IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RONALD TROWELL,

Respondent.

CASE NO. 92,393

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner or the State. Respondent, the Appellant below and the defendant in the trial court, will be referenced in this brief as Respondent or by his proper name.

The record on appeal consists of one volume. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), a citation to a volume will be followed by an appropriate page number within the volume.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent Trowell pled guilty on 5 October 1992 to first degree murder and burglary while armed in return for negotiated sentences of life imprisonment with a minimum mandatory of twenty-five years for the murder conviction and thirty years concurrent imprisonment for the burglary conviction. The state also agreed to dismiss numerous other felony charges. A plea colloquy was held and it was determined that the plea was freely and voluntarily entered into and that there was a factual basis for the convictions. Trowell was then sentenced pursuant to the plea bargain to the negotiated, statutorily mandated sentence for first degree murder, in the absence of the death penalty, and the

negotiated concurrent sentence for the armed burglary. No issues were reserved and no objections were made to the entry of the judgments and sentences. The full plea and sentencing hearing is at I30-50. The written plea agreement is at I7.

Trowell filed a motion pursuant to Florida Rule of Criminal Procedure 3.850 on 22 April 1993 seeking a belated appeal in which he alleged that he was under the influence of medication at the time of the entry of the plea, that he had requested his counsel to call witnesses on his behalf prior to entry of the plea, and that he had requested his counsel to file an appeal and been advised that there was no need to appeal. He further alleged that he filed a pro se notice of appeal which was dismissed as untimely for lack of jurisdiction on 22 December 1992. I1-8.

The state attorney filed a response to the rule 3.850 motion on 4 April 1995 which pointed out that Judge Lawrence's extensive and thorough plea inquiry refuted the claim of being under the influence of medication, that there were no allegations that the claimed witnesses would have changed the voluntary plea bargain, and that, pursuant to on point case law from the First District Court of Appeal, Thomas v. State 626 So.2d 1093 (Fla. 1st DCA 1993), there was no right to a belated appeal from a guilty plea where no issues had been identified. I23-28

Trowell's public defender trial counsel filed a response in the trial court on 19 April 1995 to the rule 3.850 motion. Trial counsel recited the factual basis for the crimes and pleas, averred that the state and the trial court had fully complied

with the bargain, that none of the four issues cognizable under Robinson v. State, 373 So.2d 898 (Fla. 1979) were present, that there was no basis for an appeal, and that Trowell, if he wished to, could file a motion to withdraw the plea pursuant to rule 3.850. I13-20.

The trial court denied the rule 3.850 motion on 30 June 1995 on the grounds, **inter alia**, that there was no right to appeal a guilty plea under these circumstances pursuant to Thomas. I21-22. Trowell filed a notice of appeal on 22 July 1995 pursuant to Florida Rule of Appellate Procedure 9.140(g) seeking review of the summary denial. I59. The notice was not served on the state and, because the narrow scope of review under rule 9.140(g) does not require briefing by the parties, counsel for the state was not aware that an appeal had been taken.

Without notice to or briefing by the parties, the district court convened a semi en banc proceeding and issued a decision on 14 July 1997 which receded from its earlier decision in Thomas, on which the trial court had relied, and held that criminal indigents had an unrestricted constitutional right under both the Florida and Federal constitutions to appeal guilty pleas regardless of whether there were any cognizable issues for appeal. Further, that this right included complete appellate review on the merits pursuant to Anders prior to any examination of the absence of jurisdiction.

The state petitioned for rehearing, clarification, or other relief on 24 July 1997. On 5 August 1997, the district court

announced it would go **en banc** on its own motion and that the state could file an "answer brief" within ten days arguing any matters not covered in the majority and dissenting opinion of the General Division or of the state's motion for rehearing. Trowell was authorized to file a reply brief within ten days to the state's answer to the court's opinions. No extensions were to be granted and no oral argument was to be held.

The state filed its "answer brief" on 15 August 1997 and Trowell, through recently appointed counsel, filed a reply brief on 26 August 1997.

On 20 January 1998, the district court issued its **en banc** decision which is now under review here.

