IN THE

SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 92,435 |
| | ) | |
| JASON EDWARD THOMPSON, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

# AMENDED RESPONDENT'S BRIEF ON THE MERITS

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CRIMINAL APPEAL REFORM ACT OF 1996

## STATEMENT OF THE CASE AND FACTS

On November 14, 1996, Respondent, Jason Thompson, 17 years old, pled guilty to DUI manslaughter (T 3-6). The plea agreement called for the state to agree to a sentence no greater than 12 years in state prison followed by 3 years probation; Thompson could seek a 4 year youthful offender sentence followed by 2 years probation, or other downward departure sentence (R 37). Judge James Balsigar accepted the plea, ordered a PSI and PDR, and set a sentencing date (T 5-6).

On December 18, 1997, Thompson was before Judge Joe Wild for sentencing (T 7). The record does not reflect the reason for the change in judge.

At sentencing, defense counsel asked Judge Wild to depart from the guidelines and sentence Thompson as a youthful offender (T 7-12). Three deputies who worked with Thompson at the Martin County Sheriff's Office Boot Camp described his excellent conduct and his amenability to rehabilitation while in their program in 1995 (T 12-18). They lamented the fact that in 1995 the Boot Camp program was only four months long (it is now a year) and did not have the GED program it has now (T 12-18). All three said Thompson was salvagable, and they recommended a youthful offender sentence (T 12-18).

The victim's mother, Freda Harris, also testified:

> Yes. I brought some picture of Bijah so that way he'll have a face, not a name. Bijah and Jason were friends. They've known each other since they were like six years old. Jason did not do this intentionally. I have no hatred toward him. That night in the ditch a lot of lives were tooken, the two young ones were tooken. One's alive and one's passed on. And I know if Bijah was here he would not want -- I don't even -- not want his friend to even suffer one minute. And what I'm looking for, what I'm looking for is, I don't believe he should be in a, in a, put away for 12 years. I don't believe that. I, kid, the kid is, he's got a good heart. He's been very remorseful over this. We've kept in contact, we've talked, and that the kid just can't, sorry enough. Excuse me, it's --
>
> THE COURT: Just take your time.
>
> MS. HARRIS: I don't, I didn't even really want to be here today because, if it was up to me I wouldn't even be sentencing Jason. You know, it was an accident. It wasn't like it was planned, it wasn't intentionally done, nothing like that. But I am asking for the four years youthful defender and the two years probation and restitution for the headstone, and counseling and alcohol and drug abuse. That's, that's what I'm asking.

(T 22).

Unmoved, Judge Wild sentenced Thompson to 12 years in state prison followed by 3 years probation (T 26-27). Judge Wild told Thompson he could appeal (T 27). Thompson did so (R 51-52). The Fourth District Court of Appeal affirmed because neither issue

raised was preserved for appellate review. The state never asserted that the Fourth District Court of Appeal lacked jurisdiction over this appeal. Nonetheless, the District Court, sua sponte, wondered whether it had jurisdiction to consider the appeal, decided that it did, but certified a question to this court.

## SUMMARY OF THE ARGUMENT

The legislature did not intend to alter the subject matter jurisdiction of the appellate courts, nor could it constitutionally do so. The failure to preserve a non-fundamental sentencing is not a jurisdictional impediment to an appeal.

## ARGUMENT

### POINT ON APPEAL

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?

Respondent, Jason Thompson, entered into a plea agreement with the state (R 36-38). The plea agreement contemplated a limited right to direct appeal (R 37).[1] The plea was accepted, and Thompson was sentenced. The sentencing judge told Thompson he could appeal. Thompson did so, raising two issues in his appeal to the Fourth District Court of Appeal. The Fourth District Court of Appeal affirmed because neither issue was preserved for appellate review. The state never asserted that the Fourth District Court of Appeal lacked jurisdiction over the appeal. Nonetheless, the District Court, sua sponte, wondered whether it had jurisdiction to consider the appeal, decided that it did, but certified a question to this court. The state now argues for the first time that the

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1 Thompson understood that he was not waiving his right to appeal a "void or voidable judgment" or his right to appeal any sentence outside the guidelines (R 37).

Fourth District Court of Appeal did not have jurisdiction.

