified to allow the State to appeal any pre-trial order that "has a reasonable likelihood of causing either serious impairment to or termination of the prosecution."[53] With the passage of this amended version of the statute, the legislature, according to the Law Court in *State v. Hood*,[54] had given the State the right to appeal any pre-trial decision "whenever the constitution would permit."[55] Under the revised statute, the State could appeal not only matters that threatened to put an end to the prosecution of the case, but also those that would seriously hamper prosecution of the case.[56]

The Law Court considered the policy implications of this version of the Appeals Statute in *State v. Drown*.[57] In *Drown*, the court maintained its previously held view that the State had broad rights of appeal under the statute.[58] Adhering to the specific language of the Appeals Statute, the court held that the legislature's intent in passing the statute was to give the state a means of appealing "*any* pretrial decision" that had a reasonable likelihood of seriously impairing the prosecution.[59] Accordingly, the court went on to say, whenever the State could obtain approval from the Attorney General[60] to proceed with an appeal, the court then "*must* consider whether under all the circumstances the lower court's ruling ha[d] produced a *significant* setback to the prosecution of the case."[61]

The *Drown* court did note that "public policy warrants against piecemeal" appeal because of the defendant's right to a speedy trial and the public's right for justice to be served swiftly.[62] The State's right to appeal would be constrained by such policy concerns, but only within the framework of the Appeals Statute. Properly restricting the use of the statute to those instances in which prosecution of a case is "threatened by a lower court ruling prior to trial" would sufficiently protect the public policy concerns enunciated by the Law Court.[63] The determination of

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53. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980). No further amendments to this section have been made to date. That statute reads, in relevant part, as follows:

> An appeal may be taken by the State in criminal questions of law from the District Court and from the Superior Court to the [L]aw [C]ourt: From . . . any other order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution.

Id.

54. 482 A.2d 1268 (Me. 1984).

55. *Id.* at 1270 (quoting United States v. Wilson, 420 U.S. 332, 337 (1975)).

56. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

57. 447 A.2d 466 (Me. 1982).

58. *Id.* at 470.

59. *Id.* (emphasis added).

60. The requirement that the State obtain approval from the Attorney General is now found in subsection 5 of the Appeals Statute:

> In any appeal taken pursuant to subsections 1 or 2, the written approval of the Attorney General shall be required; provided that if the attorney for the State filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later date.

ME. REV. STAT. ANN. tit. 15, § 2115-A(5) (West 1980).

61. State v. Drown, 447 A.2d at 470-71 (emphasis added).

62. *Id.* at 471-72.

63. *Id.* (emphasis added). The *Drown* court's position was that public policy concerns were sufficiently addressed when a lower court decision threatened to seriously impair the prosecution's case. The court did not at that time take the position that some decisions fitting within the requirements of the Appeals Statute would be appealable, while others could not be reviewed due to such policy concerns.

whether the lower court's ruling sufficiently threatened the State's case, then, was a threshold question in deciding whether an appeal would be considered. Though an appeal would be considered "improvident," and therefore one that would not be considered by the court if the prosecution of the case could continue unimpaired after the lower court's ruling,[64] such a threshold determination was one that the court was obligated to make.[65] As for delays in trial adversely affecting the defendant's right to a fair trial, such concerns had been previously addressed in *Smith*, where the court stated that an "interlocutory appeal undertaken by the prosecutor in good faith without attempting to tactically outmaneuver a defendant is generally an appropriate reason for delay."[66] Taken together, the *Smith* and *Drown* decisions indicate that the court, at the time, viewed the Appeals Statute as adequately addressing all relevant public policy concerns.

B. Restrictions on the State's Right to Appeal

Though these early cases dealing with the Appeals Statute seemed to afford the State broad rights of appeal, in *State v. Doucette*[67] the court began to limit the State's rights relating to appeals of pre-trial orders. Adhering to the Appeals Statute, the *Doucette* court held that appeals could be brought only when the State could establish that the ruling being appealed threatened serious impairment of the prosecution of the case.[68] However, the court placed an additional burden on the State by requiring that even pre-trial orders must be final in order to be appealed.[69] The court reasoned that such a rule was necessary due to "strong public policy against piecemeal appeals and the impossibility of [the court] serving as an advisory board to trial lawyers and judges."[70] Furthermore, it warned that without such a rule resources of the public and the court would be overburdened, particularly in light of an ever growing case load.[71] Aside from holding that it would not hear appeals of decisions that were not "final," the *Doucette* court also held that it would not consider interlocutory appeals when a question raised on appeal could "readily [be] answered" in a manner adverse to the moving party by a "study of the existing law"—in such cases, the appeals would be "improvident."[72] At least two

64. *See id. Drown* involved the State's appeal of the lower court's dismissal of an indictment. The Law Court held that the appeal was "improvident" because prosecution of the case could have continued unimpaired had the State merely filed an amended indictment. The court, then, addressed the threshold question it had established for itself, even though the appeal was dismissed without consideration of the substantive merits of the State's appeal. *Id.* at 472.

65. The court stated that such a determination was one it "must" make once the State complies with the statutory requirement of obtaining approval from the Attorney General to bring an appeal. *Id.* at 470-71.

66. State v. Smith, 400 A.2d 749, 753 (Me. 1979).

67. 544 A.2d 1290 (Me. 1988).

68. *Id.* at 1292.