For convenience, appendices are attached containing the court's decisions of 14 July 1997 and 20 January 1998 and its briefing order of 5 August 1997, the state's motion for rehearing of 24 July 1997 and its answer brief of 15 August 1997, and Trowell's reply brief of 26 August 1997.

SUMMARY OF ARGUMENT

In Baggett this Court held that an indigent with a right to an appeal from a judgment entered on a jury verdict had the right to the assistance of counsel and a belated appeal when he had timely asserted that right and it had been denied by the state or his counsel. The district court below misapplied this uncontroverted rule of law to a case involving a claimed right to appeal from a guilty plea. This misapplication to a situation materially at variance to Baggett creates direct and express conflict. The district court similarly misapplied case law of the United States Supreme Court.

The district court not only created direct and express conflict with Baggett, it also failed to follow on point case law from this Court, Robinson, which explicitly holds that there is no right to a general review from a guilty plea absent a motion to withdraw the plea in the trial court or an assertion of specific sentencing error.

The district court decision that there is a right to general review from a guilty plea directly and expressly conflicts with statutory law prohibiting such appeals, case law from this Court upholding the authority of the Florida Legislature to place such terms and conditions on the right to appeal, and rules of criminal and appellate procedure which this Court adopted in order to implement the statutory restrictions on appeals from criminal convictions.

The district court decision here and in Stone v. State that it will not address jurisdictional issues, even when raised by the parties, until full briefing and appellate review on the merits have been completed, is contrary to controlling case law from this Court and explicit provisions of statutory law.

Finally, the district court denied the state its due process right to be heard by treating this summary appeal pursuant to rule 9.140(g), now 9.140(I), as a full appeal on the merits of the rule 3.850 motion without affording the appellee state, or either party, an opportunity to be heard prior to appellate review and decision.

ARGUMENT

ISSUE I

IS THE DISTRICT COURT DECISION THAT CRIMINAL INDIGENTS HAVE A CONSTITUTIONAL RIGHT TO FULL AND AUTOMATIC APPELLATE REVIEW ON THE MERITS OF ALL GUILTY PLEAS CONTRARY TO CONTROLLING DECISIONS OF THIS COURT, OTHER DISTRICT COURTS, STATUTES, AND RULES OF CRIMINAL AND APPELLATE PROCEDURE?

Before addressing the controlling law on the issue of appeals from guilty pleas, it is necessary to first address the basis for the decision below. The district court relied on two lines of cases: from this Court, Baggett v. Wainwright, 229 So.2d 239 (Fla.1969), and, from the U.S. Supreme Court, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Baggett was adjudged guilty and sentenced in 1962. In 1969, he filed a petition for writ of habeas corpus in this Court alleging that he and his trial counsel, immediately following his conviction, had informed the trial court that he was now indigent and requested that the trial court appoint appellate counsel to prosecute the appeal. Baggett further alleged that the trial court advised him it would do so, but failed to do so. Baggett alleged that two years later, upon inquiry, he was told by the trial court that his appeal was being handled by a public defender. Significantly, this Court summarized the thrust of Baggett's allegations as "an attempt to demonstrate that through State action Petitioner was deprived of, or inadequately afforded, the assistance of counsel for the purpose of directly

appealing his conviction." Baggett, 229 So.2d at 240-241. There was, in short, no question of Baggett's right to appeal following a conviction entered on a jury verdict. There was only the question of whether Baggett, as an indigent, had been denied the right to the assistance of counsel contrary to Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

This Court held that Baggett's allegations, if true, would show a denial of the assistance of counsel and that Baggett could not be required to show that his appeal would have successfully overturned the judgment[1]. In so holding, this Court cited to and relied in part on Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and Rodriquez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969).

The district court's reliance on Baggett, Douglas, Anders, and Rodriquez, as pointed out below by the dissenters and by the state in its pleadings, is completely misplaced. The cited cases stand for the unexceptionable proposition that **if** there is a right to an appeal then there is a right to the assistance of counsel if indigent. None of the cases were from guilty pleas and none presented the issue of whether they was a right to appeal from guilty pleas. Thus, by misapplying the cases, and specifically Baggett to a set of facts unlike Baggett, the

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[1]As it turned out, Baggett's allegations were false and there had been no denial of the assistance of counsel. See, Baggett v. Wainwright, 235 So.2d 486 (Fla. 1970)(Writ discharged, neither Baggett nor his attorney told the trial court he was indigent, wished to appeal, and wanted counsel appointed.)

district court has created direct and express conflict with the very cases on which it relies. Gibson v. Avis Rent-A-Car System, Inc, et al, 386 So.2d 520, 521 (Fla. 1980)(Conflict jurisdiction is created "when a district court of appeal misapplies the law by relying on a decision materially at variance with the one under review.")

