IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,252

THIRD DISTRICT COURT OF APPEAL CASE NO. 98-288

LARRY WHITE,

Petitioner,

-vs-

HARRY K. SINGLETARY,

Respondent.

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The Respondent, Harry K. Singletary, Secretary of the Department of Corrections, was the respondent in the Third District Court of Appeal, and the Petitioner, Larry White, was the petitioner. In this brief, the parties will be referred to as the Petitioner and the Respondent. The symbol "R" designates the record on review. The symbol "App." designates the appendix to the Respondent's brief on the merits. Emphasis is added unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The Respondent is in substantial agreement with the Petitioner's statement of the case and regarding the facts relevant to the issue before this Court the Respondent would state the following:

On November 24, 1993 the Petitioner pled guilty to sale of cocaine and possession of cocaine in violation of his community control, for which he was subsequently sentenced to a term of five years imprisonment. (App. A). The Petitioner has never filed a motion to withdraw his plea. In paragraph two of the written plea form Petitioner signed at the time of his plea, Petitioner acknowledged that he understood that he was giving up his right to appeal "all matters except the legality of (his) sentence or this Court's authority to hear the case." (App. A, p. 1).

On February 6, 1998 the Petitioner filed a petition for writ of habeas corpus for a belated appeal, referring to both the conviction and sentence entered in case number 93-79 following his guilty plea, as well as the conviction and sentence entered in case number 93-1103 following a jury trial. (R 1-16). In the petition, regarding case number 93-1103 *only*, the petitioner simply alleged his appointed trial counsel failed to file a notice of appeal of that judgment and sentence after the Petitioner instructed him to do so. (R 2). In particular, Petitioner alleged that, "After being adjudicated guilty by 'jury trial' in case number 93-1103,

Mr. White informed his trial attorney (Mr. Michael Wheeler) that he wished to pursue a direct appeal." (R 2) (Emphasis that of Petitioner). The Petitioner made no statement as to the issue sought to be appealed or whether it was within the limited exceptions allowed for a direct appeal from a guilty plea. (R 1-16).

On June 10, 1998 the Third District Court of Appeal denied in part and granted in part the petition. (R 92-93). The district court denied the petition as to the motion for belated appeal with respect to case number 93-79 based upon the Petitioner's failure "to allege any of the limited exceptions necessary for an appeal from a guilty plea set forth in Robinson v. State, 373 So. 2d 898 (Fla. 1979)." (R 92-93). The district court granted the petition with regard to case number 93-1103. (R 92).

ISSUE PRESENTED

WHETHER THE DISTRICT COURT PROPERLY DENIED THE PETITIONER'S MOTION FOR A BELATED APPEAL FROM HIS PLEA OF GUILTY BASED UPON HIS FAILURE TO ALLEGE ANY OF THE LIMITED EXCEPTIONS REQUIRED BY ROBINSON v. STATE, 373 So. 2d 898 (Fla. 1979), FOR SUCH AN APPEAL?.

SUMMARY OF THE ARGUMENT

The State initially submits that a separate basis for the Third District's denial of Petitioner's petition for belated appeal exists here. Indeed, it appears that Petitioner *only* sought to appeal his conviction and sentence following his jury trial in case number 93-1103. Certainly, there is nothing contained in the petition to indicate that Petitioner desired to pursue an appeal from the guilty plea he entered in case number 93-79. This being so, since an independent basis existed for the District Court's denial of Petitioner's petition for belated appeal other than the fact that Petitioner failed to set forth any of the exceptions required by Robinson v. State, 373 So.2d 898, 902-903 (Fla. 1979) for an appeal from a guilty plea, the District Court's decision should be sustained.

As this Court asserted in Robinson, there is no right to an appeal on unknown and unidentified grounds. This Court made clear that the right to a direct appeal from a guilty plea is severely restricted as only those issues that are contemporaneous with the plea may form the basis for a direct appeal.