69. *Id.* at 1292-93.

70. *Id.* at 1294.

71. *Id.* at 1293-94.

72. *Id.* at 1294. A question that can be "readily answered" by a "study of existing law" is, apparently, one that can be answered by a plain reading of applicable law. In *Doucette*, the State appealed the exclusion of statements made by a witness in connection with a polygraph test. The Law Court stated that a simple reading of Maine's hearsay rules would show such statements to be inadmissible. On these grounds, in addition to the fact that the lower court ruling was not sufficiently final, the appeal was considered "improvident." *Id.* at 1291, 1293-94.

barriers now stood in the way of appeals brought pursuant to the Appeals Statute. Thus, in light of a statute the court acknowledged as expanding the State's rights to appeal,[73] the court moved from the position enunciated in *Fernald*, recognizing the State's right to appeal "final judgment[s] or the interlocutory facets of a criminal prosecution,"[74] to a position recognizing a right to appeal only those pre-trial orders that are final and that could not, by a reading of relevant law, be easily answered in a manner that was adverse to the moving party.

The court based its position in *Doucette* on the premise that, when the legislature grants the court jurisdiction over certain cases, the court retains the right to determine what cases falling within that jurisdictional grant will be heard.[75] In this manner, the court could insure that it would hear cases in a manner that "would be consistent with [its] basic functions as an appellate tribunal."[76] Such a position requires that the Appeals Statute be interpreted as a grant of jurisdiction, which was the express position taken by the *Doucette* court.[77] Lacking in this analysis is any recognition that, while the statute grants jurisdiction, the statute also, according to the prior Law Court decisions outlined above, grants substantive rights to the State,[78] allowing appeal "whenever the constitution would permit."[79] Such analysis also overlooks the court's prior announcement that "justice demands that the state be allowed to litigate an issue important to its case."[80]

Such interests were, following *Doucette*, to be recognized only in regard to pre-trial orders that were final, despite the court's prior recognition that the Appeals Statute granted rights to appeal both interlocutory and final orders. Furthermore, the *Doucette* opinion seemingly eliminated the threshold requirement the court placed upon itself in *Drown*, where it obligated itself to determine whether a lower court ruling sufficiently impaired prosecution of a case once the State received approval from the Attorney General to appeal the matter in question. Thus, under *Doucette*, if a pre-trial order was deemed to not be "final," then such an undertaking would not be necessary because the appeal would not be considered.[81]

C. Exceptions to the Doucette *Rule*

The Law Court has outlined at least two exceptions to its rule against hearing appeals of pre-trial in limine orders that are not "final." First, the court has heard appeals of in limine rulings when it has determined, from an analysis of the circumstances surrounding the ruling, that the lower court's decision is likely to be

73. *See* discussion in Part III.A.

74. State v. Fernald, 381 A.2d 282, 285 (Me. 1978) (quoting State v. Kelly, 326 A.2d 840, 843 (Me. 1977)).

75. State v. Doucette, 544 A.2d at 1292.

76. *Id.* This reasoning in *Doucette* was based on a prior decision in *State v. Foley*, 366 A.2d 172 (Me. 1976), in which the court held that it had discretion to decide whether to hear cases reported from the lower courts pursuant to Rule 37 of the Maine Rules of Criminal Procedure. Such discretion was to be used to insure protection of the court's role as an appellate forum. *See* State v. Foley, 366 A.2d at 173.

77. State v. Doucette, 544 A.2d at 1292.

78. *See* notes 49-52 and accompanying text.

79. State v. Hood, 482 A.2d at 1270 (quoting United States v. Wilson, 420 U.S. 332, 337 (1975)).

80. State v. Smith, 400 A.2d 749, 753 (Me. 1979) (citing United States v. Jackson, 508 F.2d 1001, 1005 (7th Cir. 1975)).

81. State v. Doucette, 544 A.2d at 1293.

adhered to at trial.[82] This exception was crafted in *State v. Shellhamer*,[83] in which the court considered the merits of the State's appeal because, in part, the lower court had indicated on the record that it would stand by its in limine ruling at trial, which was to begin immediately following the in limine hearing.[84] Similarly, in *State v. Patterson*,[85] the court considered the merits of the State's appeal because, at the time of ruling on the in limine motion, the lower court judge told the parties they "could go to the bank with [the decision]."[86] So, while in limine rulings are not considered final until the disputed evidence is offered at trial,[87] the court will deem the ruling sufficiently "final" to be considered on appeal if the lower court expressly indicates that its decision is final.

The court has also made an exception, without expressly announcing one, to its general rule when public policy concerns are minimized by the circumstances of the case. Such was the posture of *State v. Pinkham*,[88] where the court reiterated its opposition to hearing appeals of non-final in limine rulings, but proceeded to consider the appeal "in the interest of judicial economy and to avoid further delay."[89] However, the court made its decision to hear the *Pinkham* appeal only because the State had attempted two previous appeals that had already caused substantial delay in the case.[90] With such delay caused by numerous appeals, the court apparently considered it too late to protect its policy concerns, and proceeded to hear the case. This suggests at least two exceptions to the court's rule of hearing appeals of in limine rulings: (1) when based on the circumstances of the ruling, the lower court's order may be deemed "final," indicated by comments by the lower court that the decision will stand at trial, and (2) when the court's policy concerns will not be affected by consideration of the appeal. Such a framework served as the basis for the court's decision in *State v. Brackett*.

