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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
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CLERK, SUPREME COURT
By________
Chief Deputy Clerk

CASE NO. 92,435

STATE OF FLORIDA,

Petitioner,

vs.

JASON EDWARD THOMPSON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Jason Edward Thompson, was the defendant, and Petitioner, the State of Florida, was the prosecution, in the trial on criminal charges filed in the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Respondent was the appellant, and Petitioner was the appellee, in the appeal filed with the District Court of Appeal, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as "the State."

The following symbols will be used in this brief:

A = Appendix

R = Record on Appeal

T = Transcript

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged in an information with DUI manslaughter (R. 1-3). He petitioned the trial court to withdraw his plea of not guilty and to enter a plea of guilty to DUI manslaughter (R 36-38). The petition reflected that the plea was pursuant to an agreement between the State and Respondent, which the trial court had accepted. The agreement was that Respondent would be sentenced to twelve years incarceration followed by three years probation, but would be allowed to seek a youthful offender or other downward departure sentence.

At the change-of-plea conference, the court made it clear that although the plea allowed Respondent to ask for a lesser sentence, the only condition in the agreement was that the eventual sentence be capped at twelve years incarceration (T 5-6). The trial court accepted the negotiated plea of guilty and adjudged Respondent guilty accordingly (T 5). The trial court sentenced Respondent to twelve years incarceration followed by three years probation (R 41, 47).

Respondent appealed his sentence to the Fourth District Court of Appeal, arguing that the record did not reveal any reason for sentencing by a judge other than the one who presided at the plea hearing and that the sentencing court erred in not reducing to writing its decision to impose adult sanctions. On January 14, 1998, the Fourth District affirmed Respondent's sentence, finding

that neither alleged error was preserved for appeal (Appendix A 1).

In so holding, the Fourth District determined that the Criminal Appeal Reform Act of 1996 served only as a non-jurisdictional bar to review resulting in affirmance of non-fundamental sentencing error, rather than a jurisdictional bar resulting in dismissal (Appendix A 1). However, because the court reached this conclusion "with some hesitation" (Appendix A 2), it certified the following question as one of great public importance:

> UNDER SECTION 924.051(3), (4), FLORIDA STATUTES (SUPP. 1996) AND RULE OF APPELLATE PROCEDURE 9.140(b)(2)(B)(iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. Section 924.051, Florida Statutes (Supp. 1996) conditions an appeal on the preservation of issues in the trial court, except in the case of fundamental error. Where the preservation condition has not been met, the appellate court lacks subject matter jurisdiction over an appeal. Hence, the court must dismiss the case because it may not exceed the boundaries of its authority.

ARGUMENT

UNDER SECTION 924.051(3), (4), FLORIDA STATUTES (SUPP. 1996) AND RULE OF APPELLATE PROCEDURE 9.140(b)(2)(B)(iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?

The Fourth District noted that neither the statutes, rules, nor this Court's opinions definitively answer whether preservation of a sentencing error is a jurisdictional hurdle to appellate review (Appendix A 2). Although it held that the preservation requirements of the Criminal Appeals Reform Act of 1996 were not jurisdictional in nature, the Fourth District recognized reasons militating toward treating the requirements as jurisdictional (Appendix A 2-4). Hence, it certified the following question as one of great public importance:

> UNDER SECTION 924.051(3), (4), FLORIDA STATUTES (SUPP. 1996) AND RULE OF APPELLATE PROCEDURE 9.140(b)(2)(B)(iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?

Petitioner contends that this question should be answered in the affirmative.

Section 924.051, Florida Statutes (Supp. 1996), reads in part:

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

> would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.
>
> (4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.

(emphasis supplied).

Petitioner maintains that on the face of these subsections, it is clear that an appeal may not be taken from an unpreserved sentencing error unless it constitutes fundamental error. Indeed, section 924.051(2) provides that "[the} right to direct appeal" may only be implemented in accordance with the terms and "conditions" of the statute.

Section 924.051(8) states:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

(emphasis supplied).

The legislature, therefore, intended to have alleged error first considered at the trial level, rather than in the appellate court. See Smith v. City of St. Petersburg, 302 So. 2d 756, 757 (Fla. 1974)(a statute is to be construed to give effect to the

legislative purpose). To achieve this goal, it made preservation a "condition" of appeal.

In the Final Bill Analysis and Economic Impact Statement (Final Statff Analysis) regarding Chapter 924, the Committee recognized that the former sentencing error exception to the contemporaneous objection rule had been criticized as leading to unnecessary appellate review of nonfundamental error. In an apparent effort to have claims of sentencing error considered at the trial level and to give a defendant the opportunity to raise sentencing errors on appeal, this Court amended rule 3.800(b), Florida Rules of Criminal Procedure, to permit a defendant to preserve error by filing a motion to correct sentencing error after the rendition of the sentence. See Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So. 2d 1374 (Fla. 1996). If a defendant does not seize the opportunity to preserve a sentencing issue for review, however, he may not take an appeal.

The Final Staff Analysis states that the Criminal Appeal Reform Act of 1996 establishes "certain terms and conditions that must be met before taking direct and collateral appeals." (Appendix B 1). See State v. Pinder, 678 So. 2d 410, 414 (Fla. 4th DCA 1996)(legislative committee staff analyses are one touchstone of collective legislative will). With regard to section 924.051(3), Florida Statutes, this Court stated, "we believe the legislature

could reasonably condition the right to appeal upon the preservation of prejudicial error or the assertion of a fundamental error." Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 775 (Fla. 1996). (emphasis supplied). Accordingly, this Court amended rule 9.140(b)(2)(B)(iv), Florida Rules of Appellate Procedure, to allow a defendant who pleads guilty or nolo contendere to appeal only sentencing error "if preserved." Further, this court included rule 9.140(d) on sentencing error, which prohibits appeals alleging sentencing errors unless the alleged error was raised at the time of sentencing or in a 3.800(b) motion.