The opinions holding that there is a right to general review from a guilty plea directly and expressly conflicts with statutory law prohibiting such appeals, case law from this Court upholding the authority of the Florida Legislature to place such terms and conditions on the right to appeal, and rules of criminal and

appellate procedure which this Court adopted in order to implement the statutory restrictions on appeals from criminal convictions.

The requirement that defendants who have entered guilty pleas must state, in their notices of appeal or motions for belated appeal, the ground upon which their appeal is based is not unfair, unconstitutional, nor overburdensome. As such appeals are very restricted, requiring a defendant to show that his claim fits within the limited exceptions for such appeals, provides notice of the court's jurisdiction to hear the case and eliminates the filing of numerous frivolous appeals. The decision of the Third District Court of Appeals to deny the Petitioner's petition for a belated appeal based upon his failure to state a cognizable ground for such an appeal should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE PETITIONER'S MOTION FOR A BELATED APPEAL FROM HIS PLEA OF GUILTY BASED UPON HIS FAILURE TO ALLEGE ANY OF THE LIMITED EXCEPTIONS REQUIRED BY ROBINSON v. STATE, 373 So. 2d 898 (Fla. 1979), FOR SUCH AN APPEAL.

The State initially submits that a separate basis for the Third District's denial of Petitioner's petition for belated appeal exists here. Indeed, in his petition, Petitioner alleged that, "After being adjudicated guilty by 'jury trial' in case number 93-1103, Mr. White informed his trial attorney (Mr. Michael Wheeler) that he wished to pursue a direct appeal." (R 2) (Emphasis that of Petitioner). Accordingly, it appears that Petitioner ***only*** sought to appeal his conviction and sentence following his jury trial in case number 93-1103. To be sure, there is nothing contained in the petition to indicate that Petitioner desired to pursue an appeal from the guilty plea he entered in case number 93-79. This being so, since an independent basis existed for the District Court's denial of Petitioner's petition for belated appeal other than the fact that Petitioner failed to set forth any of the exceptions required by Robinson v. State, 373 So.2d 898, 902-903 (Fla. 1979) for an appeal from a guilty plea, the District Court's decision should be sustained. Nevertheless, the State will discuss the Robinson decision as well as the subsequently-enacted statutory law and procedural rules restricting a defendant's right to appeal from

a guilty plea.

This Court, in Robinson addressed the conditions under which an appeal could be taken from a guilty plea and held that there was no general right to an appeal on unknown and unidentified grounds as follows:

> The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect, **he is asserting a right of review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea.** The only type of appeal that requires this type of review is a death penalty case. See S 921.141(4), Fla. Stat. (1977). Furthermore, **we find that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea.** If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw plea. If the action of the trial court on such motion were adverse to the defendant, it would be subject to review on direct appeal. The standards for the withdrawal of a guilty plea both before and after sentence were discussed in detail in Williams v. State, 316 So.2d 267 (Fla. 1975). After sentence is imposed, the burden is on the defendant to prove that a manifest injustice has occurred. Williams v. State, ABA Standards Relating to the Administration of Criminal Justice, Pleas of Guilty, 14-2.1 (1979). To adopt the view asserted by the appellant in this case would in effect eliminate both the necessity for a defendant to move for a withdrawal of his plea and the obligation to show a manifest injustice or prejudice as grounds for such a plea withdrawal after sentence.

Id., 373 So.2d at 902-903.

This Court went on to hold that there was a limited and exclusive class of issues which occur contemporaneously with the entry of the plea that can properly be brought on direct appeal from a guilty plea. Id. at 902. The class consists of "only the following:

(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." Id.

As Robinson failed to assert any of these cognizable claims, this Court held the district court was justified in summarily dismissing the appeal as frivolous. Id. at 903.

Moreover, the United States Supreme Court has repeatedly held that there is no constitutional right to an appeal in non-capital criminal cases and that the states, if they grant such right, may place such terms and conditions, consistent with due process and equal protection, as they consider appropriate. See, Ross v. Moffitt, 417 U.S. 600, 611 (1974)("[I]t is clear that the State need not provide any appeal at all."; Abney v. United States, 431 U.S. 651, 656 (1977)("It is well settled that there is no constitutional right to an appeal" and "[t]he right to appeal as we

presently know it in criminal cases, is purely a creature of statute: in order to exercise that statutory right of appeal one must come within the terms of the applicable statute"); and Evitts v. Lucey, 469 U.S. 387, 393 (1985)("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors").

