IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 92,393

RONALD TROWELL,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as an appendix is the en banc opinion of the lower tribunal, which has been reported as Trowell v. State, 23 Fla. L. Weekly D307 (Fla. 1st DCA Jan. 20, 1998).[1] Petitioner's brief will be referred to as "PB," followed by the appropriate page number in parentheses.

[1]The original en banc opinion of the former general division appears as Trowell v. State, 22 Fla. L. Weekly D1757 (Fla. 1st DCA July 14, 1997). Four more judges joined the majority view, while the dissenters picked up only one.

II STATEMENT OF THE CASE AND FACTS

Mr. Trowell accepts the state's recitation at PB at 1-4, with the following clarifications. The lower tribunal did not "convene a semi en banc proceeding" (PB at 3). The former general (noncriminal) division of the lower tribunal was assigned this case, because it was civil in nature, as an appeal from the summary denial of a Fla. R. Crim. P. 3.850 motion, and sat en banc.[2]

[2]In petitioner's appendix 4, page 2, footnote 1, the state erroneously accused the lower tribunal of convening "an ad hoc grouping of judges created for the purpose of hearing this case."

III SUMMARY OF THE ARGUMENT

Mr. Trowell will argue in this brief that the majority view of the en banc opinion is correct and must be approved. Respondent enjoys a state and federal constitutional right to direct appeal from his guilty plea. That being so, he has a right to a belated appeal when his attorney failed to file a timely appeal in 1992. Ethical considerations require an attorney to file an appeal upon a timely request by his client.

The recent statutory and rule amendments cannot be applied retroactively to bar respondent's belated direct appeal. To do so would be an unconstitutional ex post facto violation, since respondent's appeal should have been filed in 1992, and the law did not change until 1996. The Fifth District has recently so held.

To the extent that the recent amendments bar a direct appeal or a belated direct appeal from a guilty plea, they are unconstitutional. The recent statutory amendments are unconstitutional because they remove access to the courts and infringe upon this Court's rule-making authority.

IV ARGUMENT

THE LOWER TRIBUNAL WAS CORRECT IN HOLDING THAT INDIGENT CRIMINAL DEFENDANTS STILL HAVE THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO APPEAL FROM A GUILTY PLEA AND THUS THE RIGHT TO A BELATED APPEAL FROM A GUILTY PLEA. (Issue Restated by Respondent)

A. THE RIGHT TO APPEAL

In the instant case, the majority of the lower tribunal, en banc, held that a defendant has the right to appeal from a guilty plea, and if his attorney does not timely file an appeal upon the defendant's request, he is entitled to a belated direct appeal. This decision is consistent with the prior panel decision in Stone v. State, 688 So. 2d 1006 (Fla. 1st DCA 1997), *rev. denied* 697 So. 2d 512 (Fla. 1997). The holding of the court in Stone was that it had jurisdiction to consider an indigent criminal appeal under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), notwithstanding the Reform Act [§924.051(4), Fla. Stat. (1997)] and amendments to the rules of appellate and criminal procedure. *See also* Miller v. State, 697 So. 2d 586 (Fla. 1st DCA 1997), in which another panel adhered to Stone, and held that the court had the duty to review guilty plea appeals. If a defendant is not afforded the right to direct appeal, then the court cannot perform its duty to review direct appeals.

As this Court stated in In re Appellate Court Response to Anders Briefs, 581 So. 2d 149, 152 (Fla. 1991):

> Although *Anders* and its progeny make no distinction between the types of arguable

> issues that may or may not be raised when counsel seek to withdraw, we are persuaded that the Court in *Anders* did not consider a situation where, for example, the only arguable issue raised in "no merit" briefs might be minor ones relating to the imposition of costs. Drawing such a distinction does not defeat the principle of *Anders* because, even with this modification, the procedure continues to ensure that indigents have the right to meaningful appellate review with the assistance of counsel where the issues raised in "no merit" briefs are substantial. **We reject the state's claim that this procedure unduly burdens the state and the administration of justice.** (emphasis added).

Accord: Palen v. State, 588 So. 2d 974 (Fla. 1991); and State v. Causey, 503 So. 2d 321 (Fla. 1987).

There is no conflict with Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773 (Fla. 1996), because this Court there was not asked to decide what effect the recent statutory amendments had on the well-established Anders procedure. The court recognized in Stone that the supreme court in Amendments had found a state constitutional right to appeal for criminal defendants in State v. Creighton, 469 So. 2d 735 (Fla. 1985): "To accept the state's argument to the contrary would result in the conclusion that the recent amendments to chapter 924 were intended to interfere with what the supreme court has concluded is a defendant's constitutional right to appeal." Stone, *supra*, at 1008.

As correctly noted by the majority below, this Court has already recognized the continuing vitality of the state constitutional right to appeal:

> More recently, the Florida Supreme Court again addressed the procedure for obtaining belated appeals in *Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996) (on reh'g). The court considered chapter 96-248, section 4, at 954, Laws of Florida, creating section 924.051, Florida Statutes (Supp. 1996), which purported to preclude a defendant who has pled nolo contendere or guilty without expressly reserving his or her right to appeal a legally dispositive issue from appealing his or her judgment and sentence. The court concluded that the new statute does not foreclose a defendant who has entered a plea from appealing the limited exceptions set forth in *Robinson*. *Id.* at 774-75. Moreover, we note that in adopting the revisions to Florida Rule of Appellate Procedure 9.140(j), dealing with petitions for belated appeal, the court included Committee Notes indicating that the revision was intended to reinstate the procedure set forth in *Baggett*. *Id.* at 807.
>
> Based on our reading of *Baggett* and *Amendments to the Florida Rules of Appellate Procedure*, we are of the firm belief that the only relevant inquiry, once a request for a belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person. If the appeal proceeds from the entry of an unconditional guilty or nolo contendere plea, it may, due to appellant's failure to submit any issue cognizable under *Robinson*, eventually result in dismissal by an ***appellate*** court, but issues of merit are not required as a precondition to the appeal. Any procedure to the contrary is a clear violation of the constitutional requirements of substantial equality and fair process for the indigent and affluent alike, under *Rodriguez*, *Douglas* and *Anders*.

Appendix at 5-6; footnote omitted; emphasis in original.

As correctly noted by the majority below, respondent also

enjoys a federal constitutional right to direct appeal from Anders v. California, *supra;* Rodriguez 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). Neither the legislature nor this Court can remove a state or federal constitutional right.

Neither the opinion in Thompson v. State, 23 Fla. L. Weekly D216 (Fla. 4th DCA Jan. 14, 1998), nor Maddox v. State, 23 Fla. L. Weekly D720 (Fla. 5th DCA Mar. 13, 1998), can change this result. Neither dealt with the constitutional right to appeal.

In Thompson, the Fourth District held that the Reform Act was not a jurisdictional bar to taking an appeal from an unpreserved sentencing error, thus aligning itself with the lower tribunal in Stone, but certified the question. Thompson actually supports respondent's position that there no jurisdictional bar to an appeal or a belated appeal. *See also* Harriel v. State, 23 Fla. L. Weekly D___ (Fla. 4th DCA Apr. 15, 1998), in which the en banc court stated it would review a guilty plea appeal for error prior to dismissing it.

In Maddox, the Fifth District held that it would no longer address unpreserved sentencing errors on direct appeal. Maddox did not find a jurisdictional bar to taking an appeal or a belated appeal.

The state's insipid diatribe against the lower tribunal's

processing of belated appeals in footnote 2 at PB 12-14 is largely irrelevant. We must remember that it was the state, and particularly Mr. Rogers, who convinced this Court to alter the long-standing habeas procedure under Baggett v. Wainwright, 229 So. 2d 239 (Fla. 1969), and give the trial courts the power to grant belated appeals under Fla. R. Crim. P. 3.850. State v. First District Court of Appeal, 569 So. 2d 439 (Fla. 1990). Now this Court has wisely returned that power to the appellate courts under Fla. R. App. P. 9.140(j).