The potential appellate jurisdiction vested in courts by statutes must be invoked in particular cases in accordance with the statutes. See Dupree v. Elleman, 191 So. 65, 67 (Fla. 1939). Under section 924.051(3), then, where a nonfundamental error is not preserved, the subject matter jurisdiction of the appellate court cannot be invoked. See Hollywood v. Clark, 15 So. 175 (Fla. 1943)(subject matter jurisdiction means power of court to adjudicate class of cases to which particular case belongs). The court must take notice of the defect and enter an appropriate order. See West 132 Feet, etc. v. City of Orlando, 86 So. 197, 198-199 (Fla. 1920)(courts are bound to take notice of limits of their authority). See also Mendez v. Ortega , 134 So. 2d 247, 247 (Fla. 3d DCA 1961)(if want of jurisdiction appears at any stage,

court must enter appropriate order); Mapoles v. Wilson, 122 So. 2d 249, 251 (Fla. 1st DCA 1960)(court must consider matter of jurisdiction sua sponte when any doubt exists).

When a party questions the subject matter jurisdiction, the court must carefully examine the question and make a determination of its jurisdiction. See Swad v. Swad, 363 So. 2d 18, 18 (Fla. 3d DCA 1978). Such an order might not be realized as necessary until after full briefing. See, e.g., Ford Motor Co. V. Averill, 335 So. 2d 220 (Fla. 1st DCA 1978). However, a lack of jurisdiction is likely to be readily apparent from a review of the initial brief or any response to a motion to dismiss. See Calhoun v. New Hampshire Ins. Co., 354 So. 2d 882, 883(Fla. 1978)(subject matter jurisdiction may be tested by good faith allegations); West 132 Feet, 86 So. at 198 (court looked for jurisdictional conditions on face of record).

The Final Staff Analysis states, "absent fundamental error, an appeal may not be taken from a judgment or order of the trial court either by direct appeal or collateral review, unless the appeal alleges that a 'prejudicial error' was made and that the error was 'properly preserved.'" (Appendix B 1). (emphasis supplied). Thus, a party challenging a judgment has the burden of demonstrating prejudicial error. Section 924.051(7). This burden is similar to the one imposed on a defendant in establishing manifest injustice when he challenges a sentence entered on a guilty plea. See

Robinson v. State, 373 So. 2d 898, 903 (Fla. 1979).

Absent a specific assertion of wrong doing, a defendant is not entitled to automatic review of a guilty plea to make sure that he was aware of his rights, either. Id. at 902. Such an assertion must first be presented to the trial court before it will be heard on appeal. Id. at 903. Courts will dismiss appeals for lack of jurisdiction where a defendant has not first raised an attack on the voluntariness of his plea in the trial court. See, e.g., Robinson, 373 So. 2d at 903; Norman v. State, 634 So. 2d 212, 213 (Fla. 4th DCA 1994); Keith v. State, 582 So. 2d 1200 (Fla. 1st DCA 1991); Duhart v. State, 548 So. 2d 302 (Fla. 5th DCA (1989).

The State contends that section 924.051 also contemplates dismissal where nonfundamental sentencing error is not asserted in the trial court. In practice, courts need do no more review of a case than that required in an appeal from a plea. If an alleged error has not been preserved and does not amount to fundamental error, then the appellate court lacks subject matter jurisdiction over the issue and must dismiss it. This analysis is the exact analysis that has been employed by the courts in affirming cases. See, e.g., Carson v. State, 23 Fla. L. Weekly D 601 (Fla. 5th DCA Mar. 6, 1998); State v. Mae, 23 Fla. L. Weekly D364 (Fla. 4th DCA Jan. 23, 1998); Pryor v. State, 23 Fla. L. Weekly D282 (Fla. 3d DCA Jan. 21, 1998); Hardman v. State, 701 So. 2d 1278 (Fla. 5th DCA 1997); Tobin v. State, 701 So. 2d 914 (Fla. 4th DCA 1997); Cowan v.

State, 701 So. 2d 353 (Fla. 1st DCA 1997); Hunter v. State, 700 So. 2d 728 (Fla. 5th DCA 1997); Johnson v. State, 697 So. 2d 1245 (Fla. 1st DCA 1997); Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997); Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997).

Of course, dismissal avoids the unnecessary waste of judicial resources that is involved in decisions affirming cases only after full briefing and consideration. As noted in the Final Staff Analysis, "Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." (Appendix B 3)(quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1973)). See Neal v. State, 688 So. 2d 392, 396 (Fla. 1st DCA 1997)(court noted waste of time and expenditure associated with appeal taken from alleged sentencing error that was unpreserved). Hence, like in the case of unreserved error on a plea, dismissal of unpreserved sentencing errors achieves the goal of promoting "the efficient disposition of cases in appellate courts." See Final Staff Analysis (Appenidix B 5).

In Ray v. State, 403 So. 2d 956, 960 (Fla. 1981), this Court stressed that an accused, like the State, must comply with established rules of procedure designed "to assure both fairness and reliability in the ascertainment of guilt and innocence." It stated that the failure to object is a strong indication that in the trial court, the defendant did not regard the alleged error as harmful. 403 So. 2d at 960. Hence, this Court declared that the

doctrine of fundamental error should be applied only in rare cases, and noted that even constitutional error might not necessarily be fundamental. Id. at 961.

This reluctance to apply the doctrine is in part because of the notion that it is only fair to give the trial court the opportunity to cure any error while the trial is in process. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). To allow a defendant to assert a claim for the first time on appeal without being subject to dismissal would serve only to produce "the delay and systemic cost" which result from invoking the appellate structure "for the application of a legal principle which was known and unambiguous at the time of trial." Id. Clearly, reduction of unnecessary and wasteful appeals was a goal of the legislature in enacting sections 924.051(3) and (4), for the Final Staff Analysis pointed out that the number of appeals exceeded "the most efficient intermediate appellate court operations." (Appendix B 4).

In this case, the Fourth District noted at the onset of its opinion that Respondent had not preserved the alleged error for review, and indicated that the claimed error was not fundamental. Having done this, the court should have recognized its lack of authority to hear the appeal and should have dismissed the case.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State of Florida respectfully submits that the certified question should be answered in the AFFIRMATIVE, and the decision of the district court should be QUASHED and the appeal be DISMISSED.