In Robinson v. State, 373 So. 2d 898 (Fla. 1979), this Court addressed the validity of section 924.06(3), Florida Statutes (1977), which read:

> 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 defendant shall obtain review by means of collateral attack. [Emphasis added.]

This Court agreed that the statute properly foreclosed appeals from matters which took place before the defendant agreed to the judgment of conviction. However, this Court held that there was a limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. These included: (1) subject matter jurisdiction; (2) illegality of the sentence; (3) failure of the government to abide by a plea agreement; and (4) the voluntary intelligent character of the plea. Robinson, 373 So. 2d at 902.

In 1996, the legislature passed the Criminal Appeal Reform Act of 1996, Ch. 96-248, § 4. Sections 924.051(b)(3) & (4), Fla. Stat. (Supp. 1996), provide as follows:

> (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.

In Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996), this Court determined what effect the Criminal Appeal Reform Act of 1996, had on the holding of Robinson. This Court stated:

> Insofar as [section 924.051(b)(4)] says that a defendant who pleads nolo contendere or guilty without expressly reserving the right to appeal a legally dispositive issue cannot appeal the judgment, we believe that the principle of Robinson controls. A defendant must have the right to appeal that limited class of issues described in Robinson.

Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d at 1105.

The legislative history of the Criminal Appeal Reform Act (attached to petitioner's brief) supports this Court's view that a defendant continues to have the right to appeal the limited class of issues described in Robinson. The legislative history states

that the Criminal Appeal Reform Act "basically codified the Florida Supreme Court's holding in Robinson, supra, . . .." H.R. Comm. on Criminal Justice, CS/HB 211 (1996) Final Bill Analysis & Economic Impact Statement, p. 5. Moreover, this Court decided in Amendments to the Florida Rules of Appellate Procedure, supra at 1104, that under article V, section 4(b) of the Florida Constitution, there is constitutional protection of the right to appeal. Thus, even if the legislature had intended to alter the subject matter jurisdiction of the appellate courts (and it clearly did not attempt to do so), it could not.

The First District Court of Appeal in Stone v. State, 688 So. 2d 1006 (Fla. 1st DCA 1997), correctly decided that the Criminal Appeal Reform Act did not deprive the court of jurisdiction to hear the defendant's direct appeal from conviction and sentence following his no contest plea:

> "Jurisdiction 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 dependent upon the ultimate disposition of the lawsuit." Calhoun v. New Hampshire Ins. Co., 354 So. 2d 882, 883 (Fla. 1978) (citations omitted). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." Lusker v. Guardianship of Lusker, 434 So. 2d 951, 953 (Fla. 2d DCA

> 1983). The rule that error must, except when it is "fundamental," be presented to, and ruled on by, the lower tribunal before it will be treated as preserved for purposes of appellate review is precisely that--a rule, created by the courts to promote fairness and judicial economy. See, e.g., Castor v. State, 365 So. 2d 701(Fla. 1978) (rule that claimed error must be presented to and ruled upon by lower tribunal to be preserved for appeal based on considerations of basic fairness and judicial economy). 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. 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.

See also Trowell v. State, 706 So. 2d 332 (Fla. 1st DCA 1998) (en banc).

Finally, from a practical standpoint, the district courts will have to have the jurisdiction or the "power to hear and determine" whether there exists a preserved or a fundamental error in an appeal from a guilty plea. The district courts of appeal must have jurisdiction over all appeals from guilty pleas because any one of these appeals may contain a fundamental error or error properly

preserved for appellate review. It may turn out that the appeal contains neither fundamental error or error preserved for appellate review. In that case, the district court can either affirm or dismiss the appeal. See Robinson, supra; Harriel v. State, 23 Fla. L. Weekly 967, 968 (Fla. 4th DCA April 15, 1998). However, this fact has no bearing on the district court of appeal's jurisdiction to hear the case in the first place. Cf. Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988) (this court has jurisdiction, or the power to hear, any petition from a written opinion that establishes a point of law, but this court exercises its discretionary review only where conflict exists).

This court should hold that the failure to preserve a nonfundamental sentencing error for appeal following a guilty plea is not a jurisdictional impediment to an appeal.

## CONCLUSION

This court should hold that the failure to preserve a nonfundamental sentencing error for appeal following a guilty plea is not a jurisdictional impediment to an appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 5th day of MAY, 1998.

Attorney for Jason Thompson