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

The Criminal Appeal Reform Act of 1996[1] along with the resulting changes in the Rules of both Appellate and Criminal Procedure[2], which this Court adopted by Amendments, also supports the Respondent's position. By their terms, they are contrary to

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[1] Enacted by Ch 96-248.

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

the district court holdings that there is an unfettered right to appeal from guilty pleas despite not meeting any of the statutory and rule criteria the Florida Legislature and this Court have implemented.

Before turning to the specifics of the Reform Act and implementing rules, it is useful to recall this Court's comments and action in 1995 on the problem of appeals from guilty pleas, prior to the enactment of the Reform Act in 1996, and the more recent comments in 1998 addressed to the commendable way in which the Florida Legislature and this Court, working "hand-in-hand" have implemented appellate reform.

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

The second, more recent comment, addresses the post-Reform Act and its implementation by this Court. See, Kalway v. Singletary, 708 So.2d 267 (Fla. 1998):

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

Id., 708 So. 2d at 269.

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

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

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

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

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

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

Amendments at 775.

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

> We construe this provision of the Act [section 924.051(4)] to permit a defendant who pleads guilty or nolo contendere without reserving a legally dispositive issue to nevertheless appeal a sentencing error, **providing it has been timely preserved by motion to correct the sentence**. See State v. Iacovone, 660 So. 2d

1371 (Fla. 1995); Williams v. State, 492 So. 2d 1051 (Fla. 1986)(statutes will not be interpreted so as to yield an absurd result).

Accordingly, we have rewritten rule 9.140 to accomplish the objectives set forth above. **Consistent with the legislature's philosophy of attempting to resolve more issues at the trial court level**, we are also promulgating Florida Rule of Criminal Procedure 3.170 (l), which authorizes the filing of a motion to withdraw the plea after sentencing within thirty days from the rendition of the sentence, but only upon the grounds recognized by Robinson or otherwise provided by law. Id.

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

3.170(l) Motion to Withdraw the Plea After Sentencing. A defendant who pleads guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within thirty days after rendition of the sentence, **but only upon the grounds specified in Florida Rule of Appellate Procedure 9.140(b)(2)(B)(I) - (v).**

9.140(b)(2) Pleas. A defendant **may not appeal from a guilty or nolo contendere plea except as follows:**

(A) A defendant who pleads guilty or nolo contendere **may expressly reserve the right to appeal a prior dispositive order of the lower tribunal**, identifying with particularity the point of law being reserved.

(B) **A defendant who pleads guilty or nolo contendere may otherwise directly appeal only**

(I) the lower tribunal's lack of **subject matter jurisdiction;**

(ii) a violation of the plea agreement, **if preserved by a motion to withdraw plea;**

(iii) an involuntary plea, **if preserved by a motion to withdraw plea;**
(iv) a sentencing error, **if preserved;**
(v) as otherwise preserved by law.

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

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

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

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

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

This Court recently reiterated its decision in Amendments

upholding and implementing the authority and decision of the Florida Legislature to place reasonable conditions on the right to appeal and to prohibit appeals where these conditions precedent were not met. See, Kalway v. Singletary, 708 So. 2d 267 (Fla. 1998), as discussed and quoted above.