Respectfully submitted,

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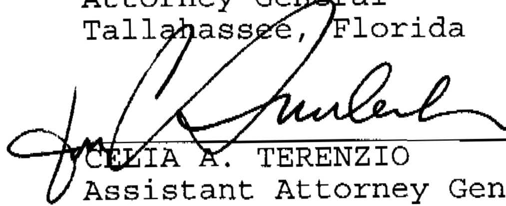

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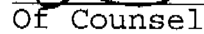
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: PAUL PETILLO, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this  day of March, 1998.

Of Counsel

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STATE OF FLORIDA,

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APPENDIX A

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1998

JASON EDWAURD THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-0164

Opinion filed January 14, 1998

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Joe A. Wild, Judge; L.T. Case No. 96-967 CF.

Richard L. Jorandby, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant.

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STEVENSON, J.

Appellant pled guilty to DUI manslaughter and was sentenced to twelve years incarceration to be followed by three years probation. He challenges his sentence on the grounds that the trial court failed to reduce to writing its decision to impose adult sanctions, and that he was sentenced by a judge other than the one who accepted his guilty plea. However, we find that neither error was preserved for appeal as required by recent amendments to the Florida Statutes and the Rules of Appellate Procedure; appellant brought neither alleged error to the attention of the trial court via a timely objection or a motion to correct sentencing errors. *See* Fla. R. App. P. 9.140(b)(2)(B)(iv), (d). We write to discuss the proper disposition of cases such as this. Specifically, we address whether the failure to preserve a non-fundamental sentencing error for appeal following a guilty plea is a jurisdictional impediment to an appeal that should result in a dismissal of the appeal, or a non-jurisdictional bar to review that should result in an affirmance. For the reasons that follow, we conclude that such cases are properly disposed of by an affirmance.

Guilty pleas and the Criminal Appeal Reform Act of 1996

Prior to the recent amendments to the Florida Statutes and the Rules of Appellate and Criminal Procedure, sentencing errors were exceptions to the "contemporaneous objection rule," and could be appealed despite the defendant's failure to raise them at trial. *See State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984). However, effective July 1, 1996, a defendant may appeal a non-fundamental sentencing error only if he first raised the alleged error in the trial court:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment *or sentence* may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

§ 924.051(3), Fla. Stat. (Supp. 1996)(emphasis added). A sentencing error is preserved by objecting at the time of sentencing or by filing a 3.800(b) motion within thirty days after the rendition of the sentence. *See* Fla. R. App. P. 9.140(d); Fla. R. Crim. P. 3.800(b).

The statutory amendments specifically address the appealability of a sentence which follows a plea of guilty or nolo contendere:

> If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a

legally dispositive issue, the defendant may not appeal the judgment or sentence.

§ 924.051(4), Fla. Stat. (Supp. 1996).

Although the plain language of this section would require the defendant to reserve the right to appeal a post-plea sentence, the supreme court has interpreted this provision as permitting appellate review of a sentencing error without a reservation of the right to appeal so long as the issue is properly preserved for appeal. *See Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773, 775 (Fla. 1996). Accordingly, the Rules of Appellate Procedure have been amended as follows:

> A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) *A defendant who pleads guilty or nolo contendere may otherwise directly appeal only*
>
> (i) the lower tribunal's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> *(iv) a sentencing error, if preserved*; or
>
> (v) as otherwise provided by law.

Fla. R. App. P. 9.140(b)(2)(emphasis added).

Appellate jurisdiction

Neither the Statutes, the Rules, nor the supreme court analysis definitively answer whether the preservation of a sentencing error is a *jurisdictional* hurdle to appellate review. However, in *Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA), *rev. denied*, 697 So. 2d 512 (Fla. 1997), the First District squarely addressed the issue and concluded:

> We do not perceive chapter 924, as recently amended, as intended to limit appellate subject matter jurisdiction in direct criminal appeals. Rather it seems to us that the recent amendments were intended merely to make clear that, except with regard to "fundamental" error, all claimed error must first be presented to and ruled upon by the trial court. If it is not, the issue will not be deemed preserved for appellate review.

Id. at 1008.

In reaching this conclusion, *Stone* first points out that "[j]urisdiction over the subject matter refers to a court's power to hear and determine a controversy. Generally, it is tested by the good faith allegations, initially pled, and is not dependant upon the ultimate disposition of the lawsuit." *Id.* at 1007 (quoting *Calhoun v. New Hampshire Ins. Co.*, 354 So. 2d 882, 883 (Fla. 1978)). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which a particular controversy belongs." *Id.* (quoting *Lusker v. Guardianship of Lusker*, 434 So. 2d 951, 953 (Fla. 2d DCA 1983)). *Stone* then determines that, in contrast to these definitions of jurisdiction, the rule that all non-fundamental errors must be raised in the trial court is merely "a rule, created by the courts to promote fairness and judicial economy." *Id.* (citing *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978)).

While we ultimately reach the same conclusion as *Stone*, we do so with some hesitation. It is true that our supreme court, in *Castor*, explained that the contemporaneous objection rule is meant to further policies of fairness and judicial economy. *Accord Yee v. City of Escondido*, 503 U.S. 519, 533 (1992)(explaining that the contemporaneous objection rule in the federal realm is not a jurisdictional prerequisite to an appeal, but a "prudential" requirement). However, *Castor* was written before the legislature codified the contemporaneous objection rule in Chapter 924 -- and expanded it in the process to include sentencing errors. The legislative intent behind Chapter 924 may not be coextensive with the policies underlying the traditional contemporaneous objection rule articulated in *Castor*.

The legislative history of Chapter 924 provides mixed signals with respect to the issue in this case. The "substantive analysis" by the House Committee

on Criminal Justice initially provides a tentative indication that the statutory amendments were designed to implicate jurisdiction, as the analysis begins with a brief discussion of appellate subject matter jurisdiction:

> Appellate jurisdiction is the power of a court to review and correct material errors of proceedings in a lower court. The appellate jurisdiction of courts in Florida is defined by the Constitution and the Florida Rules of Appellate Procedure.

H.R. Comm. on Criminal Justice, CS/HB 211 (1996) Final Bill Analysis & Economic Impact Statement 2 (*hereinafter* "Final Staff Analysis" or "Analysis"). However, this is the extent of the Committee's discussion on jurisdiction; the Analysis does not return to the topic of subject matter jurisdiction to confirm whether Chapter 924 was meant to impose jurisdictional requirements.