The state is making the same complaints it did seven years ago in Ford v. State, 575 So. 2d 1335 (Fla. 1st DCA), *rev. denied*, 581 So. 2d 1310 (Fla. 1991). Its attempt at that time to have this Court prohibit the lower tribunal from hearing guilty plea appeals also failed. State v. District Court of Appeal, 582 So. 2d 623 (Fla. 1991). The state is subtly inviting this Court to use the instant case as a vehicle to overrule Anders, which this Court cannot do. This Court must decline the invitation, as the lower tribunal did in Baucham v. State, 676 So. 2d 53 (Fla. 1st DCA), *rev. denied*, 683 So. 2d 484 (Fla. 1996).

This is one of many annoying attempts by the state to tamper with the well-established Anders procedure. *See, e.g.*, In re Appellate Court Response to Anders Briefs, *supra*; State v. Parks, 672 So. 2d 543 (Fla. 1996) (state sought review of interlocutory order of DCA which required additional transcripts in Anders appeal); Ford v. State, *supra*; State v.

District Court of Appeal, *supra*; and Ullah v. State, 679 So. 2d 1242 (Fla. 1st DCA 1996) (counsel for appellee criticized for his position in Anders cases).

B. ETHICAL CONSIDERATIONS

The state also suggests that a court-appointed attorney who files a notice of appeal upon the request of his client performs a professionally unethical act and assists clients in abusing the system. The dissenting opinions below see nothing improper about an attorney declining to file a notice of appeal. The state and the dissenting judges are apparently unaware of Opinion 81-9, Professional Ethics of the Florida Bar, where the question was:

> A Florida lawyer who represents indigent defendants by court appointment inquires of his ethical duties regarding the commencement of appeal at the insistence of defendant where the lawyer is of the professional opinion that the appeal is groundless and frivolous.

The Bar concluded:

> **A court-appointed attorney** who, at the insistence of his client and in accordance with approved procedure, commences an appeal he believes to be frivolous **may not thereafter be said to have acted unethically in commencing the appeal. The ultimate decision regarding whether the indigent defendant's appeal is frivolous appears to be reserved to the reviewing court,** to the exclusion of personal determination by court-appointed counsel.

Id; emphasis added. *See also* ABA Standard for Criminal Justice, Standard 4-8.2(a) (the decision whether to appeal

must be the defendant's own choice); and Standard 4-8.3(a) (counsel should not seek to withdraw solely on the basis of his or her opinion that the appeal lacks merit).

The state and the dissenting opinions are also apparently unaware of State v. Meyer, 430 So. 2d 440 (Fla. 1983), which held that the failure to file a timely notice of appeal upon request constitutes per se ineffective assistance of counsel.

The state and the dissenting opinions are also apparently unaware of The Florida Bar v. Dingle, 220 So. 2d 9 (Fla. 1969), which held that the failure to file a timely notice of appeal upon request opens counsel up to the imposition of grievance proceedings by the Bar. The state and the dissenting opinions are also apparently unaware of Thames v. State, 549 So. 2d 1198 (Fla. 1st DCA 1989), which held that the failure to file a timely notice of appeal upon request opens counsel up to the imposition of sanctions by the appellate court.

Thus, under the current state of ethics, counsel has no alternative but to file a timely notice of appeal upon request of his or her client.

C. THE REFORM ACT CANNOT BE APPLIED RETROACTIVELY

In respondent's view, the issues presented here are simple. Respondent enjoyed the right to direct appeal in 1992. When he requested an appeal in a timely manner, his attorney had an ethical (*see* Ethics Opinion 81-9 and ABA

Standards, *supra*) and legal (*see* Ford v. State, *supra*) obligation to file an appeal. But his attorney did not file the notice of appeal. Then respondent petitioned the court for a belated appeal. As correctly noted by the majority opinion herein, since a defendant has the right to a direct appeal from a guilty plea, then he also has the right to a belated direct appeal from a guilty plea. As correctly noted by the majority below, this Court has already recognized the continuing vitality of the state constitutional right to appeal under the Baggett procedure, even after the Reform Act.

The Reform Act did nothing to change respondent's right to a timely direct appeal as it existed in 1992, and his right to a belated direct appeal as it exists today. To the extent the Act may be applied to bar respondent's belated appeal, it is unconstitutional.

As a general rule, a statute which is retroactively applied to crimes occurring prior to its adoption constitutes an ex post facto law, in violation of art. I, §10, Fla. Const. *See* Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996) (statute limiting amount of incentive gain time which could be earned violated ex post facto where it applied to large class of prisoners whose offenses occurred before its effective date); Cunningham v. State, 423 So. 2d 580 (Fla. 2d DCA 1982).

In Duggar v. Williams, 593 So. 2d 180, 181 (Fla. 1991), this Court held that a law or its equivalent violates the prohibition against ex post facto laws if two conditions are

met: 1) it is retrospective in effect, and 2) it diminishes a substantial right the party would have enjoyed under the law existing at the time of the alleged offense. *Accord*, Avera v. Barton, 632 So. 2d 167, 168-169 (Fla. 1st DCA 1994). This Court noted that there is no requirement that the substantive right be "vested" or absolute, since the ex post facto provision can be violated even by the retroactive diminishment of access to a purely discretionary or conditional advantage. *Accord* Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)(law need not impair a vested right to violate the ex post facto prohibition).

Since respondent enjoyed the substantive and procedural right to appeal at the time of his crimes, the statute cannot be applied to eliminate his pre-existing right to appeal. Even if the Act is deemed purely "procedural," it cannot be applied retroactively:

> [I]t is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an ex post facto violation also is possible, even though the general rule is that the ex post facto provision of the state constitution does not apply to purely procedural matters.

Dugger v. Williams, 593 So. 2d at 181.

In Kopko v. State, 23 Fla. L. Weekly D821 (Fla. 5th DCA Mar. 27, 1998), the defendant sought a belated appeal in 1996 to review a sentence he had received in 1994. The court held that the Reform Act, which became effective on July 1, 1996,

could not be applied retroactively to bar a belated appeal from Kopko's 1994 sentence. Likewise, the Act cannot be applied retroactively to bar respondent's belated appeal from his 1992 judgment and sentence.

D. THE ACT DENIES ACCESS TO THE COURTS

Moreover, the Act denies respondent access to the courts, in violation of art. I, §21, Fla. Const. Swain v. Curry, 595 So. 2d 168, 174 (Fla. 1st DCA), *rev. den.* 601 So. 2d 551 (Fla. 1992).

In State Farm Mutual Automobile Insurance Co. v. Hassen, 650 So. 2d 128, 141 (Fla. 2nd DCA 1995), a "remedial/ procedural" statute was passed by the 1992 Legislature and the trial court applied it to uninsured motorist insurance issued prior to its effective date. The Second District found the statute denied access to the courts[3], and this Court agreed. Hassen v. State Farm Mutual Automobile Insurance Co., 674 So. 2d 106, 108-110 (Fla. 1996).

The same is true with regard to the Reform Act. The Legislature designated the effective date as July 1, 1996, ch. 96-248, §9, Laws of Florida, without any expression that it was to apply to crimes committed prior to that date. The Act affects the substantive right of respondent to direct appeal. As in Hassen, the title also indicates the

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[3]A position adopted by the lower tribunal in *Florida Farm Bureau Mutual Insurance Co. v. Zarahn*, 666 So. 2d 1034 (Fla. 1st DCA 1996).

substantive nature of the Act: "limiting direct appeals to allegations of prejudicial error; limiting appeals after a defendant pleads guilty or nolo contendere."

E. THE ACT VIOLATES SEPARATION OF POWERS

This Court has receded from State v. Creighton, *supra*, and recognized that there is a constitutional right to appeal under Art. V, §4(b), Fla. Const. *See* Amendments to the Florida Rules of Appellate Procedure, *supra*. In its opinion, this Court noted that "the legislature may implement this constitutional right and place *reasonable* conditions upon it so long as they do not thwart the litigants' legitimate appellate rights." 685 So. 2d at 774 [emphasis added]. Notwithstanding the language of §924.051(4), Fla. Stat. (1997), this Court recognized the right to appeal from guilty or nolo contendere pleas in certain instances.