The Court's attention is also invited to a recent *en banc* decision of the Fifth District Court of Appeal holding that there is no right to appeal from guilty or no contest pleas unless prejudicial errors have been reserved, preserved, or raised and ruled on by post-judgment motions during the thirty-day window provided by this Court. Maddox v. State, 709 So. 2d 617 (Fla. 5th DCA 1998). The decision in Maddox is noteworthy, not merely because of the holding, but because of the perceptive analysis and understanding of the Criminal Appeal Reform Act and the implementing rules promulgated by this Court in Amendments. Reasoned and written in the spirit of Kalway and Amendments, with a keen appreciation of, and deference to, the separation of powers doctrine, the Fifth District shows that appellate and trial courts, appellants, and appellees, i.e., everyone, will benefit from the interplay between the Act and the implementing rules. The Act and the rules together, "hand-in-hand," collectively present the parties with increased opportunities and rights to raise and preserve issues in the trial court and, if relief is not obtained, to then seek appellate review with a fully developed record and

preserved issues which can be intelligently addressed on their merits by the parties and the appellate courts.

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

> Bridges's problem, however, is even more fundamental in that he cannot show that he would have had a right to appeal at all. Bridges entered a plea of guilty without reserving any appellate issues, received a sentence that is facially legal and which was accepted without contemporaneous objection, and did not move to withdraw that plea prior to the imposition of a sentence which on its face is lawful. Id.

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

The primary decision upon which conflict is based is the First District's opinion in Trowell v. State, 706 So.2d 332 (Fla. 1st DCA 1998). In this opinion the district court relied on two lines of cases from this Court, Baggett v. Wainwright, 229 So.2d 239 (Fla.1969), and, from the U.S. Supreme Court, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Baggett was adjudged guilty and sentenced in 1962. In 1969, he

filed a petition for writ of habeas corpus in this Court alleging that he and his trial counsel, immediately following his conviction, had informed the trial court that he was now indigent and requested that the trial court appoint appellate counsel to prosecute the appeal. Baggett further alleged that the trial court advised him it would do so, but failed to do so. Baggett alleged that two years later, upon inquiry, he was told by the trial court that his appeal was being handled by a public defender. Significantly, this Court summarized the thrust of Baggett's allegations as "an attempt to demonstrate that through State action Petitioner was deprived of, or inadequately afforded, the assistance of counsel for the purpose of directly appealing his conviction." Baggett, 229 So.2d at 240-241. There was, in short, no question of Baggett's right to appeal following a conviction entered on a jury verdict. There was only the question of whether Baggett, as an indigent, had been denied the right to the assistance of counsel contrary to Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

This Court held that Baggett's allegations, if true, would show a denial of the assistance of counsel and that Baggett could not be required to show that his appeal would have successfully overturned the judgment[3]. In so holding, this Court cited to and

[3] As it turned out, Baggett's allegations were false and there had been no denial of the assistance of counsel. See, Baggett v. Wainwright, 235 So.2d 486 (Fla. 1970)(Writ discharged,

relied in part on Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and Rodriquez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969).

In Trowell, the district court's reliance on Baggett, Douglas, Anders, and Rodriquez, is completely misplaced. The cited cases stand for the unexceptionable proposition that **if** there is a right to an appeal then there is a right to the assistance of counsel if indigent. None of the cases were from guilty pleas and none presented the issue of whether they was a right to appeal from guilty pleas. Thus, by misapplying the cases, and specifically Baggett to a set of facts unlike Baggett, the district court created direct and express conflict with the very cases on which it relies. Gibson v. Avis Rent-A-Car System, Inc, et al, 386 So.2d 520, 521 (Fla. 1980)(Conflict jurisdiction is created "when a district court of appeal misapplies the law by relying on a decision materially at variance with the one under review.")

The Respondent further points out that the Trowell opinion also misapplied case law from the United States Supreme Court. The decisions in Douglas, Anders, and Rodriquez stand for the unexceptionable and uncontroverted principle that indigents must be afforded the right to counsel **if** they and similarly situated non-indigents have a right to an appeal. Nothing in these cases

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neither Baggett nor his attorney told the trial court he was indigent, wished to appeal, and wanted counsel appointed.)

concerns the right to appeal from guilty pleas.