The Analysis goes on to describe the purposes behind the traditional contemporaneous objection rule and suggests that the statutory amendments are intended to merely codify the traditional rule:

> Florida courts have traditionally held that questions not timely raised and ruled upon in the trial court will not be considered on appeal. This policy, often cited as the "contemporaneous objection rule," is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and to correct errors accordingly. The primary purpose of the rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. "Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually."
>
> . . .
>
> *In an effort to enforce the contemporaneous objection rule*, the bill expressly prohibits a court from reversing a judgment or sentence on appeal, unless the court determines that a prejudicial error occurred that was properly preserved in the trial court, but allows courts to reverse on the basis of "fundamental errors," despite the failure of defense counsel to object in the trial court.

Final Staff Analysis at 3, 5 (emphasis added)(internal citations omitted).

Militating toward treating sentence-preservation as jurisdictional is the Committee's position that "*[t]he appellate jurisdiction of courts in Florida is defined by* the Constitution and *the Florida Rules of Appellate Procedure*." *See* Final Staff Analysis at 2 (emphasis added). Thus, it appears to be the Committee's understanding that the amended Rule 9.140(b)(2)(B)(iv) -- which allows appellate review of a sentence only "if preserved" -- would impose a jurisdictional hurdle to the appeal.

Further militating toward treating sentence-preservation as jurisdictional is the body of Florida case law treating similar preservation requirements as jurisdictional. For example, just as a motion to correct sentencing errors is now necessary to preserve that issue for appeal, a prerequisite to appealing an allegedly involuntary plea is the filing of a motion to withdraw the plea in the trial court. *See* Fla. R. App. P. 9.140(b)(2)(B)(iii); *Robinson v. State*, 373 So. 2d 808, 902 (Fla. 1979). This court has held that the filing of a motion to withdraw a plea is a *jurisdictional* prerequisite to appealing the plea's involuntariness. *See Walker v. State*, 565 So. 2d 873, 873-74 (Fla. 4th DCA 1990)("*For this court to have appellate jurisdiction*, appellant had to move to withdraw [his] plea so the trial court had the opportunity to rule on his allegation that the . . . plea was involuntary.")(emphasis added); *Davis v. State*, 652 So. 2d 503 (Fla. 4th DCA 1995)(dismissing appeal for failure to file a motion to withdraw the plea in the trial court); *accord Keith v. State*, 582 So. 2d 1200 (Fla. 1st DCA 1991);[1]

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[1]However, a concurrence in *Keith* states:

> I do not read the *Robinson* decision as approving the dismissal of the appeal because the district court of appeal lacked jurisdiction to entertain the appeal in the sense that it lacked power to act and correct the errors raised; rather, the opinion is based on the appellant's failure to properly raise and preserve the issue for appellate review by first presenting the asserted error to the trial court for determination. Without such objection and motion being made in the trial court and obtaining a ruling thereon, the appeal presented no appropriate order for appellate review and was thus frivolous. To the extent that the

Duhart v. State, 548 So. 2d 302 (Fla. 5th DCA 1989). Where appellate review of the withdrawal of a plea requires that the issue be presented first to the trial court *as a matter of appellate jurisdiction*, there may not be a sound reason to treat the preservation of a post-plea sentencing error otherwise.

Lastly, we express some discomfort with the argument advanced in *Stone* that a legislative limitation on appellate jurisdiction would "interfere with what the supreme court has concluded is a defendant's constitutional right to appeal." 688 So. 2d at 1008. It is true that the supreme court recently determined that criminal defendants have a state constitutional right to appeal. *See Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773, 774 (Fla. 1996). However, the court continued:

> [W]e believe 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 . . . . 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*.

Id. (emphasis added). Thus, the supreme court appears to be of the view that the legislature could limit appellate jurisdiction over sentencing errors to those errors which were properly preserved.

Despite these concerns, our review of Chapter 924, the amended Rules, and the Final Staff Analysis does not reveal to us any clear legislative intent to restrict appellate jurisdiction. Thus, we agree with the First District's holding in *Stone* that the preservation requirements of Chapter 924 are not jurisdictional. We, therefore, affirm the sentence imposed by the trial court in this case. However, we certify the following question to the supreme court as one of great public importance:

> UNDER SECTION 924.051(3), (4), FLORIDA STATUTES (SUPP. 1996) AND RULE OF APPELLATE PROCEDURE 9.140(b)(2)(B)(iv), IS THE FAILURE TO PRESERVE AN ALLEGED SENTENCING ERROR FOR APPEAL FOLLOWING A GUILTY PLEA A JURISDICTIONAL IMPEDIMENT TO AN APPEAL WHICH SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NON-JURISDICTIONAL BAR TO REVIEW WHICH SHOULD RESULT IN AN AFFIRMANCE?

STONE, C.J., and DELL, J., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

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majority opinion in this case and the cases cited therein suggest a complete lack of jurisdiction compels the dismissal of the appeal, I respectfully suggest that they are inaccurate.

582 So. 2d at 1202 (Shivers, C.J., concurring).

APPENDIX B

STORAGE NAME: h0211s1z.cj
DATE: November 4, 1996

AS PASSED BY THE LEGISLATURE
CHAPTER #: 96-248, Laws of Florida

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIMINAL JUSTICE
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 211, 2nd Engrossed

RELATING TO: Criminal Appeals and Collateral Review of Criminal Proceedings

SPONSOR(S): Committee on Criminal Justice, Representative D. Saunders and others

STATUTE(S) AFFECTED: Amends: ss. 924.05, 924.06, 924.07, and 924.37, F.S.
Creates: ss. 924.051 and 924.066, F.S.