IV. THE *BRACKETT* DECISION

A. The Majority Decision

The defendant in *State v. Brackett*[91] was charged with two counts of sexual assault.[92] The State moved in limine to have evidence of the victim's past sexual behavior, including evidence that the victim had been a prostitute at some point[93]

82. *See* State v. Shellhamer, 540 A.2d 780, 782 n.1 (Me. 1988); State v. Patterson, 651 A.2d 362, 366 (Me. 1994).

83. 540 A.2d 780 (Me. 1988).

84. *Id.* at 782 n.1.

85. 651 A.2d 362 (Me. 1994).

86. *Id.* at 366.

87. State v. Pinkham, 586 A.2d 730, 731 (Me. 1991).

88. 586 A.2d 730 (Me. 1991).

89. *Id.* at 731.

90. *Id.*

91. 2000 ME 54, 754 A.2d 337.

92. The defendant was also charged with kidnapping, burglary, and criminal threatening with a dangerous weapon. *Id.* ¶ 2, 754 A.2d at 337.

93. *Id.* The defense sought to have admitted into evidence conflicting statements relating to the victim's sexual history: the victim herself told investigators that she had been a prostitute two years before the alleged assault, while another woman told a detective that that victim had been involved in prostitution a couple of months prior to the incident. Brief for the State, Appel-

and contradictory statements as to when the victim had been a prostitute, excluded.[94] The State sought to have this evidence excluded pursuant to Rule 412 of the Maine Rules of Evidence, which states that evidence of past sexual behavior not involving contact between the defendant and the victim is inadmissible unless offered to prove someone other than the defendant was the victim's assailant.[95] After the superior court denied the State's motion,[96] the State appealed to the Maine Supreme Judicial Court.[97] Though the Appeals Statute provides for interlocutory appeals by the prosecution,[98] the Law Court dismissed the appeal on the grounds that the superior court ruling was not a final order.[99]

The defense theory rested on the claim that the victim had agreed to have sex with the defendant in exchange for money.[100] In opposing the State's motion, the defense argued that evidence of the victim's past behavior was essential to proving its theory of the case, and that exclusion of the evidence would deny the defendant his constitutional rights.[101] The State argued that the evidence was inadmissible under Rule 412[102] and that, because the evidence was not relevant, its exclusion would not deny the defendant his constitutional rights.[103] In the alternative, the

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lant, at 4, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374). The Brief for the State indicates that the other woman stated the victim had been a prostitute a year prior to the incident. However, this appears to be a typographical error—the State's Brief indicates that the victim's acquaintance told investigators that the victim said she was last involved in prostitution during the summer of 1998, while the alleged assault occurred in September, 1999. *Id.* The *Brackett* decision indicates that the acquaintance said the victim was last involved in prostitution two months prior, during the summer of 1999. State v. Brackett, 2000 ME 54, ¶ 3, 754 A.2d at 338.

94. State v. Brackett, 2000 ME 54, ¶ 3, 754 A.2d at 337-38.

95. Under this rule, evidence of past sexual behavior is generally inadmissible, with only two very narrow exceptions. *See supra* note 4. The defense in *Brackett* did not offer the evidence for purposes that fit within these exceptions, *State v. Brackett*, 2000 ME 54, ¶ 4, 754 A.2d at 338, but rather to aid in presenting its theory of the case. Brief for the State, Appellant, at app. 7-14, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

96. The superior court apparently agreed with the defense contention that the evidence was essential to the defendant's ability to present his case, stating at the hearing, "I think this evidence comes in . . . [t]his is his defense." Brief for the State, Appellant, at app. 13, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374). This concern, along with questions of the constitutional implications of excluding the evidence under Rule 412 of the Maine Rules of Evidence, served as the basis for the court's opinion:

> [W]e can't use the rules of evidence to violate someone's constitutional rights. . . . And I agree [with the prosecution], it is prejudicial, but . . . she has . . . inconsistencies with regard to her recollection of her past, number one, and, number two, this is what, apparently, she does for work, whether she stopped months before or days before, and his theory is, he went to a social club, met her, offered her money, she accepted it, it was consensual, and I can't see how I could say that everything that supports his version of the events is not going to be allowed to go to the jury.

Brief for the State, Appellant, at app. 14, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

97. State v. Brackett, 2000 ME 54, ¶ 2, 754 A.2d at 337. The State did comply with the statutory requirement of obtaining approval from the Attorney General. Brief for the State, Appellant, at app. 20, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

98. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

99. State v. Brackett, 2000 ME 54, ¶ 6, 754 A.2d at 339.

100. *Id.* ¶ 4, 754 A.2d at 338.

101. Brief for the State, Appellant app. at 8-9, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

102. *Id.* app. at 7.