To the extent that the Act establishes procedures for the courts to conduct their review on appeal and creates standards of review and reversal for the appellate courts, the Act unconstitutionally violates separation of powers.[4] Art. II, §3, Fla. Const.

The recent decision in Kalway v. Singletary, 23 Fla. L. Weekly S102 (Fla. Feb. 26, 1998), does not change this

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[4]Curiously, the state asserted in pleadings filed and in oral argument in connection with *Amendments*, *supra*, that the Act was wholly *substantive*. The state should not be permitted to argue inconsistent positions in different cases. *Vaprin v. State*, 437 So. 2d 177 (Fla. 3rd DCA 1983).

result. In dicta, this Court noted that the Act had placed reasonable conditions on the right to appeal. But this Court has never said that the Act could totally remove the constitutional right to appeal.

Art. V, §2(a), Fla. Const., confers on this Court the power to adopt rules for the practice and procedure in all courts. State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993) ("All courts in Florida possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions"). Accordingly, a statute which purports to create or modify a procedural rule of court is constitutionally infirm. Markert v. Johnson, 367 So. 2d 1003 (Fla. 1978).

Establishing the appropriate standard of review on appeal is inherent in this Court's rule-making authority. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ciccarelli v. State, 531 So. 2d 129, 131 (Fla. 1988)(Grimes, J., specially concurring); and Heuss v. State, 687 So. 2d 823 (Fla. 1996). *See also* Fla. R. App. P. 9.040(a) ("In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause.").

In addition to establishing the proper standard of review, the courts' inherent powers include examining records on appeal to determine whether an objection is sufficient to

preserve an alleged error for appellate review or whether an error constitutes fundamental reversible error in the absence of an objection. *See* Dewey v. State, 135 Fla. 44, 186 So. 224, 227 (1938)(on rehearing)("established rules of practice and procedure" such as the rule that issues not presented below cannot be considered in the appellate court, should not be violated "unless it is shown that it is essential to do so to administer justice"); and Bateh v. State, 101 So. 2d 869, 874 (Fla. 1st DCA 1958)(on rehearing)(rule that questions not presented in the trial court will not be considered on appeal "is procedural in nature"); *see also*, Bennett v. State, 127 Fla. 759, 173 So. 817, 819 (1937)("to meet the ends of justice or to prevent the invasion or denial of essential rights," appellate courts may, in the exercise of their power of review, "take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved, or the question is imperfectly presented."); Fla. R. App. P. 9.040(d)("At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties"); and Fla. R. App. P. 9.140(h)(court "shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the

interest of justice, the court may grant any relief to which any party is entitled").

Clearly, courts have certain inherent powers to do things that are reasonable and necessary for the administration of justice. In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus, 23 Fla. L. Weekly S215 (Fla. Apr. 8, 1998); In re Order of Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990); and Huntley v. State, 339 So. 2d 194 (Fla. 1976). By abrogating the appellate court's duty to review guilty pleas, the Act encroaches on the court's inherent powers and is unconstitutional. Any statutory scheme which allows a defendant who is convicted following a trial the right to appeal but denies that right to a defendant who enters a plea implicates serious due process and equal protection concerns.

There are other constitutional rights so basic to due process that their infraction can never be treated as waived by a plea, *e.g.*, the denial of the right to counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); and Foster v. State, 387 So. 2d 244 (Fla. 1980)(counsel's actual conflict of interest can be raised for first time on appeal even in absence of objection or motion for separate counsel); *see also*, Trushin v. State, 425 So. 2d 1126 (Fla. 1986)(facial validity of statute can be raised for

first time on appeal). Such errors must be cognizable on appeal, regardless of whether the defendant enters a plea or is tried and convicted.

The state legislature cannot eliminate or even limit federal or state due process by direct or indirect application of its laws. *See* Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993) (legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional rights). To the extent the Act eliminates the right to appeal such fundamental errors when a defendant enters a guilty or nolo contendere plea, it violates due process and equal protection. To the extent the statute abrogates the appellate court's historic and inherent jurisdiction to review such matters on appeal when such review is essential to the administration of justice, it violates the separation of powers.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Mr. Trowell asks this Court to approve in total the en banc opinion of the lower tribunal. In the alternative, he asks that the Reform Act be declared unconstitutional.

Respectfully Submitted,

NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to James W. Rogers, Assistant Attorney General, at The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, #043456, 19225 U.S. Highway 27, MB 056, Clermont, Florida 34711, this 21 day of April, 1998.

P. DOUGLAS BRINKMEYER

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 92,393

RONALD TROWELL,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
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Criminal law--Appeals--Belated--Counsel's failure to file notice of appeal despite defendant's timely request-- Trial court erred in denying rule 3.850 motion for belated appeal on ground that defendant was not entitled to appeal because he had entered into negotiated guilty plea for life sentence and waived right to appeal matters relating to judgment--Conflict certified -- Defendant need not state meritorious issues as precondition to right to belated appeal from a criminal conviction--Court recedes from prior decision in *Thomas v. State* to the extent that decision required defendant to state what issues he or she would have raised on appeal, whether or how those issues would have been dispositive, or how defendant was otherwise prejudiced by counsel's failure to file notice of appeal--The only relevant inquiry once request for belated appeal is made is whether defendant was informed of right to appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person--If appeal proceeds from entry of unconditional guilty or nolo contendere plea, that may ultimately be basis for dismissal by an appellate court, but issues of merit are not required as precondition to appeal--In light of revision to appellate rule, which provides that petitions seeking belated appeal shall be filed in appellate court, defendant's 3.850 motion construed as a petition for belated appeal properly filed with appellate court--Petition granted--Jurisdiction relinquished to trial court to determine whether defendant is indigent and entitled to appointment of counsel for appeal

RONALD TROWELL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-3082. Opinion filed January 20, 1998. An appeal from the Circuit Court for Columbia County. Paul S. Bryan, Judge. Counsel: Nancy A. Daniels, Public Defender, P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, James W. Rogers, Senior Assistant Attorney General, Tallahassee, for Appellee.

ON REHEARING EN BANC

[Original Opinion at 22 Fla. L. Weekly D1757a]

[Editor's note: Name of counsel, footnotes, and additional concurring and dissenting opinions have been added to the original opinion. The Court's ruling is unchanged.]

(ERVIN, J.) Ronald Trowell appeals the denial of his motion, filed pursuant to Florida Rule of Criminal Procedure 3.850, for post-conviction relief and belated appeal of the judgment of conviction based upon his guilty plea to armed burglary and first-degree murder. As grounds therefor, appellant alleged that his court-appointed counsel (1) failed to honor his request to call witnesses to testify on his behalf before entry of the plea, (2) failed to raise an objection that appellant was under the influence of medication at the time of the plea, and (3) failed to file a notice of appeal, contrary to his request. Grounds one and two of the motion allege insufficient facts to state a basis for relief. Therefore, we affirm the trial court's order with respect to these claims without further discussion. We reverse, however, the lower court's ruling on appellant's claim of entitlement to a belated appeal.

In denying the defendant's motion for belated appeal, the trial court cited *Thomas v. State*, 626 So. 2d 1093 (Fla. 1st DCA 1993), and concluded that the defendant was not entitled to an appeal, because he had entered into a negotiated guilty plea for a life sentence and waived his right to appeal the matters relating to the judgment. We cannot agree.