Moreover, the district court not only misapplied Baggett to a materially different factual situation, it also failed to follow other on point case law from this Court, issued ten years after Baggett, which explicitly addressed the conditions under which an appeal could be taken from a guilty plea and held that there was no general right to an appeal on unknown and unidentified grounds. See, Robinson v. State, 373 So.2d 898, 902-903 (Fla. 1979):

> The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect, **he is asserting a right of review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea.** The only type of appeal that requires this type of review is a death penalty case. See S921.141(4), Fla. Stat. (1977). Furthermore, **we find that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea.** If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw plea. If the action of the trial court on such motion were adverse to the defendant, it would be subject to review on direct appeal. The standards for the withdrawal of a guilty plea both before and after sentence were discussed in detail in Williams v. State, 316 So.2d 267 (Fla. 1975). After sentence is imposed, the burden is on the defendant to prove that a manifest injustice has occurred. Williams v. State, ABA Standards Relating to the Administration of Criminal Justice, Pleas of Guilty, 14-2.1 (1979). To adopt the view asserted by the appellant in this case would in effect eliminate both the necessity for a defendant to move for a

withdrawal of his plea and the obligation to show a manifest injustice or prejudice as grounds for such a plea withdrawal after sentence.
Id.

The state further points out that the district court below also misapplied case law from the United States Supreme Court. The decisions in Douglas, Anders, and Rodriquez stand for the unexceptionable and uncontroverted principle that indigents must be afforded the right to counsel **if** they and similarly situated non-indigents have a right to an appeal. Nothing in these cases concerns the right to appeal from guilty pleas. Moreover, the United States Supreme Court has repeatedly held that there is no constitutional right to an appeal of non-capital criminal cases and that the states, if they grant such right, may place such terms and conditions, consistent with due process and equal protection, as they consider appropriate. See, Ross v. Moffitt, 417 U.S. 600, 611 (1974)("[I]t is clear that the State need not provide any appeal at all."; Abney v. United States, 431 U.S. 651, 656 (1977)("It is well settled that there is no constitutional right to an appeal" and "[t]he right to appeal as we presently know it in criminal cases, is purely a creature of statute: in order to exercise that statutory right of appeal one must come within the terms of the applicable statute"); and Evitts v. Lucey, 469 U.S. 387, 393 (1985)("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors").

This Court, contrary to the decision below, recently analyzed U.S. Supreme Court case law and explicitly held that there was no right to appeal under the federal constitution. Amendments to Fla. Rules of Appellate Procedure, 685 So.2d 773, 774 (Fla. 1996), hereafter Amendments, ("The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal.") Thus, although conflict with decisions of the U.S. Supreme Court is not a basis for conflict jurisdiction, this Court's interpretation of those decisions are controlling within Florida and district courts are not at liberty to interpret the federal constitution contrary to decisions of this Court or of the United States Supreme Court.

Ross v. Moffitt is particularly relevant. Contrary to the district court rationale that indigency is critical to the right to appeal, indigency is irrelevant unless there is a showing that the state has, contrary to the Douglas line of cases, "arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons" 417 U.S. at 607, and "[u]nfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." 417 U.S. at 611. Nothing in section 924.06(3), Florida Statutes (1995) or its successor, section 924.051(4), Florida Statutes (Supp. 1996), draws any distinctions between the indigent and the non-indigent. Neither have a right to appeal unless conditions set out in the statute, as

interpreted and implemented by this Court in Amendments, and in Florida Rule of Appellate Procedure 9.140(b)(2) are met.