As the Third District Court of Appeals pointed out in Gonzalez v. State, 685 So. 2d 975 (Fla. 3d DCA 1997), the idea behind a defendant's right to assistance of counsel in making a first appeal of a conviction is that it is the responsibility of a knowledgeable appellate counsel to review the records to identify any appropriate issues to be raised on appeal. It would be unreasonable to infringe on a defendant's right to appeal in such a situation to require a *pro se* showing of what meritorious issues he intended to bring on appeal. Id. at 977. As Judge Minor points out in his dissenting opinion in Trowell, in situations of guilty pleas the defendants do not face the hardship of having to review a trial record in search of error without the benefit of counsel. A defendant appealing a guilty plea does *not* have an entire record to review nor are they even allowed to try to establish innocence. Id. at 344. Because the issues allowed to be raised on appeal of a guilty plea are so limited, requiring the defendant to allege an issue cognizable on direct appeal is no more restrictive than is appropriate. Id. Anything less would result in an unjustified waste of judicial resources by an already over-burdened criminal justice system.

The claim that this requirement specifically violates the rights of indigent defendants is without merit. Ross v. Moffitt, 417 U.S. 600, 601 (1974),is particularly relevant. Contrary to the

rationale that indigency is critical to the right to appeal, indigency is irrelevant unless there is a showing that the state has, contrary to the Douglas line of cases, "arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons" 417 U.S. at 607, and "[u]nfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty." 417 U.S. at 611. Nothing in section 924.06(3), Florida Statutes (1995) or its successor, section 924.051(4), Florida Statutes (Supp. 1996), draws any distinctions between the indigent and the non-indigent. Neither have a right to appeal unless conditions set out in the statute, as interpreted and implemented by this Court in Amendments, and in Florida Rule of Appellate Procedure 9.140(b)(2) are met. In short, whether you are rich or poor you do not have the right to take a groundless appeal.

Further it is important to consider, as Judge Minor pointed out in his dissent in Trowell, that the requirement is simply to identify a ground over which the court has jurisdiction to hear following a guilty plea and not, as other opinions have expressed, a requirement that the defendant show the claims to be meritorious. Id. Thus the majority in Trowell and the other cases holding there is an unfettered right to take a direct appeal from a guilty plea not only misapplied the law controlling appeals from guilty pleas they also misapplied the law on the primacy of jurisdiction. The

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

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

> **This must be done despite the fact that the question of jurisdiction was not raised by the pleadings or otherwise presented. Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the**

> **court should notice the defect and enter an appropriate order. [cites omitted].**

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

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

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

This Court recently reiterated the above rule of law that jurisdiction is a threshold or primary issue which must be immediately addressed and which, if found absent, ends review. Proceedings, orders, and decisions in the absence of jurisdiction are a nullity. Polk County v. Sofka, 702 So.2d 1243 (Fla. 1997).

In summary, the holding that there is an unfettered right to full appellate review of guilty pleas, belated or timely, regardless of the failure to preserve or identify a cognizable issue is contrary to this Court's case law, to Florida Statutes, this Court's rules of criminal and appellate procedure, and decisions of other district courts. At the same time, properly prohibiting unauthorized appeals enables parties with legitimate

issues and an authorized right to an appeal to more efficiently obtain such review as they will not have to compete for scarce judicial resources with parties such as those who have no cognizable issues and no right to an appeal. Further, through proper adherence to the simple jurisdictional requirement for obtaining a direct appeal of a guilty plea Florida taxpayers will not have to fund numerous wholly frivolous and abusive judicial proceedings.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Respondent respectfully requests this Court to find that the District Court properly denied the Petitioner's petition for belated appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was mailed this 18th day of September, 1998, to John E. Morrison, Asst. Public Defender, Counsel for Petitioner, 1320 N.W. 14th Street, Miami, Florida 33125.