The court's decision in *Thomas* is inconsistent with a substantial body of case law from this court and other district courts of appeal. *See, e.g., Moore v. State*, 661 So. 2d 921 (Fla. 1st

DCA 1995); *Kiser v. State*, 649 So. 2d 333 (Fla. 1st DCA 1995); *Owens v. State,* 643 So. 2d 105 (Fla. 1st DCA 1994); *Clayton v. State*, 635 So. 2d 48 (Fla. 1st DCA 1994); *Hudson v. State*, 596 So. 2d 1213 (Fla. 1st DCA 1992); *Short v. State*, 596 So. 2d 502 (Fla. 1st DCA 1992); *Courson v. State*, 652 So. 2d 512 (Fla. 5th DCA 1995); *Gunn v. State*, 612 So. 2d 643 (Fla. 4th DCA 1993), *on remand,* 643 So. 2d 677 (Fla. 4th DCA 1994); *Viqueira v. Roth*, 591 So. 2d 1147 (Fla. 3d DCA 1992). To the extent that *Thomas* requires a defendant to state in a rule 3.850 motion for belated appeal what issues he or she would have raised on appeal, and whether or how those issues would have been dispositive, or how appellant was otherwise prejudiced by his counsel's failure to file a notice of appeal, we recede from it as being contrary to controlling precedent from this court and the Florida Supreme Court.

The Florida Supreme Court addressed the reason why a defendant need not state meritorious issues in a 3.850 motion as a precondition to his or her right to a belated appeal from a criminal conviction in *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1969). In that case, the court devised the following procedure to determine one's eligibility to a belated appeal. The defendant was required to file a petition for writ of habeas corpus before the appropriate appellate court,[1] wherein only two issues were pertinent for resolution: first, did the defendant, if aware of his or her right to appeal, timely express the desire to appeal to the court, defense attorney or other appropriate person, and second, did the facts show a deprivation, through state action, of this right guaranteed to the defendant?[2] *Id.* at 241.

In outlining this process, the court specifically rejected the state's contention that the defendant must make a preliminary showing of arguable points on the merits in order to be entitled to an appeal. In so doing, it relied on *Rodriguez v. United States,* 395 U.S. 327, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969), wherein the United States Supreme Court had rejected a similar argument. The *Baggett* court relied not only on *Rodriguez*, but also on two other Supreme Court decisions, *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), and *Anders v. California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), dealing with an indigent defendant's right to appeal.

The facts in *Rodriguez* disclose that the indigent prisoner had filed a motion for postconviction relief under 28 U.S.C. § 2255, the federal counterpart to Florida Rule of Criminal Procedure 3.850, seeking a belated appeal, alleging that his retained counsel had fraudulently deprived him of his right to appeal. After the Ninth Circuit Court of Appeals affirmed the trial court's denial of the requested relief for the reason that the motion, contrary to its rule, failed to disclose what errors the petitioner would have raised on appeal, the Supreme Court granted certiorari and reversed the order of denial. In reaching its decision, the Court noted that an appeal from a criminal judgment of conviction is a matter of right. It also emphasized the disparity in legal ability which exists between a pro se litigant and a defendant with funds represented by a retained lawyer, observing:

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[1]In 1990, the supreme court altered this practice by requiring that a 3.850 motion be filed before the trial court. *State v. District Ct. of App., First Dist.*, 569 So. 2d 439, 442 (Fla. 1990). The procedure set forth in *Baggett*, however, has been reinstated effective January 1, 1997. *See* Fla. R. App. P. 9.140(j)(1); *Amendments to Fla. R. App. P.*, 685 So. 2d 773 (Fla. 1996) (on reh'g).

[2]The second requirement has since been eliminated. *See State v. District Ct. of App., First Dist.*; *State v. Meyer*, 430 So. 2d 440 (Fla. 1983); *Joseph v. State*, 451 So. 2d 886 (Fla. 5th DCA 1984).

> Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a summary statement of points to be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial. They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one ... . [T]he Ninth Circuit's requirement makes an indigent defendant face "the danger of conviction because he does not know how to establish his innocence." Moreover, the Ninth Circuit rule would require the sentencing court to screen out supposedly unmeritorious appeals in ways this Court rejected in *Coppedge [v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)]. *Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings*. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated.

Rodriguez, 395 U.S. at 330, 89 S. Ct. at 1717, 23 L. Ed. 2d at 344 (emphasis added).

As the Court's analysis makes clear, there should be no difference between a defendant's right to a belated appeal, if the evidence discloses that the delay was not attributable to his or her own neglect, and the right to a timely appeal, insofar as any requirement that the defendant make a preliminary showing of merit. In both cases, a statement of meritorious issues is irrelevant to one's entitlement to appeal. Similarly, there should be no difference between a defendant's right to a belated appeal from a conviction following trial or after a plea, because, in either instance, if the appeal had been timely filed, an initial statement of arguable points would be irrelevant to the right to appeal.

Although *Baggett* involved a belated appeal following a jury trial, the opinion makes clear, with its references to *Anders* and *Douglas*, and its specific adoption of *Rodriguez*, that a defendant need not make a merit showing in order to seek a belated appeal from a conviction based on either a plea or verdict of guilt. Indeed, if the Florida Supreme Court had made the distinction the lower court approved below, its decision would have been at clear variance with the broad constitutional precepts announced in *Rodriguez*, *Douglas* and *Anders*.

In *Douglas*, the court held that an indigent prisoner was entitled to the assistance of counsel on appeal, that the due process and equal protection clauses of the Fourteenth Amendment demanded no less, and that a state could not deny the indigent such right by requiring him or her to make a preliminary showing of merit. In vacating the judgment of the California appellate court, which had denied the defendant the assistance of counsel on appeal because it had gone through the record and come to the conclusion that "no good whatever could be served by appointment of counsel," the United States Supreme Court made the following pertinent comments:

> The present case, where counsel was denied petitioners on appeal, *shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot*. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and

> marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. *The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.*

Douglas, 372 U.S. at 357-58, 83 S. Ct. at 816, 9 L. Ed. 2d at 815 (emphasis added).

The Court applied the same reasoning in another case decided the same day, wherein it was asked whether due process was offended by the state of Washington's practice of denying a transcript of the record at public expense to an indigent appellant, based upon a trial court's findings that the assignments of error were, in its judgment, frivolous and the evidence of guilt overwhelming. In striking down the practice of allowing the trial court to be virtually the sole arbiter of whether the appeal had merit, the Court explained:

> In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds--the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.

Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 779, 9 L. Ed. 2d 899, 906 (1963).

Four years later in *Anders*, the United States Supreme Court established the procedure to be followed once appellate counsel has been appointed and counsel determines that the appeal is frivolous. In order to protect an appellant's constitutional rights to a fair trial and the assistance of counsel for his or her defense, counsel who makes a representation of no merit may request permission to withdraw and must accompany the request with a brief referring to anything in the record that might support the appeal. A copy of the brief must be served on the indigent, and time allowed for him or her to raise any points that he or she chooses. Thereafter, the appellate court "proceeds, *after a full examination of all the proceedings*, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498 (emphasis added).

Aware that *Baggett* had bottomed its holding on constitutional pronouncements of the United States Supreme Court which emphasized that the Fourteenth Amendment proscribes disparate treatment of indigent and wealthy defendants in regard to their right to appeal, the district courts of appeal in Florida routinely, until 1987, when confronted with petitions for writs of habeas corpus, designated commissioners to determine the truthfulness of the defendants' representations that they had been denied a right to appeal upon timely request. In so proceeding, the courts' opinions made no distinction whether the conviction was based upon a plea or a finding of guilt following trial.

The first apparent departure from established precedent occurred in *Bridges v. Dugger*, 518 So. 2d 298 (Fla. 2d DCA 1987), in which the Second District Court of Appeal denied a petition for writ of habeas corpus on the ground that the petitioner had entered a plea of guilty without reserving any appellate issues, had received a sentence that was facially legal, which was accepted without contemporaneous objection, and had not moved to withdraw the plea before imposition of sentence. In reaching its decision, the court recognized the applicability of the United States Supreme Court's decisions in *Anders* and *Rodriguez*, as well as the Florida Supreme Court's decision in *Baggett*; yet, with little analysis, it concluded, as had the state courts whose judgments were vacated in *Douglas* and *Draper*, that the appeal would be frivolous. Several more recent appellate decisions

have taken the same approach as the court in *Bridges*. *See, e.g., Thomas v. State,* 626 So. 2d 1093 (Fla. 1st DCA 1993); *Gonzales v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997); *Loadholt v. State*, 683 So. 2d 596 (Fla. 3d DCA 1996); *Zduniak v. State*, 620 So. 2d 1083 (Fla. 2d DCA 1993).