The district court decision relies on part on the uncontroverted principle set out in Baggett that a petitioner with a timely right to an appeal, who loses that right because of the ineffectiveness of counsel, does not have to show that he will prevail on the merits in order to obtain a belated appeal. This was a "straw man" argument created by the district court which the state expressly disavowed. It was not the state's position in the district court and is not the state's position now. As the state argued below in its motion for rehearing, clarification, or other relief[2], and argues now:

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[2] The district court's management of this rule 9.140(g) appeal from the summary denial of a rule 3.850 motion denied the state its due process right to be heard on significant issues which were not encompassed within the narrow scope of a rule 9.140(g), now 9.140(I), appeal. Rule 9.140(I) presents a very narrow scope of review - does the trial court order with attachments, i.e., the record on appeal, conclusively show that no relief is appropriate? -and, if not, an even narrower remedy - remand to the trial court without prejudice to either party for appropriate proceedings. The scope of review and the remedy are so limited that the rule does not even require, or encourage, briefing by the parties. Here, the district court departed from that narrow scope of review by identifying a substantial legal issue outside the scope of rule 9.140(I), convening a nine-judge panel, and reaching the merits of the rule 3.850 claim without affording either party, and particularly the appellee state, an opportunity to be heard. It then issued a decision of great importance to the orderly administration of justice, and particularly to the state, which receded from prior case law and created certified conflict between the districts. This case management procedure is contrary to State v. Causey, 503 So.2d 321 (Fla. 1987) where this Court held, in the indistinguishable circumstances of appellate review pursuant to Anders, that this same district court could not identify an issue not raised by the parties and dispose of it on

The simple two-part showing a petitioner for belated appeal

the merits without first permitting the parties to file merits briefs on the issue.

The district court's decision placed the appellee state, which had not been heard, in the position of seeking "rehearing," on a substantive decision of great public importance when it had not been granted an initial hearing. The district court then compounded the denial of the due process right to be heard by giving the state only ten days to "answer" the decision of the court, without oral argument and without extension, and within narrow grounds established by the court on what could be contained within the "answer" brief. Because no initial brief had been filed by the appellant, it also placed the appellee state in the awkward position of litigating with the court, not **before** the court and not against the opposing party, on a decision to which the court had already committed itself.

Our constitutional system of judicial adjudication requires that the parties be permitted to advocate before, not after, the judicial decision. See, Mills v. State, 620 So.2d 1006, 1008 (Fla. 1993)("There is a substantial difference between allowing discussion before the question is answered and allowing discussion after the question is answered and the jury is sent back to deliberate. It is unrealistic to believe a judge would be equally willing to encompass defense counsel's suggestions in both situations, and it is impossible to tell how the judge would have reacted to counsel's suggestions had they been made before the question was answered.") The state suggests this home truth is even more accurate when the court is a nine-judge panel and its decision has been reached after approximately two years of in-court deliberation and published in the Florida Law Weekly with multiple dissents.

Unfortunately, the improper procedure followed here by the district court is not unusual. See, for example, Vanderblomen v. State, Case no. 97-2557 (Fla. 1st DCA 24 March 1998), where the district court went beyond the limited scope of rule 9.140(I) to examine questions it considered to be of great public importance and which it certified to this Court as such. This was done without briefing or an appearance by the state, or so far as is known, by the appellant. Thus, contrary to State v. Causey, 503 So.2d 321, 323 (Fla. 1987), the parties have been denied their right to be heard and the district court has been denied "the benefit of each side's thoughts, research, and analysis so that the court can be more fully informed on the issues." Moreover, because of the certified question, the parties are now expected to bring the case to this Court where they will be heard for the first time and where this Court will not have the benefit of the district court's analysis of the parties views. The state

must make is (1) I had a right to appeal which I timely wished to exercise and (2) my attorney lost it. If that showing is made, a belated appeal is appropriate regardless of the lack of merit of any of the issues which might be raised. Appellant Trowell's problem is that he has not moved to withdraw his plea, and thus cannot, as a matter of law, challenge his conviction. Similarly, his sentence is demonstrably legal, and, as Judge Miner shows, it is both statutorily mandated and pursuant to a plea bargain. See, state's motion for rehearing, footnote 5 and associated text.