DOUGLAS J. GLAID
Assistant Attorney General

APPENDIX A

RL0258IN0225

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR MONROE COUNTY

CRIMINAL DIVISION

CASE NUMBER: 93-79 CF

STATE OF FLORIDA

VS

Larry White /

PLEA(S)

1. I, Larry White, defendant herein, withdraw my Plea(s) of Not Guilty, and enter a Plea(s) of:

( ) Guilty (✓) ~~Nolo Contendere to~~ ADMITS TO VOP (sale of Cocaine & Poss. Cocaine)

( ) Guilty ( ) Nolo Contendere to

( ) Guilty ( ) Nolo Contendere to

2. I understand that if the court accepts the pleas(s), I give up my right to a trial, at which I would have had the following rights: (1) to have a jury determine whether I am guilty or not guilty, or a hearing before a judge if charged with violation of probation; (2) to see and hear the witnesses testify, and to have my lawyer question them for me; (3) to subpoena and present witnesses and items of evidence in my defense and to present any defense I might have to the jury; (4) to testify or to remain silent and (5) to require the prosecutor to prove my guilt by admissible evidence beyond any reasonable doubt, or to the satisfaction of the court's conscience if charged with violation of probation, before I can be found guilty. I further understand that I give up my right to appeal all matters except the legality of my sentence or this Court's authority to hear this case. My lawyer has explained to me what an appeal is.

3. I understand that a Plea of Not Guilty denies that I committed the crime(s); a Plea of Guilty admits that I did commit the crimes(s); a Plea of Nolo Contendere (or "No Contest") says that I do not contest the evidence against me. I understand that if the Court accepts my plea(s) there will be no trial and the court will impose sentence(s) based upon my plea(s).

4. I have read the information/indictment/warrant in this case and I understand the charge(s) to which I enter my plea(s). My lawyer has explained to me the maximum penalty for the charge(s),

the essential elements of the crime(s), and possible defenses to the crime(s), and I understand these things. I understand that if I am on parole, my parole can be revoked and I can be returned to prison to complete that sentence; if I am on probation, my probation can be revoked and I can receive a separate sentence up to the maximum on the probation charge in addition to the sentence imposed on this case.

5. No one has promised me anything to get me the plea(s), except

a. (✓) No exception

b. ( ) The prosecutor agrees: —O—

_____

_____

c. ( ) The Court has agreed: _____

_____

6. No one has pressured or forced me to enter the plea(s). I am entering the plea(s) because:

( ) I believe that I am guilty.

(✓) I believe that it is in my own best interest.

I enter the plea(s) voluntarily of my own free will.

7. I give up my right to have the prosecutor recite to the judge the facts showing my guilt (factual basis) before he accepts my plea(s).

8. I understand that the maximum sentence that the court can impose is: 20 yrs F.S.P.
I understand if the court departs from the sentencing guideline, by one (1) grid (in either direction) I will have the right to appeal my sentence.

9. I understand and agree that if the judge permits me to remain at liberty pending sentencing I must notify my lawyer and bondsman or pretrial release officer of any change of my address or telephone number, and if the judge orders a Presentence Investigation (PSI) and I willfully fail to appear for an appointment with the probation officer for the PSI interview, the judge can revoke my release and place me in jail until the PSI interview has been completed or until my sentencing.

10. My education consists of the following: 11 Yr. I am not under the influence of any drugs, medication or alcohol at the time I sign this plea. I am not suffering from mental problems at this time which affects my understanding of this plea.

11. I have read every word in this written plea. I have

discussed this written plea with my lawyer and I fully understand it. I am fully satisfied with the way my lawyer has handled this case for me.

12. I understand, and my attorney has explained to me that if I am not a United States Citizen, any plea of guilty or Nolo Contendere subjects me to deportation according to the Law and Regulations of the United States Immigration and Naturalization Service.

SWORN TO, SIGNED AND FILED in Open Court in the presence of defense counsel and Judge this 24 day of November, 1997.

CLERK OF THE CIRCUIT COURT

Defendant's Signature

Address: _____

Telephone: _____

CERTIFICATE OF DEFENDANT'S ATTORNEY

I, defendant's counsel of record, certify that: I have discussed this case with defendant, including the nature of the charge(s), essential elements of each, the evidence against him/her of which I am aware, the possible defenses he/she has, the maximum penalty for the charge(s) and his/her right to appeal. No promises have been made to the defendant other than as set forth in this plea or on the record. I believe he/she fully understands this written plea, the consequences of entering it, and that defendant does so of his/her own free will.