Bridges and its progeny are based primarily on *Robinson v. State*, 373 So. 2d 898 (Fla. 1979),[3] wherein the Florida Supreme Court held that a valid guilty plea waives the right to appeal all issues arising before the entry of the plea. The court nonetheless noted a few limited exceptions which may be appealed regardless of the entry of a plea, such as (1) lack of subject matter jurisdiction, (2) illegality of the sentence, (3) failure of the state to abide by the plea agreement, and (4) the voluntary and intelligent nature of the plea. *Id.* at 902.[4]

We note, however, that when the Florida Supreme Court revisited the procedure for obtaining belated appeals in *State v. District Court of Appeal, First District,* 569 So. 2d 439 (Fla. 1990), the court left intact *Baggett's* pronouncement rejecting any requirement of meritorious grounds for appellate relief as a condition precedent to one's right to appeal, despite the existence of *Robinson*. Moreover, the opinion made no distinction between appeals from convictions following pleas or verdicts of guilt. Indeed, nothing in the opinion discloses whether the request for an appeal had followed a trial or a plea.

More recently, the Florida Supreme Court again addressed the procedure for obtaining belated appeals in *Amendments to the Florida Rules of Appellate Procedure,* 685 So. 2d 773 (Fla. 1996) (on reh'g). The court considered chapter 96-248, section 4, at 954, Laws of Florida, creating section 924.051, Florida Statutes (Supp. 1996), which purported to preclude a defendant who has pled nolo contendere or guilty without expressly reserving his or her right to appeal a legally dispositive issue from appealing his or her judgment and sentence. The court concluded that the new statute does not foreclose a defendant who has entered a plea from appealing the limited exceptions set forth in *Robinson. Id.* at 774-75. Moreover, we note that in adopting the revisions to Florida Rule of Appellate Procedure 9.140(j), dealing with petitions for belated appeal, the court included Committee Notes indicating that the revision was intended to reinstate the procedure set forth in *Baggett. Id.* at 807.

Based on our reading of *Baggett* and *Amendments to the Florida Rules of Appellate Procedure,* we are of the firm belief that the only relevant inquiry, once a request for a belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person. If the appeal proceeds from the entry of an unconditional guilty or nolo contendere plea, it may, due to appellant's failure to submit any issue cognizable under *Robinson*, eventually result in dismissal by an *appellate* court, but issues of merit are not required as a precondition to the appeal. Any procedure to the contrary is a clear violation of the constitutional requirements of substantial equality and fair process for the

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[3]Although *Bridges* does not actually cite *Robinson*, it relies on case law that does.

[4]In his dissenting opinion, Judge Joanos refers to Florida Rule of Criminal Procedure 3.172(c)(4) to support his position that a defendant who pleads guilty does not have an unfettered right to appeal. This rule addresses the judge's voluntariness determination and does not preclude a defendant from appealing the issues set forth in *Robinson*.

indigent and affluent alike, under *Rodriguez, Douglas* and *Anders*.[5]

In so saying, we consider that the procedure the lower court approved compounds the practical difficulties confronting any pro se litigant attempting to marshal legal issues necessary to entitle him or her to the "one and only appeal an indigent has as of right" from a conviction. *Douglas*, 372 U.S. at 357, 83 S. Ct. at 816, 9 L. Ed. 2d at 814. Moreover, it runs contrary to the continuing concern expressed in the relevant United States Supreme Court decisions, *e.g., Rodriguez, Douglas, Draper* and *Anders*, recognizing that an affluent defendant who has the means to secure counsel to perfect an appeal is not required to state meritorious issues as a precondition to such appeal; while an indigent, who cannot personally retain an attorney, is required to file issues of merit before his or her appeal may be perfected. The Supreme Court has continuously rejected such disparate treatment.

Although it may be difficult for us to determine from this record what chance the defendant may have for success on the merits, any such uninformed prognosis is not the proper test of one's entitlement to an appeal. As observed in *Penson v. Ohio*, 488 U.S. 75, 87, 109 S. Ct. 346, 353-54, 102 L. Ed. 2d 300, 313 (1988) (footnote omitted): "Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is unguided by the adversary process." Moreover, the " '[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.' " *Id.* at 88, 109 S. Ct. at 354, 102 L. Ed 2d at 313 (*quoting Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 696 (1984)).

We note that the procedure the lower court endorsed, if approved, could ultimately result in the denial of Trowell's only right to a direct appeal, to which he would otherwise have been entitled had the appeal been timely filed, together with his right to the aid of an attorney. The uncounseled defendant at bar, as the defendant in *Rodriguez*, "may not even be aware of errors which [may have] occurred." *Rodriguez*, 395 U.S. at 350, 89 S. Ct. at 1717, 23 L. Ed. 2d at 344.

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[5]This is consistent with the procedure this court articulated in *Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA) (on motion to dismiss), *review denied*, No. 90176 (Fla. Jun. 20, 1997), which is required when reviewing an appeal under *Anders* following a guilty or nolo plea. This court denied the state's motion to dismiss the appeal on the ground that the defendant had failed to reserve a *Robinson* issue below, holding that such failure may require dismissal on appeal, but not dismissal before appeal.

> Upon the completion of briefing, we will examine the briefs and the record to determine whether a *Robinson* issue exists. If we reach a negative conclusion, we will dismiss the appeal with a citation to *Robinson*. If we conclude that such an issue does exist, we will then determine whether the issue has been preserved. If it has, we will address the merits. If it has not, we will affirm without reaching the merits.

Id. at 1008. *Accord Miller v. State*, 22 Fla. L. Weekly D1960 (Fla. 1st DCA Aug. 7, 1997) (applying *Stone*).

Finally, such procedure is, in fact, no less offensive to due process than the situations which transpired in *Rodriguez, Douglas* and *Anders*, because Trowell's court-appointed trial counsel has apparently conceded that Trowell requested him to file an appeal immediately following the entry of his plea and sentence. In his response to the motion for relief, trial counsel replies merely that because Trowell's conviction was the product of a plea-bargain agreement, and the plea was freely given, "the failure to honor the timely request for an appeal is inconsequential." Thus, the only difference between the practice the United States Supreme Court rejected in *Anders* and that which the court below appears to sanction is that the trial attorney may trump the *Anders* procedure by declaring his client's appeal to be of no merit because it followed an unconditional guilty plea. Consequently, the defendant, thereafter unassisted by counsel, must first file sufficiently stated errors before his appeal may proceed; a procedure which would be entirely irrelevant to his appellate rights if his lawyer had simply honored his client's request and filed the notice.

Nevertheless, because our decision today conflicts with *Bridges v. Dugger,* 518 So. 2d 298 (Fla. 2d DCA 1987), and its progeny, *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997); *Loadholt v. State,* 683 So. 2d 596 (Fla. 3d DCA 1996); and *Zduniak v. State*, 620 So. 2d 1083 (Fla. 2d DCA 1993), we certify our conflict therewith.

In that Trowell's trial attorney has not denied that his client timely requested him to file an appeal, we reverse the order of denial as it relates to this issue. In light of the revisions the Florida Supreme Court made to Florida Rule of Appellate Procedure 9.140(j)(1), effective January 1, 1997, which provides that petitions seeking belated appeal shall be filed in the appellate courts, we now construe Trowell's motion as a petition for belated appeal properly filed with this court pursuant to the rule. We grant the petition and direct the clerk of this court to file an order in the Circuit Court of Columbia County in accordance with rule 9.140(j)(5)(D). We also relinquish jurisdiction to the trial court to determine whether Trowell is indigent and entitled to the appointment of counsel for the appeal.

