047

FILED
SID J. WHITE
NOV 2? ?3
CLERK, SUPREME COURT
By________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY MORSE,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

Case No. 93,705

ON APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL IN THE
STATE OF FLORIDA

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANGELA D. McCRAVY
Assistant Attorney General
Florida Bar No. 983391

and

ROBERT J. KRAUSS
Senior Assistant Attorney General
Florida Bar No. 0238538
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS ii

STATEMENT REGARDING TYPE 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

ISSUE I
CRIMINAL INDIGENTS DO NOT HAVE A CONSTITUTIONAL RIGHT TO FULL AND AUTOMATIC APPELLATE REVIEW OF ALL GUILTY PLEAS. (Restated) 6

CONCLUSION 30

CERTIFICATE OF SERVICE 31

TABLE OF CITATIONS

PAGE NO.

CASES:

Abney v. United States,
431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) . . . 10

Amendments to Fla. Rules of Appellate Procedure,
685 So. 2d 773 (Fla. 1996) 11, 12, 14, 16, 17, 18, 21

Amendments to Florida Rules of Criminal Procedure,
685 So. 2d 1253 (Fla. 1996) 14

Anders v. California,
386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) . . 8, 10

Baggett v. Wainwright,
229 So. 2d 239 (Fla. 1969) 6, 7

Baggett v. Wainwright,
235 So. 2d 486 (Fla. 1970) 8, 9, 12

Beasley v. Beasley,
463 So. 2d 1248 (Fla. 5th DCA 1985) 2, 3

Bohlinger v. Higginbotham,
70 So. 2d 911 (Fla. 1954) 24

Brice v. State,
419 So. 2d 749 (Fla. 2d DCA 1982) 2

Bridges v. State,
518 So. 2d 298 (Fla. 2d DCA 1987) 14

Carter v. Carter,
504 So. 2d 418 (Fla. 5th DCA 1987) 2, 3

Cohen v. State,
121 So. 2d 155 (Fla. 1960) 24

Counts v. State,
376 So. 2d 59 (Fla. 2d DCA 1979) 16

Cunningham v. Standard Guar. Ins. Co.,
630 So. 2d 179 (Fla. 1994) 26

Douglas v. California,
372 U.S. 353, 83 S. Ct. 814,
9 L. Ed. 2d 811 (1963) 7, 8, 10, 12

Dowell v. Sunmark Industries,
521 So. 2d 377 (Fla. 2d DCA 1988) 2

Evitts v. Lucey,
469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) . . . 11

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) 15

The Florida Bar v. Dingle,
220 So. 2d 9 (Fla. 1969) 28

Ford Motor Company v. Averill,
355 So. 2d 220 (Fla. 1st DCA 1978) 25

Gibson v. Avis Rent-A-Car System, Inc, et al,
386 So. 2d 520 (Fla. 1980), **on remand**,
388 So. 2d 55 (Fla. 3d DCA 1980) 8

Gonzalez v. Singletary,
Case No. 93,547 (Fla. 1998) 6

Gonzalez v. State,
685 So. 2d 975 (Fla. 3rd DCA 1997) 13

Hall v. State,
316 So. 2d 279 (Fla. 1979) 29

Harrell v. State,
710 So. 2d 102 (Fla. 4th DCA 1998) 14

Hewitt v. State,
575 So. 2d 273 (Fla. 4th DCA 1991) 3

Holland v. State,
39 Fla. 178, 22 So. 298 (1897) 2, 3

Jackson v. State,
575 So. 2d 181 (Fla. 1991) 2

Kalway v. Singletary,
708 So. 2d 267 (Fla. 1998) 16, 21

Loadholt v. State,
683 So. 2d 596 (Fla. 3rd DCA 1996) 14

Maddox v. State,
708 So. 2d 617 (Fla. 1998) 21

Mapoles v. Wilson,
122 So. 2d 249 (Fla. 1st DCA 1960) 23, 27

McDonald v. State,
23 Fla. L. Weekly D232 (Fla. 5th DCA 1998) 3

Medina v. State,
466 So. 2d 1046 (Fla. 1985) 3

Mendez v. Ortega, 134 So. 2d 247, 248 (Fla. 1961),
app. after remand dism., 143 So. 2d 586 (Fla. 3d DCA 1962) . 24