The state's position is also supported by the decisions of the second and third district courts of appeal which hold that there is no right to appeal from a guilty plea unless a motion to withdraw the plea has been filed or there is a Robinson issue. See, e.g., Gonzalez v. State, 685 So.2d 975 (Fla. 3rd DCA 1997)("[T]he defendant's motion failed to allege with specificity any of the limited exceptions, dictated by Robinson v. State, 373 So.2d 898 (Fla. 1979), necessary for an appeal from a guilty plea.") and Bridges v. State, 518 So.2d 298,300 (Fla. 2nd DCA 1987):

Bridges's problem, however, is even more fundamental in that he cannot show that he would have had a right to appeal at all.

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respectfully submits that there is something seriously wrong with a case management system when a rule 9.140(I) appeal ends up in the state's highest court where the parties and the Court address the issue for the first time.

The state recognizes that the denial of due process before the district court in the instant case is being cured by being heard here. However, the district court's method of handling rule 9.140(I) appeals presents a matter of great importance to the orderly administration of justice. Accordingly, the state urges the Court to refer this matter to the appellate rules committee with instructions to amend rule 9.140(I) to make it clear that the parties must be afforded the right to be heard if the district court decides that it may go outside the narrow scope of review and remedy set out in rule 9.140(I). Obviously, also, that hearing should precede not follow a decision on the merits.

Bridges entered a plea of guilty without reserving any appellate issues, received a sentence that is facially legal and which was accepted without contemporaneous objection, and did not move to withdraw that plea prior to the imposition of a sentence which on its face is lawful. Id.

To the same end, see, Loadhold v. State, 683 So.2d 596 (Fla. 3rd DCA 1996) and Zduniak v. State, 620 So.2d 1083 (Fla. 2nd DCA 1993).

The district court below construed the appeal from the summary denial of a rule 3.850 motion as a Petition Seeking Belated Appeal pursuant to Florida Rule of Appellate Procedure 9.140(j). This rule became effective 1 January 1997 as part of the revised Rules of Appellate Procedure which this Court adopted in Amendments. Those revised rules, along with the revised Rules of Criminal Procedure[3] implement the Criminal Appeal Reform Act of 1996[4]. The Reform Act, this Court's holdings in Amendments, and the implementing criminal and appellate rules are directly onpoint. By their terms, they are contrary to the district court decision below that there is a unfettered right to appeal from guilty pleas despite not meeting any of the statutory and rule criteria the Florida Legislature and this Court have implemented.

Before turning to the specifics of the Reform Act and implementing rules, it is useful to recall this Court's comments and action in 1995 on the problem of appeals from guilty pleas, prior to the enactment of the Reform Act in 1996, and the more

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[3]Adopted by Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996).

[4]Enacted by Ch 96-248.

recent comments in 1998 addressed to the commendable way in which the Florida Legislature and this Court, working "hand-in-hand" have implemented appellate reform.

First, see Amendments to Florida Rules of Appellate Procedure 9.020(g) and 9.140(b) and Florida Rule of Criminal Procedure 3.800, 21 Fla. L. Weekly S5 (Fla. 21 December 1995)("It has come to our attention that scarce resources are being unnecessarily expended in appeals from guilty pleas and appeals relating to sentencing errors."). This Court's proposed rule of 1995 requiring that all sentencing errors be first brought to the attention of the trial court, together with the Robinson requirement that motions to withdraw the plea are a prerequisite to any appeal, are essentially what was subsequently adopted in the Reform Act, effective 1 July 1996, and implemented by this Court in its revised rules of criminal and appellate procedure which became effective 1 January 1997.

The second, more recent comment, addresses the post-Reform Act and its implementation by this Court. See, Kalway v. Singletary, 23 Fla. L. Weekly S102 (Fla. 26 February 1998):

> Separation of powers is a potent doctrine that is central to our constitutional form of state government. See, Art.II,S3, Fla. Const. ("No person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein.") This does not mean, however, that two branches of state government in Florida cannot work hand-in-hand in promoting the public good or implementing the public will, as evidenced by our recent decision in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), wherein we deferred to the legislature in limited matters relating to the constitutional right to appeal.
>
> [W]e believe that the legislature may implement this constitutional right and place reasonable condition upon it so

long as they do not thwart the litigant's legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals. Id, at 774-775.