AFFIRMED in part and REVERSED in part.

(ALLEN, MICKLE, DAVIS, BENTON, VAN NORTWICK and PADOVANO, JJ., CONCUR. WEBSTER, J., CONCURS WITH WRITTEN OPINION, IN WHICH BARFIELD, C.J., ALLEN, VAN NORTWICK and PADOVANO, JJ., CONCUR. BOOTH, J., DISSENTS WITHOUT WRITTEN OPINION. JOANOS, J., DISSENTS WITH OPINION, IN WHICH BOOTH, MINER, WOLF and KAHN, JJ., CONCUR. MINER, J., DISSENTS WITH OPINION, IN WHICH BOOTH, JOANOS, WOLF and KAHN, JJ., CONCUR. WOLF J., DISSENTS WITH OPINION, IN WHICH BOOTH and MINER, JJ., CONCUR. KAHN, J., DISSENTS WITH OPINION, IN WHICH BOOTH, MINER and WOLF, JJ., CONCUR. LAWRENCE, J., RECUSED.)

(WEBSTER, J., concurring.) Long ago, our supreme court acknowledged that:

> The constitutional right of equal protection of the laws means that every one is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation.
>
> Equal protection of the laws means subjection to equal laws applying alike

to all in the same situation.

State v. Bryan, 87 Fla. 56, 63, 99 So. 327, 329 (1924) (citation omitted). The rule advocated by the dissenters would create two classes--those whose attorneys honored their request to file a notice of appeal, who need not satisfy any further condition to prosecute their appeal; and those, like appellant, whose attorneys did not honor their request to file a notice of appeal, who, solely because of their attorneys' dereliction, must overcome an additional hurdle before they will be permitted to prosecute their appeal. I can perceive no rational basis for such disparate treatment. For this reason, it seems to me that those who, like appellant, would fall into the second class would be denied their constitutional right to equal protection of the laws. Accordingly, I concur.

(JOANOS, J., dissenting.) The majority has lost sight of what this case is about. The trial court has not deprived Ronald Trowell of the right to counsel. Trowell was fully represented. Nor has the trial court treated Trowell any differently than it would have treated the wealthiest of defendants.

This case is about a plea of guilty. When Trowell pled guilty, he knowingly waived most of his right to an appeal. Plainly and simply, he had no remaining right to appeal his conviction unless he asserted one of the few remaining reasons open to him for appeal. If Trowell had a reason to appeal on one of the grounds still open to him, he should have stated as much in his petition to the trial judge. If he had told his trial lawyer that he wanted to raise one of those issues, his trial counsel would have been obligated to appeal. Trowell was under the same standard then as now. No magic words are necessary, no money is necessary; then, he should have told his trial counsel, now, he should tell the court, what it is he wanted to appeal. If he wanted to raise an appealable reason, he will not only be allowed to appeal, but will have the full services of an attorney and everything necessary to have this court review that appeal. Until he can raise one of the issues still open to him, he has no right to an appeal. That is a consequence of pleading guilty.

Trowell pled guilty to the first degree murder of his wife, and to burglary while armed, pursuant to a plea agreement. In his written offer of a plea, Trowell specifically stated that he understood that by pleading guilty, he gave up the "the right to appeal the matters relating to the judgment." The trial judge accepted the plea of guilty, only after making the required determinations that the plea was entered knowingly and voluntarily. After receiving a negotiated sentence, Trowell alleged in the motion here under review, that he asked his attorney to appeal. He has not indicated in any way what it was that he wanted his attorney to appeal. Despite this omission, the majority of this court has determined that Trowell's attorney was ineffective for telling him that "there was no need to appeal," and for failing to appeal. Contrary to the majority view, if counsel had taken an appeal without an appropriate reason, it would have been completely improper. In *Robinson v. State,* 373 So. 2d 898, 903 (Fla. 1979), the supreme court, through Justice Overton, stated unequivocally: "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."

In *Robinson*, our supreme court clearly set out Florida law on this subject. In that case, the court dealt with the same issue which confronts us here, "the right of appeal which exists from a guilty plea." 373 So. 2d at 901. In that case, our supreme court ruled that "[o]nce a defendant enters a plea of guilty, the only points available for an appeal concern

actions which took place contemporaneously with the plea," and that "[a] plea of guilty cuts off any right to an appeal from court rulings that preceded the plea in the criminal process including independent claims relating to deprivations of constitutional rights that occur prior to the entry of the guilty plea." 373 So. 2d at 902.

The court then enumerated the "exclusive and limited class of issues which occur contemporaneously with the entry of [a guilty] plea that may be the proper subject of an appeal." These issues are: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. 373 So. 2d at 902. The supreme court concluded the *Robinson* case with an affirmation of the dismissal of an appeal by the district court of appeal, because no appropriate ground for appeal had been raised.

The majority's view makes no distinction between a defendant who was convicted after a trial and one who pled guilty. In its opinion, the majority states, "there should be no difference between a defendant's right to a belated appeal from a conviction following trial or after a plea, because, in either instance, if the appeal had been timely filed, an initial statement of arguable points would be irrelevant to the right to appeal." This view directly conflicts with *Robinson*.

The majority opinion obliterates the difference between the right to a trial and the right to an appeal. Every accused has the right to a trial, and that has been the law from this country's beginnings. Every accused has the right to have the voluntariness of a plea reviewed, and has had such right for a long time. However, the law also is that a defendant who pleads guilty does not have an unfettered right to appeal. Our rules require that before a guilty or nolo contendere plea is accepted, a judge in a Florida court must determine that the defendant understands that "if the defendant pleads guilty, or nolo contendere without express reservation of the right to appeal, *he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence*, but does not impair the right to review by appropriate collateral attack ..." (Emphasis supplied). Fla. R. Crim. P. 3.172(c)(4).

In *Thomas v. State*, 626 So. 2d 1093 (Fla. 1st DCA 1993), this court affirmed the denial of a rule 3.850 claim that defense counsel was ineffective for failing to file a timely notice of appeal. The court determined that Thomas entered nolo contendere pleas to offenses in four separate cases without reserving any issue for appellate review, and the motion failed to allege what issues Thomas proposed to raise on appeal, whether and how those issues would have been dispositive, or how Thomas was prejudiced by his counsel's failure to file a notice of appeal. In a similar vein, the Second District appears to be unwilling to grant an unlimited right to a belated appeal after entry of a guilty plea, based solely on a claim that defense counsel failed to file a timely notice of appeal. *See Zduniak v. State*, 620 So. 2d 1083 (Fla. 2d DCA 1993); *Bridges v. Dugger*, 518 So. 2d 298 (Fla. 2d DCA 1987). The third district is of a similar view. See *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997).

This court's rationale in *Thomas* is a proper application of the supreme court's pronouncement in *Robinson*. To demonstrate entitlement to a belated appeal, appellant in this case merely alleged that he requested his counsel to file an appeal on his behalf, but counsel refused to do so. Appellant entered an unconditional plea of guilty to two of the counts charged in a multi-count information, without reserving any issue for appeal. Further, the trial court in this case attached portions of the record which indicate the voluntariness of the plea, and the state's compliance with the plea bargain. Since appellant has not alleged, or otherwise indicated the existence of, any of the limited class of issues

which are the proper subject of an appeal after entry of a guilty plea, and the attached portions of the record do not suggest the existence of any such issue, the trial court's denial of post-conviction relief should be affirmed.