COMPANION BILL(S): CS/SB 2, 1st Eng. (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIMINAL JUSTICE YEAS 14 NAYS 6
(2) APPROPRIATIONS (W/D)
(3)
(4)
(5)

I. SUMMARY:

CS/HB 211 creates the "Criminal Appeal Reform Act of 1996" to establish certain terms and conditions that must be met before taking direct and collateral appeals. Specifically, absent fundamental error, an appeal may not be taken from a judgment or order of the trial court, either by direct appeal or collateral review, unless the appeal alleges that a "prejudicial error" was made and that the error was "properly preserved." In addition, a court must find that an error was both prejudicial and properly preserved before the court can reverse a judgment or sentence on appeal. The bill places the burden on the appellant to show that the error was "prejudicial."

In addition, the bill requires a defendant who pleads guilty, or who pleads nolo contendere and fails to reserve the right to appeal a legally dispositive issue, to demonstrate to the appellate court, on or before filing the initial brief or petition, that he or she has a right to appeal under s. 924.06 or s. 924.07, F.S.

In an effort to streamline the collateral appeals process, the bill codifies the present rule of the courts that collateral relief is not available on grounds that were or could have been raised at trial, and if properly preserved, on direct appeal of the conviction and sentence. Further, the bill prohibits a petition or motion for collateral or other postconviction relief from being considered if it is filed (i) more than 2 years after the judgment and sentence became final in a noncapital case, or (ii) more than 1 year after the judgment and sentence became final in a capital case in which a death sentence was imposed, unless certain circumstances are alleged. In addition, the bill provides that a person in a noncapital case has no right to a court-appointed lawyer in seeking collateral relief.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Appellate jurisdiction is the power of a court to review and correct material errors of proceedings in a lower court. The appellate jurisdiction of courts in Florida is defined by the Constitution and the Florida Rules of Appellate Procedure. Pursuant to Article V of the Florida Constitution, the Florida Supreme Court has mandatory jurisdiction to hear appeals from final judgments of trial courts imposing the death penalty and decisions of district courts of appeal that declare as invalid a state or federal statute or a provision of the State Constitution. In addition, the Florida Supreme Court has discretionary jurisdiction to hear decisions of district courts of appeal that construe a provision of the state or federal Constitution or that expressly and directly conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law. Article V, Section 3(b), Fla. Const.; See also Fla. R. App. P. 9.030 (a).

The district courts of appeal have jurisdiction of appeals from final judgments in all other cases in which the circuit court has original jurisdiction and from all other final judgments except those that may be appealed directly to the Supreme Court or a circuit court. Article V, Section 4, Fla. Const.; Fla. R. App. P. 9.030 (b). The circuit courts have jurisdiction of appeals from final judgments in misdemeanor cases tried by county courts. See Article V, Section 5, Fla. Const.; Fla. R. App. P. 9.030 (c); and s. 924.08, F.S.

Neither the Florida Constitution nor the United States Constitution guarantees a right to appeal, except in some capital cases. The right of defendants to appeal lies solely within the prerogative of the Legislature. Ross v. Moffitt, 417 U.S. 600, 611 (1974); State v. Creighton, 469 So.2d 735, 741 (Fla. 1985); In chapter 924, F.S., the Legislature has provided both the state and defendants the right to appeal certain orders and judgments in criminal cases. Pursuant to s. 924.07, F.S., and Fla. R. App. P. 9.140(c)(1), the state may appeal:

- An order dismissing an indictment or information.
- An order granting a new trial.
- An order discharging a defendant pursuant to Fla.R.Crim.P. 3.191 (speedy trial).
- A ruling on a question of law when the defendant is convicted and appeals from the judgment.
- An illegal sentence.
- A judgment discharging a prisoner on habeas corpus.
- A sentence imposed outside the range recommended by the sentencing guidelines.
- An order or ruling suppressing before trial confessions or evidence obtained by search and seizure.

These provisions list the only matters that may be appealed by the state, but they are "not intended to affect the jurisdiction of the supreme court to entertain by certiorari interlocutory appeals governed by Rule 9.100, or the jurisdiction of circuit courts to entertain interlocutory appeals of pretrial orders from the county courts." Committee Notes to Fla. R. App. P. 9.140. See also State v. Smith, 260 So.2d 489 (Fla. 1972).

Pursuant to s. 924.06, F.S., and Fla. R. App. P. 9.140(b)(1), defendants may appeal:

- A final judgment of conviction when probation has not been granted.
- An order granting or revoking probation.

- A sentence on the ground that it is illegal.
- A sentence imposed outside the range recommended by the sentencing guidelines.

In addition to granting defendants certain rights of appeal, s. 924.06, F.S., also precludes defendants from appealing from a judgment entered upon a plea of guilty, and, unless the right of appeal is expressly reserved from a prior order of the trial court, from judgments entered upon a plea of nolo contendere. s. 942.06 (3), F.S., and Fla. R. App. P. 9.140 (b)(1). See also Robinson v. State, 373 So.2d 898 (1979). In Robinson, the Florida Supreme Court interpreted s. 924.06(3), F.S., to apply only to pretrial rulings and not to matters that may occur contemporaneously with the plea of guilty or plea of nolo contendere. Thus, as interpreted by Robinson, the statute precludes appeal from matters that took place *before the defendant agreed to a plea*, but does not preclude the right of appeal from conduct that would invalidate the plea itself. Under Robinson, a defendant who has pled guilty may *only* appeal issues concerning:

- Subject matter jurisdiction.
- The illegality of the sentence.
- The failure of the government to abide by the plea agreement, and
- The voluntary and intelligent character of the plea.

Id. at 902. In addition, it has been held that a defendant who has pled guilty is not prohibited from appealing his or her sentence on the basis that the trial court erred in departing from sentencing guidelines. Knowlton v. State 466 So.2d 278 (4th DCA 1985).