Counsel for Defendant

CERTIFICATE OF PROSECUTOR

(None) I hereby consent to the entry of the plea to the lesser charge(s).

(None) I confirm that the premises set forth in paragraph 5b have been made.

Assistant State Attorney

PLEA(S)

818600 OFF REC 12[illegible] PAGE 0318

____ Probation Violator

__✓__ Community Control Violator

____ Retrial

____ Resentence

In the Circuit Court, Sixteenth Judicial Circuit

in and for Monroe County, Florida

Case Number KW93-79-CF

FILED FOR RECORD

'94 JAN -6 A9:09

DANNY L. KOLHAGE
CLERK
MONROE COUNTY, FLA.

State of Florida

Larry White

Defendant

JUDGMENT

The defendant Larry White, being personally before this court represented by Michael Hoolon, the attorney of record, and the state represented by Marty Mahoney, and having

____ been tried and found guilty by jury/by court of the following crime(s)

_✓_ entered a plea of guilty to the following crime(s)

____ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Number Number(s)	Degree of Crime	Case Number	OBTS Number
I	Sale of Cocaine	893.13	2°	93-79-CF	000309894
II	Possession of Cocaine	893.13	3°	93-79CF	

_✓_ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

____ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submit blood specimens.

____ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

(White) - Clerk: CANARY - State Attorney; PINK - Defendant

818600 OFF REC 1[illegible]8 PAGE 0319

Defendant Sonny White Case Number KW93-99-CF OBTS Number 0030898942

SENTENCE

(As to Count I)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, _____ Michael Wheeler, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

_____ and the Court having on _____ (date) deferred imposition of sentence until this date

_____ and the Court having previously entered a judgment in this case on _____ (date) now resentences the defendant

✓ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court that:

_____ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $_____ as the 5% surcharge required by section 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

_____ The defendant is hereby committed to the custody of the Sheriff of _____ County, Florida.

_____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

_____ For a term of natural life.

✓ For a term of 5 years.

_____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

_____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.
In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

ORIGINAL (White) - Clerk: CANARY - State Attorney; PINK - Defendant

Defendant Larry White Case Number KW-9379-CF

SPECIAL PROVISIONS

(As to Count I)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm	____	It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
Drug Traffficking	____	It is further ordered that the _____ mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
Controlled Substance Within 1,000 Feet of School	____	It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.
Habitual Felony Offender	____	The defendant is adjudicated a habitual felon offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Habitual Violent Felony Offender	____	The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
Law Enforcement Protection Act	____	It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with section 775.0823, Florida Statutes.
Capital Offense	____	It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
Short-Barreled Rifle, Shotgun, Machine Gun	____	It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this court.
Continuing Criminal Enterprise	____	It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction	____	The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).
Jail Credit	✓	It is further ordered that the defendant shall be allowed a total of 187 days as credit for time incarcerated before imposition of this sentence.
Prison Credit	____	1/15/93-1/31/93, 2/1/93-2/28/93, 3/1/93-3/31/93, 4/1/93-4/30/93, 5/1/93-5/3/93 It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
Consecutive/Concurrent As To Other Counts	____	It is further ordered that the sentence imposed for this count shall run (check one) _____ consecutive to _____ concurrent with the sentence set forth in count _____ of this case.

ORIGINAL (White) - Clerk: CANARY - State Attorney; PINK - Defendant

Defendant Sonny White 818609 OFF REC 1 3 PAGE 320 Case Number KW93-99-CF OBTS Number 000398942

SENTENCE

(As to Count II)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, Michael Wheeler, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

_____ and the Court having on _____ (date) deferred imposition of sentence until this date

_____ and the Court having previously entered a judgment in this case on _____ (date) now resentences the defendant

✓ and the Court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

It Is The Sentence Of The Court that:

_____ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $_____ as the 5% surcharge required by section 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

_____ The defendant is hereby committed to the custody of the Sheriff of _____ County, Florida.

_____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To Be Imprisoned (Check one; unmarked sections are inapplicable.):

_____ For a term of natural life.

✓ For a term of 5 Years.