The majority says that the *Thomas* case is inconsistent with a substantial body of case law. Not so. In the broad sense, some of the cases cited may appear to conflict, because some just state without elaboration, that an attorney's failure to take an appeal when requested to do so gives rise to a belated appeal. As a general proposition that is true. Most appeals arise from contested proceedings. But an appeal after a plea is different. Not one of those cases says that an attorney, an officer of the court, is ineffective for not taking an appeal when his client has waived appeal by pleading guilty, and there is no *Robinson* issue. If the cases so stated, they would be in conflict with *Robinson.*

Yes, there are decisions issued even by this court which hold generally that a post-conviction motion makes a facially sufficient showing of entitlement to the relief requested, if the motion alleges that defense counsel failed to honor the defendant's timely request for an appeal. *See, e.g., Moore v. State,* 661 So. 2d 921, 922 (Fla. 1st DCA 1995); *Kiser v. State*, 649 So. 2d 333, 334 (Fla. 1st DCA 1995); *Owens v. State*, 643 So. 2d 105, 106 (Fla. 1st DCA 1994); *Clayton v. State*, 635 So. 2d 48 (Fla. 1st DCA 1994); *Hudson v. State*, 596 So. 2d 1213 (Fla. 1st DCA 1992); *Short v. State*, 596 So. 2d 502 (Fla. 1st DCA 1992). However, again, those cases do not address the effect that a plea of guilty has upon the taking of an appeal.

In the majority opinion, Judge Ervin relies upon two Florida Supreme Court cases, *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1969), *writ discharged*, 235 So. 2d 486 (Fla. 1970), and *State v. District Court of Appeal, First District,* 569 So. 2d 439 (Fla. 1990), and a United States Supreme Court case, *Rodriquez v. United States,* 395 U.S. 327, 89 S. Ct. 1715, 23 L. Ed. 340 (1969). None of those cases involve the situation before us where the defendant entered an unconditional plea of guilty and later, after the appeal time had run, alleged in a postconviction motion that his counsel had failed to take an appeal. Consequently, none of the three cases deal with the requirements set forth by the Florida Supreme Court in *Robinson* for taking an appeal when a plea of guilty is entered.

The majority also cites to *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963), and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), for the proposition that there should not be disparate treatment between indigent and wealthy defendants. Without question, this is a correct statement of the law. However, that has nothing to do with Trowell. Just like a wealthy man, Trowell had counsel to help him with his trial, and to take an appeal if grounds for an appeal existed. He does not have the right to take a groundless appeal. A millionaire has no greater rights than Trowell, no matter how many lawyers he or she can afford to hire.

Accordingly, the order on appeal should be affirmed. The affirmance should be without prejudice to appellant's right to file, pursuant to recently adopted Florida Rule of Appellate Procedure 9.140(j), a petition which states that one or more of the four issues set out in *Robinson* will be raised in the appeal. If he does that, he is entitled to an appeal. If he does not do that, he simply should not be allowed to appeal. Anything less is simply an unjustified waste of resources by an already over-extended and unnecessarily complex criminal justice system.

March 8, 1991, incident at the home of Jeannie Trowell's mother), two counts of aggravated assault, armed extortion, and shooting within an occupied dwelling.

Some eighteen months after Jeannie Trowell's tragic death, the assistant public defender assigned to represent Ronald Trowell filed Trowell's written Offer of Plea with the court wherein Trowell agreed to plead guilty to first degree murder and armed burglary in exchange for a life sentence with a twenty-five year minimum mandatory term and a concurrent thirty-year sentence with a three-year minimum mandatory term on the armed burglary charge. For its part, the State agreed to nolle prosse all remaining charges in the indictment. At a hearing on Trowell's Offer of Plea, the trial judge, after an extensive colloquy with Trowell, accepted his offer and, as bargained, adjudicated and sentenced him accordingly. The State also nolle prossed all remaining charges as it had agreed to do.

Sometime after appellant was transported to the Reception and Medical Center (Lake Butler) of the Department of Corrections, he filed a pro se notice of appeal which this court dismissed as untimely without prejudice to his seeking relief by way of a motion under Fla. R. Crim. P. 3.850. Trowell filed such a motion in which he alleged:

> 1. That his assistant public defender failed to call witnesses to testify in his behalf prior to entry of the plea even though he requested that counsel do so.
>
> 2. That he was under the influence of medication when he entered his plea and his counsel did not object to the entry of the plea under the circumstances, and
>
> 3. That he was entitled to a belated appeal because his attorney was ineffective for failing to file a notice of appeal at Trowell's request.

The trial court denied the requested relief finding that issue 1 was legally insufficient on its face, issue 2 was belied by the record, and finally that Trowell was not entitled to a belated appeal based upon the "uniqueness of the facts of this case ... ." From this order denying relief, Trowell, acting pro se, filed this appeal.

The majority opinion finds that the first two grounds for relief asserted in Trowell's 3.850 motion are legally insufficient to state a basis for relief. I am in complete accord with this conclusion and, to that extent, I concur in the majority opinion. My disagreement with the majority stems, in part, from what I believe to be its unwarranted refusal to accept that, for appeal purposes, there is a marked difference between a confession of guilt made in open court by one charged with a crime and a finding of guilt by jury after trial.

Section 924.06(3)[6], Florida Statutes (1991), provides that a defendant who pleads guilty

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[6]This section provided as follows: "A defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. Such a defendant shall obtain review by means of collateral attack." This section was amended in 1996, but in regard to a defendant's lack of a right to direct appeal, it remains substantively the same. Section 924.06(3) now provides the following: "A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue ... shall have no right to direct appeal." *See* § 924.051(4), Fla. Stat. (Supp. 1996); *Amendments to the Florida Rules of Appellate*

has no right to a direct appeal. In *Robinson v. State*, 373 So. 2d 898 (Fla. 1979), the Florida Supreme Court rejected the defendant's claim therein that this statute denied indigent defendants equal protection of the law "because the statute makes collateral attack on the guilty plea the initial means of review and thereby allegedly infringes on the right to a direct appeal with the assistance of counsel." *Id.* at 901. The court stated that "a plea of guilty cuts off any right to an appeal from court rulings that preceded the plea in the criminal process including independent claims relating to deprivations of constitutional rights that occur prior to the entry of the guilty plea" and flatly rejected the notion that a defendant is entitled to an automatic review from a guilty plea. *Id.* at 902.

The court emphasized that only four issues for appeal are available to a defendant who pleads guilty: (1) subject matter jurisdiction, (2) sentence illegality, (3) failure of the State to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. In fact, the third ground is actually included in the fourth ground, voluntariness of the plea. *See Tillman v. State*, 522 So. 2d 14, 16 (Fla. 1988) ("A defendant agrees to plead guilty based specifically on the agreement he or she has made with the State. Any breach of that agreement by the State renders the plea involuntary, as the plea is based on an agreement that was not fulfilled."). The Supreme Court further limited even these grounds for appeal when it found "that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea" and that a defendant must first present the issue of the voluntary and intelligent character of the plea "to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea." *Id.* at 902.

Thus, a defendant who pleads guilty to a criminal offense cannot appeal the voluntariness of his plea without first having filed a motion to withdraw the plea. *E.g., Smith v. State*, 465 So. 2d 573 (Fla. 1985); *Massey v. State*, 417 So. 2d 1162 (Fla. 1982). However, a defendant may file a motion for collateral relief pursuant to Fla. R. Crim. P. 3.850 that raises the issue of the voluntary and intelligent character of the guilty plea. *Robinson*, 373 So. 2d at 903.

