ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RONALD TROWELL

Respondent.

CASE NO. 92,393

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The state relies on its previous statement of the case and facts.

SUMMARY OF ARGUMENT

Respondent's answer brief has failed to refute, and in some instances even address, the arguments in the state's initial brief showing that respondent Trowell did not have a right to an appeal, belated or timely, of his guilty plea to first degree murder where a negotiated, statutorily mandated sentence of life imprisonment was imposed and no motion to withdraw the plea had been filed.

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?

The state relies on the arguments presented in its initial brief and replies as follows to the five subtopic arguments presented by the respondent.

RIGHT TO APPEAL

Respondent argues that there is a constitutional right to appeal from guilty pleas under both the federal and Florida constitutions. First, the United States Supreme Court has repeatedly held that there is no right to appeal a non-capital judgment under the United States constitution[1]. 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

[1]This argument was fully developed in the state's initial brief but, inexplicably, respondent failed entirely to address the state's argument in his answer brief.

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"). Contrary to respondent's view, nothing in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); Rodriquez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), and Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) creates a constitutional right to appeal. As pointed out in the initial brief, those cases stand for the unexceptionable and uncontroverted principle that indigents must be afforded assistance in prosecuting appeals where the state or the federal government have afforded the right to appeal. Anders, in particular, simply requires that appointed counsel demonstrate to the satisfaction of the appellate court that effective assistance of counsel has been provided to the indigent prior to confessing that the appeal of right is wholly frivolous. It has no relevance where there is no right to appeal. Necessarily, there is no right to the assistance of appellate counsel when there is no right to an appeal by either the indigent or the wealthy.

Concerning the right to appeal under the state constitution, respondent selectively quotes from this Court's decision in

Amendments to the Florida Rules of Appellate Procedure 685 So.2d 773 (Fla. 1996)(hereafter Amendments) and fails entirely to address or rebut the state's reliance in its initial brief on this Court explicit holding that the legislature may place reasonable conditions on the right to appeal, including the requirement that non-fundamental issues be first raised in the trial court. Moreover, in the same vein, respondent fails to recognize that this Court's decision in Robinson v. State, 373 So.2d 898 (Fla. 1979), predating the Reform Act by seventeen years, placed severe restrictions on the right to appeal from guilty pleas pursuant to section 924.06, Florida Statutes (1979), including the requirement that a motion to withdraw the plea be filed in the trial court. See, also, Florida Rules of Appellate Procedure 9.140(b)(2)(B)(iv)(A defendant may only appeal a preserved sentencing error following a guilty plea) and 9.140(d)(A sentencing error may not be raised on appeal unless the alleged error has been preserved in the trial court), and Amendments, 685 So.2d at 775 (We construe section 924.051(b)(4) to permit appeals of alleged sentencing error from guilty or nolo pleas **"providing it has been timely preserved by motion to correct the sentence."** (e.s.).

ETHICAL CONSIDERATIONS

Respondent contends that a counsel has an ethical duty to file a notice of appeal when ordered to do so by a client

regardless of whether there is a right to such appeal and cites an ethics opinion from The Florida Bar, State v. Meyer, 430 So.2d 440 (Fla. 1983), The Florida Bar v. Dingle, 220 So.2d 9 (Fla. 1969), and Thames v. State, 549 So.2d 1198 (Fla. 1st DCA 1989). Respondent does not point out to this Court that these cases are not onpoint in that they do not involve appeals from guilty pleas, such as here, where filing a notice of appeal when there is no good faith basis for such pleading violates relevant provisions of the oath of office taken by all members of The Florida Bar[2], Florida Rule of Judicial Administration 2.060(d)[3], and this Court's direct holding in Robinson, 373 So.2d at 903 on the impropriety of an attorney appealing from guilty pleas where there is no identified, and authorized, ground for the appeal.

> There is clearly no authority to seek an appellate review upon unknown or unidentified grounds, and **it is improper to appeal on grounds known to be nonappealable.** (e.s.)
> . . . .
> Attorneys have a responsibility to ensure that our system of justice functions properly. If counsel believes that the plea

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[2]"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land.
I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to misled the Judge or Jury by any artifice or false statement of fact or law."

[3]"The signature of an attorney [on a pleading] shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

proceedings are defective or improper, he is ethically bound to immediately advise the trial judge of that fact. It is ethically wrong to ignore or cause technical or procedural errors to ensure an opportunity for reversal on appeal. We reiterate our holding in Hall v. State, 316 So.2d 279 (Fla. 1979), that both the prosecutor and the defense counsel are ethically bound to see that proper procedural steps are followed when a guilty plea is entered by a defendant.
Id.