103. State v. Brackett, 2000 ME 54, ¶ 4, 754 A.2d at 338; Brief for the State, Appellant app. at 10, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

State further argued that to the extent the evidence was relevant, it should be excluded under Rule 403 of the Maine Rules of Evidence as unfairly prejudicial.[104] The superior court ruled that the evidence was admissible because the defendant's constitutional rights were at stake and on the grounds that "everything that supports [the defendant's] version of events [should be] allowed to go to the jury."[105]

The prosecution and defense raised the same arguments on appeal to the Law Court,[106] with the defense additionally arguing that the State's appeal was "improvident" because admission of the evidence in question would neither seriously impair nor terminate the prosecution's case[107] due to the fact that the prosecution would not be prevented from presenting any of its evidence.[108] The State countered that the lower court ruling was in clear violation of Rule 412, and that admitting evidence of past prostitution on the part of the victim would seriously impair the prosecution due to the prejudicial nature of the evidence.[109] The Law Court, however, declined to address any of the arguments presented by the parties. Though the court recognized that the Appeals Statute gives the State the right to appeal interlocutory orders, it held that the interlocutory nature of the in limine order made the appeal "premature," and dismissed the case accordingly.[110]

Relying on the *Doucette* and *Patterson* decisions, the *Brackett* court indicated that it would not hear interlocutory appeals unless circumstances of the case demonstrated that the motion justice would stand by the ruling at trial.[111] Only in such circumstances would the appeal be considered provident.[112] In *Brackett*, the Law Court held that the superior court's decision lacked any such clear commitment, and the State's appeal was therefore premature.[113] As in *Doucette*, the court also

104. State v. Brackett, 2000 ME 54, ¶ 4, 754 A.2d at 338; Brief for the State, Appellant app. at 13, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374). Rule 403 reads as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ME. R. EVID. 403.

105. Brief for the State, Appellant app. at 14, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

106. *See generally id.*; Brief of Defendant-Appellee, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

107. Brief of Defendant-Appellee at 4-5, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

108. *Id.* at 7. The defendant also argued that, because the lower court based its ruling on the need to protect constitutional rights, and to allow the defendant to present evidence supporting its theory, the decision was not an abuse of discretion. *Id.* at 8-14.

109. Reply Brief for the State, Appellant at 2-3, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

110. State v. Brackett, 2000 ME 54, ¶ 6, 754 A.2d at 339.

111. *Id.* ¶ 7, 754 A.2d at 339. The *Brackett* court cited *State v. Patterson*, 651 A.2d 362, 365 (Me. 1994), in which the Law Court made an exception to its general policy of not hearing motions in limine because the trial court had told the defendant he could "go to the bank" with the in limine ruling. *Id.* at 366; *see also* State v. Shellhammer, 540 A.2d 780, 782 n.1 (Me. 1988) (allowing an appeal of an in limine ruling to be heard because the trial court "clearly indicate[d] a commitment . . . to stand by its ruling").

112. State v. Patterson, 651 A.2d at 366; State v. Shellhammer, 540 A.2d at 782.

113. State v. Brackett, 2000 ME 54, ¶ 7, 754 A.2d at 339. The court noted that the Justice below said nothing to indicate that the decision would be final, and that there was a possibility that a different justice could preside at trial. *Id.*

cited the need to protect a defendant's right to a speedy trial, and a need to limit the financial burden borne by taxpayers in financing criminal trials.[114]

In holding that the in limine decision was insufficiently definite to be considered on appeal, the *Brackett* court stressed the possibility that (1) the judge who made the motion might not preside at trial, and (2) regardless of who presided at trial, the in limine ruling could be changed at trial, precluding the need for appeal; therefore, so long as the decision could change at trial, consideration of an appeal would be unwarranted.[115] Facts developed at trial might lead to a change in the ruling, providing further grounds for declaring the appeal to be premature.[116]

What went unmentioned in the decision was that allowing the lower court ruling to stand effectively precluded the State's ability to appeal later if the decision were not reversed once the case went to trial. This is because the Appeals Statute allows the State to appeal only *before* or *after* trial.[117] With post-trial appeals permitted only in limited circumstances where double jeopardy is not a concern,[118] the State would not be able to appeal the in limine ruling if the jury returned a not guilty verdict. As a result, the *Brackett* decision left the State with no means of appealing a decision it claimed would seriously impair its case—all in light of the court's previous positions that (1) recognized that the Appeals Statute gave the State the right to appeal both final orders and interlocutory matters,[119] (2) obligated it to determine if a pre-trial order caused serious impairment to the prosecution whenever the State brought an appeal pursuant to the Appeals Statute,[120] and (3) the court's own recognition of the "potential importance" of the issues raised in the *Brackett* appeal.[121]

By taking such an approach, the Law Court essentially treated the in limine ruling denying the State's motion as similar to a "preliminary prohibitive" ruling. That is, the court considered the denial of the motion as a decision that could change as the facts were further developed at trial.[122] The question, however, of what further facts could be developed at trial remains because the only evidentiary question presented in the motion was whether the evidence sought to be excluded conflicted with Rule 412.

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114. *Id.* ¶ 6, 754 A.2d at 339. The court stated its concerns over the systemic costs of appeals, and the defendant's rights as follows:

> [T]he defendant has a constitutional right to a speedy trial, *see* Me. Const. art. I, § 6, and obviously, the members of the public, including both the victims of crime and taxpayers, have a great interest in bringing persons accused of crimes to justice promptly and efficiently. Appeals taken by the State from pretrial orders inevitably delay the commencement of trials and add to the public cost. . . . The appeal [may] cause[] unnecessary consumption of public resources, on the part of the Law Court and also counsel for the State and for defendants.

Id. (citing State v. Doucette, 544 A.2d 1290, 1293-94 (Me. 1988) (quoting State v. Drown, 447 A.2d 466, 472 (Me. 1982))).

115. *Id.* ¶ 7, 754 A.2d at 339.