As provided in s. 924.06 (3), F.S., a defendant pleading guilty or nolo contendere may seek postconviction or "collateral" relief in the state courts on issues that occur either before or after the plea. Collateral review is a second round of appellate proceedings that may be initiated after a court has made a final ruling on the direct appeal. Collateral proceedings are governed largely by Fla. R. Crim. P. 3.850, which allows a prisoner in custody to file a motion to vacate, set aside, or correct his or her sentence on the grounds that (i) the judgment was entered or the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida; (ii) the court was without jurisdiction to enter the judgment or impose the sentence; (iii) the sentence was in excess of the maximum authorized by law; (iv) the plea was given involuntarily; or (v) the judgment or sentence is otherwise subject to collateral attack. R. 3.850 does not allow collateral relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

Preservation of Issues for Appeal

Florida courts have traditionally held that questions not timely raised and ruled upon in the trial court will not be considered on appeal. See McIntosh v. State, 211 So.2d 256 (3rd DCA 1968); Castor v. State, 365 So.2d 701 (Fla. 1978); Randi v. State, 182 So.2d 632 (1st DCA 1966). This policy, often cited as the "contemporaneous objection rule," is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and to correct errors accordingly. State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984). The primary purpose of the rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. Id. "Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." Castor v. State, 365 So.2d 701, 703 (Fla. 1973).

The contemporaneous objection rule has not been strictly adhered to and has been expanded through court decisions. For example, "fundamental errors," those errors that involve an allegedly unconstitutional statute or "reach down into the very legality of the trial itself," can be considered on appeal without an objection in the trial court. State v. Smith, 240 So.2d 807 (1970). In addition, the Florida Supreme Court has held that the contemporaneous objection rule does not apply to the sentencing process because any sentencing error can be corrected by simply remanding the case to the trial court. Rhoden, 448 So.2d 1013 at 1016. The Court has applied the latter exception to allow the appeal of illegal sentences despite the failure of defense counsel to object at trial. Id. See also Walker v. State, 462 So.2d 452, 454 (Fla. 1985). This exception to the contemporaneous objection rule has been criticized as having the potential to lead to "unnecessary and undesirable appellate review of nonfundamental, even harmless, error to the denigration of the trial court process." Id. at 455 (Shaw, J., concurring in result only).

The "Harmless Error" Test

In determining whether or not to reverse a conviction on appeal, the appellate courts look to whether the error asserted affected the outcome of the trial. Judgments are not reversible unless the appellate court is of the opinion that the error "injuriously affected substantial rights of the appellant." Small v. State, 630 So.2d 1087 (1994); s. 942.33, F.S. As otherwise stated in s. 59.041, F.S., a judgment cannot be set aside or reversed, or new trial granted, unless the appellate court finds that the error has resulted in "a miscarriage of justice." This test, as adopted by both the Florida Supreme Court and the United States Supreme Court, constitutionally requires that the burden be placed on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the error was "harmless," i.e. that there is no reasonable possibility that the error complained of contributed to conviction. State v. DeGuilio, 491 So.2d 1129, 1135 (Fla. 1986); Chapman v. California, 386 U.S. 18, 24 (1967). Using this test, courts have held that even constitutional error may be treated as "harmless" where evidence of guilt is overwhelming. See Palmes v. State 3397 So.2d 648 (1981). The harmless error rule is said to conserve judicial labor by holding harmless those errors which, in the context of the case, do not impair the due process right to a fair trial, and, thus, do not require a new trial. Deguilio at 1135.

Findings of the Committee on Reducing Appeals

The Judicial Council's Committee on Reducing Appeals met in 1994 to review the criminal and civil appellate process. The committee's study of caseloads in the Florida district courts of appeal revealed that Florida was second in the nation (behind California) in overall appeals, first in the nation in mandatory appeals, and third in the nation for total number of appeals per 100,000 population. According to the Office of the State Courts Administrator, the desired goal for the most efficient intermediate appellate court operations is 250 case filings per year for each appellate judge. All five district courts of appeal currently exceed this goal, and the high number of filings is part of a continuing growth trend.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 211 creates the "Criminal Appeal Reform Act of 1996." The bill amends s. 924.05, F.S., to clarify that only *direct* appeals as provided by chapter 924, not collateral appeals, are a matter of right.

Terms and Conditions for Exercising the Right to Appeal

In an effort to promote the efficient disposition of cases in appellate courts, the bill creates s. 924.051, F.S., to establish certain terms and conditions that must be met before taking direct or collateral appeals. Specifically, absent fundamental error, an appeal may not be taken from a judgment or order of the trial court, either by direct appeal or collateral review, unless: "prejudicial error" is alleged, and the error was "properly preserved."

If the error alleged was not properly preserved, the error must be fundamental in order for the appeal to be taken. "Prejudicial error" is defined by the bill as "an error in the trial court that harmfully affected the judgment or sentence." In addition, "preserved" is defined to mean that the issue being raised on appeal "was timely raised before, and ruled on by, the trial court, and . . .was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."

In an effort to enforce the contemporaneous objection rule, the bill expressly prohibits a court from reversing a judgment or sentence on appeal, unless the court determines that a prejudicial error occurred that was properly preserved in the trial court, but allows courts to reverse on the basis of "fundamental errors," despite the failure of defense counsel to object in the trial court.

Under the bill, a judgment of the trial court is presumed to be correct. Subsection (8) of created s. 924.051, F.S., places the burden of demonstrating that a prejudicial error occurred on the party challenging the judgment or order. Thus, a defendant who appeals his or her conviction or sentence will have the burden of proving that the error alleged is "prejudicial." Similarly, if the state appeals, the state will have the burden of proving "prejudicial error." As stated by the bill, no conviction or sentence may be reversed unless the appellate court expressly finds that a prejudicial error occurred in the trial court.

Appeals by Defendants Who Plead Guilty or Nolo Contendere

The bill creates s. 924.051(4), F.S., to prohibit a defendant who pleads guilty from appealing his or her judgment or sentence if the sentence imposed is legal. The bill basically codifies the Florida Supreme Court's holding in Robinson supra, which interpreted current s. 924.06 (3), F.S., to preclude defendants who have pled guilty, or nolo contendere without reservation of the right to appeal, from appealing only those issues that took place *before the defendant agreed to a plea*, but which allowed appeals on issues arising after the plea, i.e. sentencing. The prohibition of created s. 924.05 (4), F.S., also applies to defendants who plead nolo contendere and who fail to expressly reserve the right to appeal a "legally dispositive" issue. The Supreme Court has stated that a "legally dispositive" issue includes a motion testing the sufficiency of a charging document, the constitutionality of a controlling statute, and the suppression of contraband for which a defendant is charged with possession. Brown v. State, 376 So.2d 382, 385 (Fla. 1979). .