RETROACTIVE APPLICATION OF THE REFORM ACT

Respondent asserts that he had the right to appeal in 1992 and that the provisions of the Criminal Appeals Reform Act of 1996[4] cannot be applied to him. This, of course, is an acknowledgment by respondent that he would not have a right to appeal a guilty plea if the current provisions of law apply, as the district court held they did in treating the appeal as a petition for writ of habeas corpus under the 1997 rules. That concession is highly significant because it is the future which is relevant to this proceeding, not the 1992 proceeding. Further, as the district court recognized in going **en banc** in order to overrule extant case law, the trial court correctly applied the extant case law[5] in denying the rule 3.850 motion for a belated appeal from a guilty plea. Moreover, and even more significantly,

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[4]Codified in chapter 924, Florida Statutes (Supp. 1996) and in Florida Rules of Appellate and Criminal Procedure. Ch 96-248, Laws of Florida; Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) and Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996)

[5]Thomas v. State, 626 So.2d 1093 (Fla. 1st DCA 1993).

the citations and quotes from Robinson above show that there was no right to appeal from a guilty plea prior to the enactment of the Reform Act when there had been no motion to withdraw the plea in the trial court and the sentence imposed was pursuant to the negotiated plea and was statutorily mandated. Respondent is not entitled to a belated appeal under either pre- or post-Reform Act law.

DOES THE REFORM ACT DENY ACCESS TO THE COURTS

Respondent argues that application of the Reform Act to crimes occurring prior to its effective date denies access to the court. This argument is a variant of the argument immediately above and is also misplaced for the reasons set forth above. See, also, the claim immediately below that the Reform Act violates the Separation of Powers doctrine of the Florida Constitution.

DOES THE REFORM ACT VIOLATE THE SEPARATION OF POWERS DOCTRINE

This Court has already rejected respondent's procedural versus substantive argument and upheld the constitutional authority of the Florida Legislature under the Separation of Powers Doctrine to place reasonable conditions on the exercise of the constitutional right to an appeal. This Court's holding in Amendments specifically construed and upheld sections 924.051(3) and (4), the relevant statutory provisions, which condition the right to appeal from guilty pleas, both guilt and sentencing, on

the preservation of issues in the trial court[6]. See, Amendments at 774-776.

> [W]e believe that the legislature may implement this constitutional right [to appeal] and place reasonable conditions upon it so long as [it does] not thwart the litigants' legitimate appellate rights. [fn omitted].
>
> 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 a 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 within ten days. . . . Because many sentencing errors are not immediately apparent at sentencing, we felt that this rule would provide an avenue **to preserve sentencing errors and therefore appeal them**. [e.s.]
>
> . . . .
>
> There remains, however, another problem. Section 924.051(b)(4) also states that a defendant pleading guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue cannot appeal the sentence. . . . [W]e construe this provision of the Act 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**. [e.s.] . . . .
>
> 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.

In this connection, the Court's attention is again invited to the actual provisions of rules 9.140(b)2) and (d) which fully

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[6]This Court recently reaffirmed its decision in Amendments rejecting the separation of powers challenge to the Reform Act in Kalway v. Singletary, 23 Fla. L. Weekly 102 (Fla. 26 February 1998).

implement the relevant provisions of the Reform Act and independently prohibit appeals, such as here, from guilty pleas where no issues have been preserved in the trial court and there is no claim of fundamental error.

ADDITIONAL POINTS

Since the filing of the state's initial brief, the Fourth DCA has joined the 2d, 3rd, and 5th DCAs in holding that there is no right to appeal from guilty pleas where no issues are preserved in the trial court and that such appeals, if taken, may be dismissed on motion by the state or **sua sponte** by the appellate court. Harrell v. State, 23 Fla. L. Weekly D967 (Fla. 4th DCA 15 April 1998). Thus, there is direct and express conflict between the district court decision below and those of all four other district courts.

The state also points out that its initial brief addressed the issue of whether jurisdiction was a threshold issue which should be immediately addressed when in doubt either **sua sponte** or on motion of a party. Respondent has failed to challenge this uncontroverted legal principle. The district court below has created direct and express conflict by holding that its jurisdiction to entertain appeals from guilty pleas will not be determined until completion of the appellate process, including full briefing by both parties and complete appellate review by the appellate court. Stone v. State, 688 So.2d 1006 (Fla. 1st

DCA), review denied, 601 So.2d 551 (Fla. 1997). This holding is in conflict with countless cases from all five districts and this Court, including most recently, Harrell and Polk County v. Sofka, 702 So.2d 1243 (Fla. 1997).

CONCLUSION

The district court decision below should be reversed and the conflicting decisions of the 2d, 3d, 4th, and 5th district courts approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the PETITIONER'S REPLY 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 11th day of May 1998.

James W. Rogers
Attorney for the State of Florida

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