With the above perspective in mind, which correctly recognizes the constitutional duty of the three branches of government to cooperatively work together for the greater public good, the state turns to the specific provisions of the Reform Act, Amendments, and the implementing rules of criminal and appellate procedure which are in direct and express conflict with the decision below.

Section 924.051(3), Florida Statutes (Supp. 1996) places the following condition precedent on the right to appeal.

> (3) **An appeal may not be taken** from a judgment or order of a trial court **unless a prejudicial error is alleged and is properly preserved** or, if not properly preserved, would constitute fundamental error.

By its terms, this condition precedent applies to all appeals, including those entered following guilty or unreserved no contest pleas.

This Court explicitly upheld the authority of the legislature to condition the constitutional right to appeal upon the proper preservation of error in the trial court.

> Applying this rationale to the amendment of section 924.051(3), we believe **the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error** or the assertion of fundamental error. Anticipating that we might reach such a conclusion, this Court on June 27, 1996, promulgated an emergency amendment designated as new Florida Rule of Criminal Procedure 3.800(b) to authorize the filing of a motion to correct a defendant's sentence with ten days. [cite omitted] Because many sentencing errors are not immediately apparent at sentencing, **we felt that this rule would provide an avenue to preserve sentencing errors and thereby appeal them.**
> Amendments at 775.

This Court similarly construed section 924.051(4) as consistent with section 924.051(3).

> We construe this provision of the Act [section 924.051(4)] to permit a defendant who pleads guilty or nolo contendere without reserving a legally dispositive issue to nevertheless appeal a sentencing error, **providing it has been timely preserved by motion to correct the sentence**. See State v. Iacovone, 660 So. 2d 1371 (Fla. 1995); Williams v. State, 492 So. 2d 1051 (Fla. 1986)(statutes will not be interpreted so as to yield an absurd result).
>
> Accordingly, we have rewritten rule 9.140 to accomplish the objectives set forth above. **Consistent with the legislature's philosophy of attempting to resolve more issues at the trial court level**, we are also promulgating Florida Rule of Criminal Procedure 3.170 (l), which authorizes the filing of a motion to withdraw the plea after sentencing within thirty days from the rendition of the sentence, but only upon the grounds recognized by Robinson or otherwise provided by law. Id.

The terms of the new rules condition the right to appeal on the proper preservation of error in the trial court with the exception of fundamental error. See, criminal rule 3.170 (l) and its companion appellate rule 9.140(b)(2):

> 3.170(l) Motion to Withdraw the Plea After Sentencing. A defendant who pleads guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within thirty days after rendition of the sentence, **but only upon the grounds specified in Florida Rule of Appellate Procedure 9.140(b)(2)(B)(I) - (v).**
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> 9.140(b)(2) Pleas. A defendant **may not appeal from a guilty or nolo contendere plea except as follows:**
>
> (A) A defendant who pleads guilty or nolo contendere **may expressly reserve the right to appeal a prior dispositive order of the lower tribunal**, identifying with particularity the point of law being reserved.
>
> (B) **A defendant who pleads guilty or nolo contendere may otherwise directly appeal only**
>
> (I) the lower tribunal's lack of **subject matter jurisdiction**;
>
> (ii) a violation of the plea agreement, **if preserved by a motion to withdraw plea;**
>
> (iii) an involuntary plea, **if preserved by a motion to withdraw plea;**
>
> (iv) a sentencing error, **if preserved**;

(v) as otherwise preserved by law.

This Court did not overlook the substantive requirement that sentencing errors be first raised in the trial court. Rule 9.140(d) requires:

> **(d) Sentencing errors.** A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:
> (1) at the time of sentencing; or
> (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

It should be noted that this rule is simply an extension of the same rule which this Court proposed in December 1995 prior to the enactment of the Reform Act.

The state also invites the attention of the Court to the provisions of Florida Rule of Appellate Procedure 9.020(h)(1) and 9.020(h)(3). The first delays the rendition of final trial court orders when motions to correct sentence or withdraw pleas are pending in the trial court. Relevant portions of the second are instructive on whether an appeal may be taken when no issues have been properly preserved in the trial court.