Each of the issues that a defendant who pleads guilty may raise on direct appeal may be raised in a collateral motion pursuant to Fla. R. Crim. P. 3.850 or 3.800. A different situation obtains however in the case of a defendant appealing from a guilty verdict. It is well established in our law that a defendant appealing from a verdict of guilty after a jury trial is prohibited from filing a collateral attack on issues that could have been or were raised on direct appeal. *Parker v. State*, 611 So. 2d 1224, 1226 (Fla. 1992) ("We have repeatedly said that a motion under Rule 3.850 cannot be used for a second appeal to consider issues that either were raised in the initial appeal or could have been raised in that appeal.") Such a defendant's direct appeal, however, is not statutorily denied; nor has the judiciary, to my knowledge, pronounced "an exclusive and limited class of issues" that a defendant convicted by a jury may appeal as it did for appeals from guilty pleas in *Robinson.*

Despite these significant differences in regard to the rights of direct appeal and collateral relief based on whether they ensue from a guilty plea or a jury verdict, the majority equates the two based on the Supreme Court's ruling in *Rodriguez v. United States,* 395 U.S. 1715 (1969), which, in my view, provides no support for this position. The defendant in Rodriguez alleged that, following his trial, he told his counsel to file an appeal, but that counsel failed to comply. In rejecting the Ninth Circuit's requirement that petitioners such

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Procedure, 685 So. 2d 773 (Fla. 1996).

as Rodriguez seeking a belated appeal "disclose what errors they would raise on appeal and demonstrate the denial of an appeal had caused prejudice," the court stated that such petitioners "may not even be aware of error which occurred at trial" and

> thus would be deprived of their only chance to take an appeal even though they never had the assistance of counsel in preparing one. Like the approach rejected long ago in *Powell v. Alabama,* 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L. Ed. 2d 158 (1932), the Ninth Circuit's requirement makes an indigent defendant face 'the danger of conviction because he does not know how to establish his innocence.' *Rodriguez*, 395 U.S. at 330.

The Court's focus on the fact that Rodriguez was seeking an appeal following a jury trial and its comparison to the hardship facing a defendant reviewing a trial record in search of error without benefit of counsel has no applicability to the case in hand. First, a defendant appealing from a guilty plea does not have an entire trial record to review, nor is he or she allowed even to try to establish innocence. Such defendant is statutorily prohibited from raising issues that precede the guilty plea. Second, the Court in *Rodriguez* was concerned with a defendant's right to counsel in preparing a direct appeal. Such concern is inapposite in a case such as this one, where a defendant has no right to a direct appeal under the express provisions of Florida law. Neither *Anders v. California*, 386 U.S. 738 (1967), nor *Rodriguez*, both of which involved direct appeals following jury trials, purports to confer a right to appeal where none exists. It is illogical to put the cart before the horse by lamenting that the defendant in the instant case was deprived of his right to counsel on appeal when he had no right to appeal in the first place.

Unlike appeals from a guilty verdict, the issues an appellant may raise on direct appeal are "an exclusive and limited class of issues," each of which is equally cognizable in a claim for collateral relief. The trial court in the instant case required that appellant, in requesting a belated appeal following his guilty plea, allege an issue cognizable on direct appeal and demonstrate prejudice from not having it raised in a direct appeal. It seems to me that this requirement is no more restrictive for a defendant seeking a belated appeal following a guilty plea than is appropriate.

The case of *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1970), on which the majority relies to contradict such a requirement is distinguishable. First, according to the majority, the court in *Baggett* was concerned with a defendant's "right to a belated appeal from a criminal conviction." The facts of *Baggett* reinforce that Baggett sought to vindicate his right to appeal following his conviction by a jury. At the risk of being redundant, I reiterate that a defendant who has pled guilty cannot attack his conviction; he is prohibited by statute from doing so.

In addition, *Baggett*, in reliance on *Rodriguez*, rejected the position that entitlement to a belated appeal was dependent on a defendant's showing at least arguable reversible error. Both *Baggett* and *Rodriguez* concerned the plight of a defendant reviewing a trial record for reversible error when that defendant has an unfettered right to direct appeal. I agree that insisting on such a showing in a case where a defendant has such a right is error, but, as explained above, that is not the case we have before us. Finally, in this case, I believe that requiring appellant to identify a ground over which this court has jurisdiction following a guilty plea and which serves as a basis for an appeal should not be equated with requiring a defendant to state a meritorious claim.

The record before us does not reflect and Trowell does not contend that he requested his counsel to move to withdraw his plea then so recently entered. This is understandable,

perhaps, when one considers the particularly egregious circumstances surrounding Jeannie Trowell's murder and the fact that the plea negotiated by Trowell's attorney over some eighteen months may well have saved Trowell from the electric chair. Since Trowell did not move to withdraw his plea, any claim that his plea was not voluntarily and intelligently made becomes non-appealable. Under *Robinson*, he is thus left with only two direct appeal issues, sentence illegality and subject matter jurisdiction, which, under the instant facts, he neither can nor does argue.

Even more troubling than the majority's failure to distinguish between a guilty plea and a jury verdict is the premise on which the majority disposes of this case--that failure of counsel for an accused who has pleaded guilty under a negotiated disposition of a criminal offense to file a notice of appeal when directed to do so, in and of itself amounts to ineffective assistance of counsel entitling the guilty pleading defendant to a belated appeal. To such a proposition, one might reasonably ask, "If there is no entitlement to a direct appeal, how can counsel be labeled ineffective for not filing a notice of appeal as to issues which cannot, by law, be appealed?"

More to the point is the question the majority should have but does not address: If a guilty-pleading defendant is not entitled to a direct appeal, how can he be entitled to a belated direct appeal? One need go no further than *Robinson* for edification. Simply put, there is, in Florida, no right of review for one who pleads guilty absent "a specific assertion of wrong doing." Counsel for guilty-pleading defendants are admonished that "[a]ttorneys have a responsibility to ensure that our system of justice functions properly" and that "[t]here 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 non-appealable.*" *Robinson* 373 So. 2d at 903 (emphasis added).

In the record before us, Trowell asserts that when he told his attorney to file a notice of appeal from the judgment and sentence imposed upon him, his attorney told him in so many words that there was nothing he could appeal under the circumstances. His attorney spoke the truth, and I am not prepared to brand an attorney as ineffective because he declined to do something condemned by a unanimous Florida Supreme Court as improper. Consequently, I would affirm the trial court in all respects.

(WOLF, J., dissenting.) In *State v. Leroux*, 689 So. 2d 235 (Fla. 1996), the court took the first step in holding that there is no legal significance in the plea colloquy; the majority opinion in this case takes the second step. Under the majority's reasoning, we may as well strike the language contained in rule 3.172(c)(4), Florida Rules of Criminal Procedure, which requires the court to inquire whether the defendant understands that "he or she gives up the right to appeal" by entering a plea. I concur in all respects with the dissents of Judge Joanos and Judge Miner.

(KAHN, J., dissenting.) I agree completely with the legal analyses contained in the separate dissenting opinions of Judge Joanos and Judge Miner. I write separately because I do not believe that the majority's attempt to characterize the issue in terms of rich defendants versus poor defendants can go unchallenged. Slip Op. 6-8, 12-13. This case has nothing whatsoever to do with the financial means available to Mr. Trowell. The fact of the matter is that under our system in Florida, indigent defendants are often able to enjoy the benefit of a full-blown appeal in cases where their non-indigent counterparts might not

be so fortunate.[7] This is so because once a defendant qualifies for assistance from the public defender's office, he or she is entitled to that assistance through the trial and through one appeal as of right. The non-indigent defendant must make an economic choice at every stage along the proceedings concerning whether the cost of carrying the fight one step further is worth the potential benefit. This is particularly true of working men and women in our state who must make very difficult choices concerning expenditure of their hard-earned monies in situations where they or their children have legal problems. The average working person, forced to expend funds in such an instance, must defer, or forego entirely, other use of those funds, even where monies have been saved over years for a particular purpose, such as retirement or a child's college education. The indigent defendant faces no such choice in our system. This person is provided free and competent counsel by the government irrespective of the merits of the claims and defenses he or she wishes to assert either before the trial court or on direct appeal. In its use of the altogether inappropriate vernacular of class struggle, the majority opinion is an affront to working men and women who pay taxes and must, on a daily basis, make difficult choices about how to spend their hard- earned money.

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[7]In another appearance before this court, Mr. Trowell successfully obtained reversal of a permanent restraining order entered against him in response to a domestic violence petition filed by a former wife (not the one he murdered). *Trowell v. Meads,* 618 So. 2d 351 (Fla. 1st DCA 1993). In that case, Mr. Trowell had the assistance of free counsel provided by legal services. The hapless former wife, who saw her injunction dissolved, had no counsel.