116. The court stated that it would be "premature for [the court] to make a determination without the benefit of the actual facts presented at the trial." *Id.*

117. *See supra* text accompanying note 43.

118. *See supra* text accompanying note 43.

119. State v. Fernald, 381 A.2d 282, 287 (Me. 1978).

120. State v. Drown, 447 A.2d 466, 471 (Me. 1982).

121. State v. Brackett, 2000 ME 54, ¶ 7, 754 A.2d at 339.

122. *Id.*

The defense as much as admitted that a strict reading of Rule 412 would exclude the evidence, but claimed that the defendant's constitutional rights demanded admission.[123] The question presented to the superior court at the in limine hearing, and to the Law Court on appeal, was not dependent on disputed facts, but on questions of law in the context of facts that neither party suggested would or could change at trial.[124] There were no remaining questions to be developed at trial that could change the facts upon which the decision was made. Though it was possible that another judge would preside at trial, by declining to address the merits of the appeal, the Law Court's decision offered neither guidance for a subsequent decision at trial, nor any protection for the prosecution if an adverse decision would indeed seriously impair its case. On both counts, the decision, arguably, undermines two goals of the Appeals Statute.[125]

B. The Dissent

The dissent criticized the court for treating the in limine ruling as one that depended on facts to be developed at trial, and focused instead on whether the appeal was one that fit within the statutory definition of an appeal that should be considered by the court. The dissent noted that the lower court order was "clearly contrary" to Rule 412 because the evidence in question did not involve instances of past relations between the victim and the accused.[126] At the very least, this would suggest that a basic reading of the law would not readily provide a decision adverse to the State on the evidentiary question posed in the appeal, clearing part of the "improvidence" hurdle presented in *Doucette*.[127]

Even if the application of law to the facts of the case would not render consideration of the appeal "improvident" under the rationale of *Doucette*, the order appealed would still have to fit within the requirements of the Appeals Statute, and involve a decision that was sufficiently certain to remain unchanged at trial.[128] To

123. Brief for the State, Appellant at app. 9-11, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

124. *See generally id.*; Brief of Defendant-Appellee, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

125. *See* David J. Corson, Comment, *The State Right to Appeal: Has Maine Been Too Cautious?*, 21 ME. L. REV. 221, 234 (1969); ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

126. State v. Brackett, 2000 ME 54, ¶¶ 8-9, 754 A.2d at 339-40. The dissent noted that there was no evidence of any prior relations between the victim and the defendant, nor any evidence that the defendant had any prior knowledge of the victim's admissions relating to prostitution, putting the evidence outside the scope of Rule 412's exceptions. *See id.*; ME. R. EVID. 412.

127. In *Doucette*, the court held that hearing an appeal when the "evidentiary question raised . . . could readily have been answered by study of existing law" would be "improvident," but such reasoning would seem to apply to cases when such a reading of law would lead to a decision that is adverse to the party appealing the in limine motion. *See* State v. Doucette, 544 A.2d 1290, 1294 (Me. 1988) (stating that consideration of the appeal becomes "more obviously" improvident when the "answer is plainly adverse to the appellant").

128. *See id.* at 1292 (stating that the question of whether the State will be impaired in trying its case is part of the jurisdictional test); State v. Patterson, 651 A.2d 362, 365 (Me. 1994) (stating that an appeal meets jurisdictional requirements when there is "any reasonable likelihood that the State will be handicapped in trying the defendant" (quoting State v. Doucette, 544 A.2d at 292)); State v. Pinkham, 586 A.2d 730, 731 (stating that the court "should not entertain appeals" of in limine rulings brought pursuant to section 2115-A(1) of Title 15 of the Maine Revised Statutes unless the rulings represent a final order of the lower court).

fall within the Appeals Statute, the trial court's decision must be one that "has a reasonable likelihood of causing either serious impairment to or termination of the prosecution."[129] The dissent noted that the Appeals Statute mandates that the granted right of appeal be liberally construed,[130] and that sufficient impairment will be found if there is "any reasonable likelihood that the State will be handicapped in trying the defendant."[131] With evidence that the victim was a prostitute "likely to 'provoke moral and emotional reactions in the trier of fact increasing the risk of unfair prejudice'"[132] the dissent asserted that the State had met the "serious impairment" standard of section 2115-A(1).[133]

This left the question of whether the in limine ruling met the requirement of being sufficiently binding at trial. The dissent agreed with the majority that appeals concerning in limine rulings likely to change at trial should not be heard.[134] However, the dissent noted the distinction, enunciated in *Gendron v. Pawtucket Mutual Insurance Co.*,[135] between in limine rulings that are dependent on facts being developed at trial ("preliminary prohibitive") and those that are not dependent on such factual development ("absolute prohibitive").[136] The distinction between the two types of rulings, according to the dissent, is that the latter type of ruling is likely to govern the "conduct of the trial."[137] Because the lower court decision allowed evidence that was, in the dissent's opinion, contrary to the rules of evidence, the dissent argued that it was unlikely that any development of facts at trial could lead to a reversal of the in limine ruling; the State could do no more at trial than it already had done in order to show that the evidence did not fit within the requirements of Rule 412.[138] This meant that the lower court ruling was "not dependent on [any] other evidence [being] admitted at trial" and was, therefore, "unlikely to be changed by the trial court."[139] On these grounds, the dissent recommended hearing the appeal and vacating the lower court's decision to admit evidence relating to the victim's past sexual behavior.[140]

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129. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

130. State v. Brackett, 2000 ME 54, ¶ 11, 754 A.2d 340; *see also* ME. REV. STAT. ANN. tit. 15, § 2115-A(6) (West 1980). The statutory provision requiring liberal construction of the State's right of appeal reads as follows:

> Liberal Construction. The provisions of this section shall be liberally construed to effectuate its purpose, or purposes, of insuring that the State is able to proceed to trial with all the evidence it is legally entitled to introduce, in view of the limited ability of the State to have error reviewed after trial.