Subsection (5) of created s. 924.051, F.S., requires a party who appeals from a judgment or sentence entered after a defendant pleads guilty or nolo contendere to demonstrate to the appellate court, *on or before filing the initial brief or petition*, that the party has a right to appeal under s. 924.06, F.S., or s. 924.07, F.S. This requirement, which appears to apply to both the state and defendants in cases where the defendant has plead guilty or nolo contendere, creates a 2-step process whereby a brief is initially filed to prove right to appeal, followed by a second brief arguing the merits of the appeal.

Collateral Appeals

Subsection (6) of created s. 924.051, F.S., codifies the present rule of the courts that collateral relief is not available on grounds that were or could have been raised at trial, and if properly preserved, on direct appeal of the conviction and sentence. See Fla. R. Crim. P. 3.850.

Further, subsection (7) of created s. 924.051, F.S., prohibits a petition or motion for collateral or other postconviction relief from being considered if it is filed (i) more than 2 years after the judgment and sentence became final in a noncapital case, or (ii) more than 1 year after the judgment and sentence became final in a capital case in which a death sentence was imposed, unless it alleges that:

- The facts upon which the claim is based were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.
- The fundamental constitutional right asserted was not established within the time established in this section for review and has been held to apply retroactively, or
- The sentence imposed was illegal because it either exceeded the maximum or fell below the minimum prescribed by law.

This subsection generally restates the time limitations and exceptions set forth in R. 3.850.

Subsection (8) of created s. 924.051, F.S., re-emphasizes that a conviction or sentence on collateral review may not be reversed absent a finding that prejudicial error occurred in the trial court and places the burden of proving prejudicial error on the party challenging the judgment or order.

The bill creates s. 924.066, F.S., to permit a prisoner in custody to seek collateral relief on the grounds that the judgment of conviction or sentence was imposed in violation of the Constitution or law of the United States or the State of Florida. Either the state or the prisoner may appeal the ruling of the trial court that collaterally reviewed the case to the next higher state court. In addition, the State may obtain review of any court ruling that fails to enforce a procedural bar.

Further, subsection (3) of created s. 924.066, F.S., provides that a person in a noncapital case has no right to a court-appointed lawyer in seeking collateral relief.

Miscellaneous

Section 924.37, F.S., is amended to provide that a cross-appeal by the state is not jurisdictional. When the state cross-appeals from a ruling on a question of law adverse

to the state, the appellate court must decide the question *if it is reasonably capable of repetition in any proceeding.*

In newly created s. 924.051(9), F.S., there is a statement of legislative intent that all terms, conditions, and procedural bars to direct appeal and collateral review are to be strictly enforced to ensure that claimed errors are raised and resolved at the first opportunity.

The bill creates s. 924.051 (10) to prohibit the use of funds, resources, or employees of this state or its political subdivisions from being used in appellate or collateral proceedings unless the use is constitutional or statutorily mandated.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 provides that this act may be cited as the "Criminal Appeal Reform Act of 1996."

Section 2 directs that the title of chapter 924, F.S., be changed from "APPEALS" to "CRIMINAL APPEALS AND COLLATERAL REVIEW."

Section 3 amends s. 924.05, F.S., to clarify that only direct appeals as provided in chapter 924 are a matter of right.

Section 4 creates s. 924.051, F.S., to provide for the terms and conditions of appeals and collateral review, as described above.

Section 5 amends s. 924.06, F.S., to clarify existing language and to emphasize that a defendant who pleads guilty, or nolo contendere with no express reservation of the right to appeal, may not appeal the conviction or sentence unless the issue on appeal was properly preserved, or if not properly preserved, would constitute fundamental error.

Section 6 creates s. 924.066, F.S., to set forth the terms and conditions under which collateral relief may be sought, as described above.

Section 7 amends s. 924.07, F.S., to clarify existing language.

Section 8 amends s. 924.37, F.S., to provide circumstances under which the state may obtain a ruling on cross-appeal, as described above.

Section 9 provides that the act takes effect on July 1, 1996.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate.

2. Recurring Effects:

   Indeterminate. See *Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth:

   Indeterminate.

4. Total Revenues and Expenditures:

   Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

   Indeterminate.

2. Recurring Effects:

   Indeterminate. See *Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth:

   Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

   Defendants convicted of non-capital crimes would not have access to a publicly financed lawyer to pursue collateral relief.

2. Direct Private Sector Benefits:

   None anticipated.

3. Effects on Competition, Private Enterprise and Employment Markets:

   None anticipated.

D. FISCAL COMMENTS:

According to the State Courts Administrator, CS/HB 211 has elements of a two-step process that may have an indeterminate fiscal impact on the court system. In addition, the bill will likely cause a temporary increase in appeals due to increased litigation over the revised procedures.

The Florida Public Defenders Association reports that the bill would increase expense to the state and counties. Specifically, public defenders estimate that they will need 17 additional positions, the annual fiscal impact of which would be approximately $790,000

per year. Public defenders have stated that if the additional positions are not appropriated, further delays will occur in the submission of briefs by public defender offices. In addition, because public defender offices may have to conflict out of appeals due to overload, private counsel may need to be appointed at the expense of the counties.

According to the Office of the Attorney General, passage of this CS will have a negligible fiscal impact for fiscal year 1996-97 because of the time it will take for the proposed changes to take effect. However, beginning in fiscal year 1997-98, the Attorney General's office estimates that the CS would result in a reduction of the overall workload of the Attorney General's Criminal Division by approximately 5 percent and, as a result, will save the State $375,000 in personnel costs annually. The Attorney General's office further estimates that similar savings would occur in the five public defender offices that handle indigent criminal appeals statewide. Additional savings will be realized in future fiscal years as the effects of this bill are consolidated into routine criminal practice.

The Office of the Attorney General disputes any statement to the effect that the CS will increase the number of criminal appeals or their cost. Any challenges to procedural changes in the PCS will be raised in the course of existing criminal appeals.