> (3) .... However, a pending motion to correct a sentence or order of probation or a motion to withdraw the plea after sentencing shall not be affected by the filing of a notice of appeal from a judgment of guilt. In such instance, the notice of appeal shall be treated as prematurely filed and the appeal is held in abeyance until the filing of a signed, written order disposing of such motion.

This Court recently reiterated its decision in Amendments upholding and implementing the authority and decision of the Florida Legislature to place reasonable conditions on the right to appeal and to prohibit appeals where these conditions

precedent were not met. See, Kalway v. Singletary, 23 Fla. L. Weekly 102, 103 (Fla. 26 February 1998), as discussed and quoted above.

The Court's attention is also invited to a recent **en banc** decision of the Fifth District Court of Appeal holding that there is no right to appeal from guilty or no contest pleas unless prejudicial errors have been reserved, preserved, or raised and ruled on by post-judgment motions during the thirty-day window provided by this Court. Maddox v. State, 23 Fla. L. Weekly 720 (Fla. 5th DCA 13 March 1998). The decision in Maddox is noteworthy, not merely because of the holdings, but because of the perceptive analysis and understanding of the Criminal Appeal Reform Act and the implementing rules promulgated by this Court in Amendments. Reasoned and written in the spirit of Kalway and Amendments, with a keen appreciation of, and deference to, the separation of powers doctrine, the Fifth District shows that appellate and trial courts, appellants, and appellees, i.e., everyone, will benefit from the interplay between the Act and the implementing rules. The Act and the rules together, "hand-in-hand," collectively present the parties with increased opportunities and rights to raise and preserve issues in the trial court and, if relief is not obtained, to then seek appellate review with a fully developed record and preserved issues which can be intelligently addressed on their merits by the parties and the appellate courts. At the same time, because they prohibit unauthorized appeals, parties with legitimate

issues and an authorized right to an appeal will not have to compete for scarce judicial resources with parties such as here who have no cognizable issues and no right to an appeal and Florida taxpayers will not have to fund such wholly frivolous, abusive judicial proceedings as the instant case.

In sum, consistent with what the Florida Legislature and this Court have mandated, there is no right to an appeal from a guilty or unreserved no contest plea unless either a motion to withdraw the plea pursuant to rule 3.170(l) or a motion to correct the sentence pursuant to rule 3.800 has been filed and ruled on by the trial court. See, rules 9.140(b)(2) and (d).

Trowell did not preserve any claims of error in the trial court and there is no constitutional or statutory authorization for this appeal. He, and others similarly situated, have remedies under the Reform Act and the implementing rules which are far superior to the unauthorized appeal of guilty pleas where no cognizable issues are present. There is no rational reason, and no authority in law, for permitting Trowell and others similarly situated to abuse the judicial system by appeals such as this.

The district court below not only misapplied the law controlling appeals from guilty pleas. It also misapplied the law on the primacy of jurisdiction. The district court announced a policy in Stone v. State, 688 So.2d 1006 (Fla. 1st DCA), pet. for review denied, ___ So.2d ___ (Fla. 20 June 1997), which it continues in Trowell, of refusing to address jurisdiction to entertain appeals from guilty pleas, even when raised by the

parties, until the parties have exhausted the briefing process and appellate review had been conducted on the merits. In doing so, the district court places itself in direct and express conflict with decisions of this Court, other district courts of appeal, and its own previous decisions on the question.

The question of jurisdiction is a "primary concern ... **which [a court] must address ... sua sponte when any doubt exists**" even if the parties fail to raise the issue. Mapoles v. Wilson, 122 So. 2d 249 (Fla. 1st DCA 1960). Stein v. Darby, 126 So. 2d 313 (Fla. 1961); Cohen v. State, 121 So. 2d 155 (Fla. 1960). It is hornbook law that "**[c]ourts are bound to take notice of the limits of their authority, and if want of jurisdiction appears at any stage of the proceeding, original or appellate, the court should notice the defect and enter an appropriate order.** [cites omitted]." West 132 Feet v. City of Orlando, 80 Fla 233, 86 So. 197, 198-199 (Fla. 1920).