Id.

131. State v. Brackett, 2000 ME 54, ¶ 11, 754 A.2d at 340-41 (quoting State v. Patterson, 651 A.2d 362, 365 (Me. 1994)).

132. *Id.* ¶ 11, 754 A.2d at 341 (quoting ME. R. EVID. 412 advisory committee note to 1983 amendment).

133. *Id.*

134. *Id.*

135. 409 A.2d 656 (Me. 1979).

136. State v. Brackett, 2000 ME 54, ¶ 13, 754 A.2d 341. For a discussion of the distinction between "absolute prohibitive" and "preliminary prohibitive" in limine rulings, see *Gendron v. Pawtucket Mutual Insurance Co.*, 409 A.2d at 659. *See also supra* text accompanying notes 19-21.

137. State v. Brackett, 2000 ME 54, ¶ 13, 754 A.2d at 341.

138. *Id.* ¶ 8, 754 A.2d at 339-40.

139. *Id.* ¶ 13, 754 A.2d at 341.

140. *Id.* ¶ 14, 754 A.2d at 341.

Though the dissent's position afforded the State more protection under the Appeals Statute than did the majority opinion, the dissent did not deviate far from the general proposition that interlocutory orders had to be "final" before being considered by the Law Court on appeal.[141] So, while the dissent's application of the Appeals Statute was more expansive than that of the majority, it nonetheless failed to address the conflicts between the court's modern interpretation of the statute, the court's early readings of the statute, and the plain language of the statute. Again, the court's prior stance that the State had a substantive right to appeal under the statute, that those rights applied to both final and interlocutory orders, and that the court was required on appeal to determine if a pre-trial order would seriously impair the prosecution's case took a back seat to the threshold requirement that a pre-trial order had to be "final" before it would be heard.

Also missing from both the majority and dissenting opinions was any recognition of the position taken in *State v. Drown*,[142] where the court recognized that taking appropriate steps to ensure that appeals heard fit within the requirements of the Appeals Statute would protect the court's public policy concerns.[143] In this sense, both the majority and the dissenting opinions took a relatively restrictive view of the Appeals Statute by requiring "finality" of an interlocutory order. The real difference between the majority and the dissent was in how "final" would be defined—the majority stated that an order would not be deemed final unless there was a clear indication from the lower court that it would stand by its decision at trial (which is closely tied to the question of whether or not the same judge that made the in limine ruling would preside at trial). The dissent, meanwhile, focused on whether or not the in limine decision depended on further development of facts at trial.

V. RECOMMENDING A NEW APPROACH TO INTERLOCUTORY APPEALS OF IN LIMINE ORDERS

In dismissing the *Brackett* appeal, the Law Court stressed that public policy warrants against the court serving as an "advisory board," and that the defendant's right to a speedy trial needs to be protected.[144] The need to limit both the financial burden on the system, and the case load of the court also factored into the decision to dismiss the appeal. Yet, refusing on such grounds to even hear appeals brought pursuant to the Appeals Statute threatens to undermine the statute's intent to prevent erroneous pre-trial orders from causing serious impairment to the State's case.

A. The Court's Public Policy Concerns Versus the Purpose of the Appeals Statute

Public policy may well warrant, as is suggested in the decision, that the court avoid serving as an "advisory board." Nonetheless, this does not alter the fact that

141. *See id.* ¶ 13, 754 A.2d at 341. Though the dissent ultimately thought the appeal in question should be heard, it still warned against hearing appeals that would be "susceptible to being changed at trial." *Id.* The dissent viewed the lower court decision as reviewable because it was not likely to change at trial. *Id.* In this sense, the dispute between the two opinions comes down to what is viewed as being sufficiently final.

142. 447 A.2d 466 (Me. 1982).

143. *Id.* at 471; *see supra* discussion at note 63 and accompanying text.

144. State v. Brackett, 2000 ME 54, ¶ 2, 754 A.2d at 339.

the legislature passed a statute granting the State a right to appeal interlocutory orders. As such, there appears to be at least a minimal conflict between the legislature's interpretation of public policy and the court's interpretation. Simply declaring that the court will not hear appeals that parties are granted a right to bring does not seem an adequate resolution of this conflict. Furthermore, the need to protect the defendant's right to a speedy trial is not necessarily furthered by the preclusion of interlocutory appeals, nor does it eliminate the State's right to a fair trial. The court itself has recognized that deciding an interlocutory appeal can further "judicial economy."[145] As mentioned above, the court has also recognized that delay is appropriate when caused by a legitimate appeal brought by the prosecution.[146]

Preventing the State from bringing appeals on matters that may indeed pose a risk of causing "serious impairment"[147] to the prosecution fails to protect the rights of the State. The very purpose of in limine motions is to prevent the jury from hearing unfairly prejudicial information. The motion recognizes that it is not always possible to "unring the bell."[148] In *Brackett*, because the defendant was not prohibited in any way from mentioning the evidence the State sought to exclude, forcing the State to wait for a "final" ruling at trial would cause the prosecution to run the risk of having the bell rung repeatedly before having the evidence ruled inadmissible at trial, if such a ruling could even be obtained. Under such conditions, the legislature's intent to prevent erroneous pre-trial orders from causing "serious impairment"[149] to the prosecution would potentially be undermined. Of course, the question of impairment in *Brackett* remained unanswered because the court declined to determine whether the in limine ruling caused serious impairment to the State's case, though it had previously said it was obligated to do so.