_____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

_____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

_____ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.
In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

ORIGINAL (White) - Clerk: CANARY - State Attorney; PINK - Defendant

818600

Defendant Larry White Case Number KW-93-79-CF

SPECIAL PROVISIONS

(As to Count II)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm ____ It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Traffficking ____ It is further ordered that the _____ mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School ____ It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender ____ The defendant is adjudicated a habitual felon offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender ____ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act ____ It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with section 775.0823, Florida Statutes.

Capital Offense ____ It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun ____ It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this court.

Continuing Criminal Enterprise ____ It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction ____ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

Jail Credit ✓ It is further ordered that the defendant shall be allowed a total of 187 days as credit for time incarcerated before imposition of this sentence.

1/5/93 – 1/31/93, 2/1/93 – 2/28/93, 3/1/93 – 3/31/93, 4/1/93 – 4/30/93, 5/1/93 – 5/3/93

Prison Credit ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

Consecutive/Concurrent As To Other Counts ____ It is further ordered that the sentence imposed for this count shall run (check one) _____ consecutive to _____ concurrent with the sentence set forth in count _____ of this case.

ORIGINAL (White) - Clerk: CANARY - State Attorney; PINK - Defendant

818600

Defendant Sonny White Case Number KW93-79-CF

Other Provisions, continued:

Consecutive/Concurrent As To Other Convictions

✓ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run
(Check one) ✓ consecutive to ____ concurrent
with the following:
(check one)
____ any active sentence being served.
____ specific sentences: Case # 93-1103-CF

In the event the above sentence is to the Department of Corrections, the Sheriff of Monroe County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends ____

DONE AND ORDERED in open court at Monroe County, Florida

this 15 day of Dec., 1993

Judge

ORIGINAL (White) - Clerk: CANARY - State Attorney; PINK - Defendant

STATE OF FLORIDA
VS
LARRY WHITE DC# 381353
Defendant

In the CIRCUIT Court
MONROE County, Florida
No. KW93-79CF
FOWLER/WHITE/rem

ORDER OF REVOCATION OF COMMUNITY CONTROL

THIS CAUSE coming on to be heard, and being heard in the Fall term of this Court before Honorable Richard J. Fowler, Judge and it appearing that Larry White, hereinafter referred to as the aforesaid, was on the 3rd day of May, A.D. 1993, convicted of the offense of Count I Sale of Cocaine, Count 4 Possession of Cocaine in the Circuit Court of Monroe County, which Court suspended the imposition of sentence and placed the aforesaid on community control for a term of two (2) years, in accordance with the provisions of Chapter 948, Florida Statutes, and

It further appearing that the aforesaid has not properly conducted himself but has violated the conditions of his community control in a material respect by

*** Violation of Conditions Five (5), Six (6), Eleven (11), Eleven (11), Eleven (11), Eleven (11), as stated on Affidavit filed in August 1993.**

On 12/15/93 the subject pled guilty to the violation of community control, he was sentenced to five (5) years for count 1 in the State of Florida Prison System consecutive to five (5) years for count 2 and concurrent with KW93-1103.

IT, THEREFORE, IS ORDERED AND ADJUDGED that the community control of the aforesaid defendant ought to be revoked and it is hereby revoked in accordance with Section 948.06 Florida Statutes, and the said defendant is hereby ordered to remain in the custody of this Court for the imposition of sentence in accordance with the provisions of law.

DONE AND ORDERED IN OPEN COURT, this 28 day of Jan A.D. 1994
NUNC PRO TUNC: 12/15/93

JUDGE

Recorded in Official Records Book
in Monroe County, Florida
Record Verified
DANNY L. KOLHAGE
Clerk Circuit Court

'94 FEB 23 A8:59

Original: Court
Copies: File
(FPC)

DC4-905A
Rev.7/78

Original: FPC/Other State
Copy: File

DC4-925C
Rev 7/78

REC 1294 PAGE 1322
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