This holding was reaffirmed in Bohlinger v. Higginbotham, 70 So. 2d 911,914-915 (Fla. 1954)(**When jurisdiction was brought in issue "the court should have considered and ruled on the merits of the [jurisdictional] issue**" because "**courts 'are bound to take notice of the limits of their authority, and if want of jurisdiction appears at any stage of the proceedings ... the court should notice the defect and enter an appropriate order.'** [cites omitted]". The holding was followed in Mendez v. Ortega, 134 So. 2d 247, 248 (Fla. 1961) where the court reversed and remanded because the trial court lacked jurisdiction.

This must be done despite the fact that the question of jurisdiction was not raised by the pleadings or otherwise presented. Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order. [cites omitted]

Accord, Swad v. Swad, 363 So. 2d 18 (Fla. 3d DCA 1978)("Where a party questions the subject matter jurisdiction of the court proceeding with a cause, **the court must carefully examine the question and make a determination of its jurisdiction".**

Historically, the district court below also followed this hornbook law. See, Ford Motor Company v. Averill, 355 So. 2d 220, 221 (Fla. 1st DCA 1978):

> **We, of course, have no authority to assume jurisdiction when there is none. We therefore have the duty and responsibility at any stage of the proceeding at which we discover jurisdiction lacking to immediately cease exercising same.**

This Court recently reiterated the above rule of law that jurisdiction is a threshold or primary issue which must be immediately addressed and which, if found absent, ends review. Proceedings, orders, and decisions in the absence of jurisdiction are a nullity. Polk County v. Sofka, 702 So.2d 1243 (Fla. 1997). This decision should have been particularly instructive for the district court because two of its members sat on the case because of the recusal of Justices Grimes and Wells.

In Polk County, the parties entered into a bargain under which they agreed that a final judgment would be entered in favor of Sofka and that the county could then seek appellate review of merits issues in the district court. The district court duly

conducted appellate review, resolved the contested issues on the merits, and certified questions to this Court. This Court, **sua sponte**, directed the parties to brief the threshold issue of whether the district court had jurisdiction to hear the appeal. After briefing by the parties in which both argued for jurisdiction, the Court concluded there was no jurisdiction, quashed the decision of the district court, and remanded with directions that the district court dismiss the appeal for lack of jurisdiction.

> It is clear that the parties have stipulated to the district court's jurisdiction. However, it is equally clear "that the parties cannot stipulate to jurisdiction over the subject matter where none exists." Cunningham v. Standard Guar. Ins. Co., 630 So.2d 179, 181 (Fla. 1994). See, also Snider v. Snider, 686 So.2d 802, 804 (Fla. 4th DCA 1997)("Subject matter jurisdiction is conferred upon a court by a constitution or statute, and cannot be created by waiver, acquiescence or agreement of the parties."). . . .
> . . . Thus, based upon the record to which the parties agreed, the district court lacked jurisdiction to hear the appeal, notwithstanding the parties' attempt to confer such jurisdiction.
> It is true, as the parties state, that this conclusion "will result in a waste of judicial resources." However, "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." West 132 Feet v. City of Orlando, 80 Fla. 233, 239, 86 So. 197, 198-99 (1920). This is because the limits of a court's jurisdiction are of "primary concern," requiring the court to address the issue **"sua sponte** when any doubt exists." Mapoles v. Wilson, 122 So.2d 249, 251 (Fla. 1st DCA 1960). Thus, while the resulting "waste of judicial resources" is regrettable, in the absence of jurisdiction, it is unavoidable.
> Id.

The decision, the holding, and the reasoning in Polk County that jurisdiction is primary are the very antithesis of the decision, holding, and rationale of Trowell and Stone v. State that full appellate briefing and review on the merits is required

prior to determining if there is jurisdiction. It should also be noted that in Polk County the absence of jurisdiction might well result in a waste of judicial resources. That is not the case where there is no authorization for appealing from guilty pleas. Both the judicial system and the public benefit from the enforcement of this cardinal principle.

In summary, the district court decision that there is an unfettered right to full appellate review of guilty pleas, belated or timely, regardless of the failure to preserve or identify a cognizable issue is contrary to this Court's case law, to Florida Statutes, this Court's rules of criminal and appellate procedure, and decisions of other district courts. The decision below should be reversed.

CONCLUSION

The district court decision should be reversed for the reasons set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 30th day of March 1998.

James W. Rogers
Attorney for the State of Florida

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