B. The Defendant's Rights Versus the State's Rights

The defense argued that excluding evidence of the victim's past sexual behavior would violate the defendant's constitutional rights and prevent the defense from vigorously arguing its case. Though the Law Court did not address these arguments, its silence on the matter may have been an indication that it agreed with one or both of them. The *Brackett* decision, as well as prior decisions, did focus on a defendant's rights, indicating that the right to a speedy trial, in addition to a desire to prevent the court from being overburdened, factored into the policy requiring that interlocutory orders be "final" before they will be heard on appeal. Again, such concerns may well be warranted. Yet, it is difficult to imagine that the court could even attempt to restrict a defendant's right to appeal on the grounds that appeals overburden the system. If the Appeals Statute granted the state substan-

145. *See* State v. Pinkham, 586 A.2d 730, 731 (Me. 1990).

146. State v. Smith, 400 A.2d at 749, 753 (Me. 1979). The defendant claimed that prior appeals brought by the State, State v. Smith, 381 A.2d 1117 (Me. 1978), contributed to unfair delays that denied him the right to a speedy trial. State v. Smith, 400 A.2d at 752. However, the Law Court held that such delays, if caused by appeals brought without intent to "outmaneuver" the defendant, were an acceptable reason for delay. *Id.* at 753.

147. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

148. Clemens v. American Warranty Corp., 238 Cal. Rptr. 339, 342 (Cal. Ct. App. 1987) (quoting Hyatt v. Sierra Boat Co., 145 Cal. Rptr. 47, 54 (Cal. Ct. App. 1978)).

149. ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

tive rights of appeal similar to that enjoyed by a defendant, as the court indicated in *State v. Fernald*,[150] then the court's restriction of the State's rights would seem inappropriate, at least on these grounds. Of course, there are other possible reasons that the court held as it did in *Brackett*.

By not addressing the issues raised by either party on appeal, the court may well have been signaling a position favoring the arguments raised by the defense. The defense argued that the defendant's constitutional rights had priority over Rule 412, and that admitting the evidence in question was essential to letting the defendant argue his theory of the case.[151] It is possible that the court agreed with one or both of these arguments. First, if the court agreed that Rule 412 violated the defendant's constitutional rights to the extent that it would prohibit the admission of evidence in question under the circumstances of the case, dismissing the appeal without considering the merits may have been considered preferable to directly questioning the constitutionality of the rule. On the other hand, if the court did see a constitutional problem, it may have been inclined to say so in order to prevent future violations of such rights.

Given these considerations, it is possible that the court simply viewed the defendant's right to tell his story as appropriate grounds for admitting the evidence. If this were the case, it would be difficult for the court to openly say so—such a holding would leave the court in the position of injecting into the trial evidence that would otherwise be inadmissible under Rule 412. Yet taking such a position even implicitly undermines two goals of appeals statutes such as Maine's:[152] protecting the State's right to a fair trial, and providing a means of uniformity in lower court decisions.[153]

C. The Dissent as a Possible Compromise

Given the conflicts above, it would have been difficult for the decision in *Brackett* to fulfill all of the policy goals stated in the opinion while protecting the State's rights under the Appeals Statute. Nonetheless, achieving these goals, while also protecting the rights guaranteed to the State, could have been possible within the confines of the court's prior treatment of in limine rulings, and the policy supported in the dissenting opinion. The dissent suggested that appeals of in limine rulings should be heard when the lower court decision is "made for the purpose of governing the conduct of the trial,"[154] which could be determined by whether the ruling is "dependent on what other evidence is admitted at trial."[155]

This is, indeed, the type of policy hinted at in *Gendron v. Pawtucket Mutual Insurance Co.*,[156] where the court differentiated between "absolute prohibitive" and "preliminary prohibitive" orders.[157] Of course, the in limine ruling in *Brackett*

150. 381 A.2d 282 (Me. 1978).

151. State v. Brackett, 2000 ME 54, ¶ 4, 754 A.2d 337, 338; Brief for the State, Appellant at app. 9-14, State v. Brackett, 2000 ME 54, 754 A.2d 337 (FRA-99-374).

152. *See* David J. Corson, Comment, *The State Right to Appeal: Has Maine Been Too Cautious?*, 21 ME. L. REV. 221, 234 (1969).

153. *See id.*

154. State v. Brackett, 2000 ME 54, ¶ 13, 754 A.2d at 341.

155. *Id.*

156. 409 A.2d 656 (Me. 1979).

157. Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 659; *see* text accompanying notes 19-21.

was not prohibitive, but permissive; neither party was prohibited from introducing or mentioning evidence. Rather, the defense was permitted to mention the evidence in question at any time. The premise of *Gendron*, however, may still apply by drawing a distinction, as the dissent suggests, between orders that are contingent on what evidence is developed at trial, and those that are not dependent on such factual development.

If the court were to adopt an approach similar to that suggested by the dissent, it could accomplish the goals cited in both *Brackett* and *Doucette*. By deciding only those interlocutory appeals involving orders that are not dependent on the subsequent development of facts at trial, the court could limit the number of appeals decided (and, thereby advance the goal of controlling the aggregate system costs) while also advancing the goals of the Appeals Statute and ensuring that the rights of both parties are protected to some extent. Trials would only be delayed when the State was faced with a ruling that would govern the course of the trial and potentially cause substantial harm to the prosecution of the case. The State could not appeal orders that depended on evidentiary developments at trial, but such rulings, by nature, would ensure that the bell is not rung until the judge rules on the admissibility of evidence. Such a result would not only further the interests of the defendant and the courts, but also the State's interest in being able to vigorously prosecute its case.

By avoiding the need to engage in a subjective ad hoc determination of what is "final" (by definition, no in limine decision is truly final),[158] such a policy would provide a clear guide to practitioners as to what types of appeals they could appropriately bring before the court.[159] If the step was taken to apply the *Gendron* analysis and use that structure as a means of determining when appeals would be heard, the court could not only further its goals, but also provide a means of ensuring fairness and predictability. This would further the policy goals of the legislature, which were recognized as quite broad under the court's earliest decisions involving the Appeals Statute, to a much greater extent than provided for in *Brackett*.

VI. CONCLUSION

Regardless of whether or not a position similar to that outlined above were adopted, serious questions would remain about the propriety of the court placing

158. All motions in limine are subject to change for good cause. Rule 12(c) of the Maine Rules of Criminal Procedure provides as follows:

> The defendant or the state may make a pretrial motion requesting a pretrial ruling on the admissibility of evidence at trial or on other matters relating to the conduct of the trial. The court may rule on the motion or continue it for a ruling at trial. In determining whether to rule on the motion or to continue it, the court should consider the importance of the issue presented, the desirability that it be resolved prior to trial, and the appropriateness of having the ruling made by the justice or judge who will preside at trial. For good cause shown the justice or judge presiding at trial may change a ruling made in limine.

ME. R. CRIM. P. (12)(c).

159. The difficulty of determining what is final is evidenced by the fact that Justice Clifford, who wrote the dissent in *Brackett*, also joined the dissenting opinion in *Patterson*, which warned against hearing the interlocutory appeal considered in the majority opinion because the in limine ruling of the lower court would not be final until the evidence in question was offered at trial. *See* State v. Patterson, 651 A.2d 362, 368 (Me. 1994).

restrictions on rights of appeal that have been granted by statute. The court itself has previously recognized that the Appeals Statute affords the State broad rights of appeal—rights that were to be limited only by the United States Constitution, according to one early decision.[160] Placing further court constructed limits on those rights should be viewed as a risky proposition, regardless of the policy reasons driving such a decision. If the Appeals Statute is to be viewed as a grant of substantive rights providing a means of assuring the State a fair trial, while also providing a means to ensure uniformity in lower court decisions, any limit that potentially undermines those goals should be considered with extreme caution. Recent decisions of the Law Court, including the *Brackett* decision, have lamentably disregarded such concerns.

By failing to address these concerns, the *Brackett* decision, and the decisions upon which it was based, threatens to eviscerate the Appeals Statute. The plain language of the statute allows for appeals of any pre-trial order that threatens to seriously impair the prosecution's case.[161] This language anticipates appeals of rulings made on in limine motions, a common pre-trial motion.[162] Because in limine rulings are, by definition, almost always interlocutory and therefore not final,[163] the plain language of the statute would allow appeals of such rulings. The Law Court itself has recognized that the authority to grant the State rights to appeal in criminal cases rests solely with the legislature.[164] By refusing to hear an appeal of a pre-trial order that, by definition, could not truly be final, when the appeal was brought pursuant to a statute authorizing such appeals, the *Brackett* court took it upon itself to limit rights that only the legislature can grant.

After *Brackett*, it appears that appeals of pre-trial in limine orders will only be heard if the lower court judge expressly declares that the decision will be binding at trial. Such a restriction may indeed drastically reduce the number of pre-trial orders that the State will be able to appeal. This, of course, was the goal of the *Brackett* court. Though such an outcome may further the court's public policy concerns, it also subverts the legislature's charge that the State may appeal "any" pre-trial order that seriously threatens its case. The *Brackett* decision's restriction of "any" to include only those orders the court chooses to consider reduces the Appeals Statute to an empty promise rather than a grant of rights. Though the court's policy concerns may be well-founded, it should have considered the propriety of limiting a legislative grant of rights before so severely limiting those rights.

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160. *See* State v. Hood, 482 A.2d 1268, 1270 (Me. 1984) (quoting United States v. Wilson, 420 U.S. 332, 337 (1975)).

161. *See* ME. REV. STAT. ANN. tit. 15, § 2115-A(1) (West 1980).

162. *See* Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d at 659; State v. Tate, 265 S.E.2d 223, 225 (N.C. 1980).

163. *See* cases cited *supra*, note 22 and accompanying text.

164. *See* State v. Kelly, 376 A.2d 840, 843 (Me. 1977).