IV. <u>CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION</u>:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may require counties or municipalities to spend funds or to take an action requiring the expenditure of funds (see *Fiscal Comments*). However, the bill is exempt from the requirements of Article VII, Section 18, of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. <u>COMMENTS</u>:

CS/HB 211 prohibits a court from reversing a judgment or sentence unless the defendant can prove that a "prejudicial error" occurred. In placing the burden on the defendant to prove that the *error* was "prejudicial," the bill would appear to conflict with the constitutionally required "harmless error" test, which places on the *state*, as beneficiary of the error, the burden of demonstrating beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the conviction. <u>See</u> <u>DeGuilio</u> <u>supra</u> 491 So.2d 1129 at 1135 ; <u>Chapman</u> <u>supra</u> 386 U.S. 18 at 24. Consequently, this provision of the bill may be held unconstitutional.

CS/HB 211 also prohibits a defendant who has pled guilty or nolo contendere from appealing sentencing errors that are not "fundamental," unless they are properly preserved in the trial court. This provision of the bill appears to conflict with the Florida Supreme Court's holding that a defendant may appeal a sentencing error, despite the failure to object at the trial court, because the contemporaneous objection rule does not apply to the sentencing process. Rhoden supra 448 So.2d 1013 at 1016; Walker supra 462 So.2d 452 at 454.

The bill provides that a person in a noncapital case who is seeking collateral review has no right to a court-appointed lawyer. This provision of the bill contradicts the Florida Supreme Court's statement that although there is no absolute right to counsel in post-conviction relief proceedings, "the Court before which the proceedings are pending must determine the need for counsel and resolve any doubts in favor of the appointment of counsel for the defendant." Graham v. State, 372 So.2d 1363 (Fla. 1979). Under the Court's holding, there may be times in which a defendant is constitutionally required to have assistance of counsel in a post-conviction proceeding.

According to the Florida Public Defenders Coordination Office, the bill's proposed s. 924.051(5), F.S., attempts to establish technical grounds (or rules of pleading) for the summary dismissal of certain *pro se* appeals. This provision of the bill is contrary to the rules of appellate procedure, which permit an appellant to further demonstrate right to relief in a reply brief, or, if the appellee files a motion to dismiss, in a response, and is potentially violative of Art. V, s. 2(a), Fla. Const., which gives to the Supreme Court the authority to establish rules of practice and procedure.

In response, the Attorney General's office has stated that "[t]he right to appeal is purely statutory and the Florida Legislature has the constitutional authority to grant or deny the right to appeal, to set the terms and conditions under which the right may be exercised, and to prescribe the conditions under which reversals may be permitted."

Current Statistics Relating to Numbers of Appeals

The Florida Public Defenders Association, Inc. has reported that of the 528,933 total trial cases in 1994-95, 4,638 cases were appealed to the District Court of Appeal, 380 to the Circuit Court, and an additional 71 capital cases to the Supreme Court. According to these figures, total appeals were less than 1 % of all trial cases in 1994-95. In addition, the public defenders report that of the 528,933 total trial cases, 130,441 were non-capital felonies tried in the circuit court (not including juvenile cases), of which 4,638 were appealed to the District Court of Appeal. These figures reflect that the number of appeals from felony cases in the circuit court was 3.6% of total felony cases in 1994-95.

The Office of the Attorney General has responded that the above 1% figure does not provide an accurate picture of the percentage of appeals because the total number of cases, as reported by the public defenders, is mostly comprised of county court criminal cases (criminal traffic infractions and misdemeanors), which are less often appealed than circuit court felony cases. To illustrate, the Attorney General's office reports that from January to December of 1994, there were 452,490 total defendants charged in the county court, but only 159,937 total defendants charged in the circuit court. The Attorney General further reports that of the 159,937 defendants charged in the circuit court, 5,808 appealed to the District Court of Appeal. According to these figures, the number of appeals from defendants charged with a felony in the circuit court was 3.6% of total felony cases in 1994.

Although the statistics provided by the Florida Public Defenders Association, Inc. are based on different (but proximate) periods of time and measured in a different manner than those statistics provided by the Office of the Attorney General, the percentage of appeals from total felony cases, as based on statistics provided by both agencies, appears to be consistent (3.6 %).

The Florida Public Defenders Association, Inc., also reports that in the six-month period from July to December, 1995, the Second Circuit Appellate Office, which handles indigent appeals to the First District Court of Appeal, filed a total of 345 non-capital appeals. Of those 345 appeals, 115 had *Anders* briefs filed, 72 of which were cases in which the defendant had pled guilty or nolo contendere. Of the 345 appeals, there was a total of 39 cases with guilty pleas, of which 17 had merit. In addition, there was a total of 90 cases with nolo contendere pleas, of which 40 had merit.

The Attorney General's office also reports that in the six-month period from September, 1995, to February, 1996, the Second Circuit Appellate Office filed a total of 296 initial briefs. Of those, 91 had *Anders* briefs filed, of which 45 were cases in which the defendant had pled guilty or nolo contedere without reservation of appeal.

Legislative History

The committee substitute was reported favorably by the Committee on Criminal Justice on March 21, 1996, and was referred to the Committee on Appropriations on April 8, 1996. CS/HB 211 was withdrawn from the Appropriations Committee on April 11, 1996, and placed on the calendar. On April 17, 1996, CS/HB 211 was placed on the special order calendar. The bill was read the second time, and amendments were adopted on April 22, 1996 [*see* House Journal at 812]. On April 23, 1996, CS/HB 211 was read the third time, amendments were adopted [*see* House Journal at 854], and the bill, as amended, passed the House [YEAS 99, NAYS 12].

CS/HB 211, 2nd Eng., was received by the Senate on April 25, 1996, and referred to the Senate Committees on Criminal Justice and Judiciary. On May 3, 1996, the bill was withdrawn from the Senate Committees and passed the Senate [YEAS 35, NAYS 1].

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIMINAL JUSTICE:

Prepared by:	Staff Director:
Gina M. Wilson	Lynn C. Cobb

FINAL ANALYSIS PREPARED BY COMMITTEE ON CRIMINAL JUSTICE:

Prepared by:	Staff Director:
Lynn C. Cobb	Lynn C. Cobb

STANDARD FORM 11/90

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Appendix to Brief of Petitioner on the Merits" has been furnished by courier to: PAUL PETILLO, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 23rd day of March, 1998.

Of Counsel