Moody v. State,
574 So. 2d 260 (Fla. 4th DCA 1991) 3

Nelson v. State,
85 So. 2d 832 (Fla. 1956) 2, 3

Pertz v. Zohar,
556 So. 2d 459 (Fla. 2d DCA 1990) 3

Polk County v. Sofka,
702 So. 2d 1243 (Fla. 1997) 25, 27

Robinson v. State,
373 So. 2d 898 (Fla. 1979) 9, 13, 15, 16, 19, 28

Rodriquez v. United States,
395 U.S. 327, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969) . . 8, 10

Ross v. Moffitt,
417 U.S. 600, 94 S. Ct. 2437,
41 L. Ed. 2d 341 (1974) 10, 11, 12

Snider v. Snider,
686 So. 2d 802 (Fla. 4th DCA 1997) 26

State v. Iacovone,
660 So. 2d 1371 (Fla. 1995) 18

State v. Meyer,
430 So. 2d 440 (Fla. 1983) 28

State v. Trowell,
Case No. 92,393
(Fla. 1998) 6, 8, 10, 11, 12, 13, 15, 17, 23, 27, 30

State v. Wells,
308 So. 2d 163 (Fla. 1st DCA 1974),
cert. denied, 326 So. 2d 175 (Fla. 1976) 3

Stein v. Darby,
126 So. 2d 313 (Fla. 1961) 24

Stone v. State,
688 So. 2d 1006 (Fla. 1st DCA 1997),
pet. for rev. den., 697 So. 2d 512 (Fla. 1997) 23, 27

Strickland v. State,
391 So. 2d 222 (Fla. 1st DCA 1980) 3

Swad v. Swad,
363 So. 2d 18 (Fla. 3d DCA 1978) 25

Thames v. State,
549 So. 2d 1198 (Fla. 1st DCA 1989) 28

Trowell v. State,
706 So. 2d 332 (Fla. 1st DCA 1998) 5, 6

West 132 Feet v. City of Orlando,
80 Fla. 233, 86 So. 197 (Fla. 1920) 24, 26

Williams v. State,
316 So. 2d 267 (Fla. 1975) 9

Williams v. State,
492 So. 2d 1051 (Fla. 1986) 18

Zduniak v. State,
620 So. 2d 1083 (Fla. 2d DCA 1993) 5, 6, 13, 28

OTHER AUTHORITIES:

1996 Fla. Laws Ch. 96-248 14

Florida Statutes Chapter 921.141(4) (1977) 9

Florida Statutes Chapter 924.051(3) (Supp. 1996) 17

Florida Statutes Chapter 924.051(4) (Supp. 1996) 12, 18

Florida Statutes Chapter 924.06(3) (1995) 12

Florida Rule of Appellate Procedure 9.140 (I) 12

Florida Rules of Appellate Procedure 9.140(b) . . . 16, 19, 22

Florida Rule of Appellate Procedure 9.140(j) 1, 3, 12, 14, 19, 20

Florida Rule of Appellate Procedure 9.200 (a) (2) 2

Florida Rule of Criminal Procedure 3.800(b) 18, 19, 20

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

PRELIMINARY STATEMENT

Apparently the Second District Court of Appeal treated Appellant's petition for writ of habeas corpus as a Petition Seeking Belated Appeal pursuant to **Florida Rule of Appellate Procedure 9.140(j).**

This is a direct appeal of the denial of the petition - it is not an original habeas action being filed in this Court. As such, defendant Michael Anthony Morse will be referred to as "Appellant" (rather than Petitioner), and the State of Florida will be referred to as "Appellee" (rather than Respondent).

This brief contains substanial similarities to the briefs already submitted to this Court in **State v. Trowell**, Case No. 92,393, and **Gonzalez v. Singletary**, Case No. 93, 547.

STATEMENT OF THE CASE AND FACTS

Counsel for Appellant has failed to provide this Court with any record other than a copy of the petition for writ of habeas corpus which was filed in the Second District Court of Appeal. In his merits brief, counsel for Appellant makes many factual assertions in his statement of the case and facts on pages 2 - 4, which are contained nowhere in the record. Specifically, on pages 2 and 3 he relates allegations of conversations between defense counsel and Appellant, and between defense counsel and Appellant's mother. However he has failed to provide any transcript of any evidentiary hearing which shows that these alleged conversations occurred.

Despite these assertions apparently based upon mere personal knowledge by counsel for Appellant, this Court is precluded from considering facts outside the record on appeal in *this* case. **Jackson v. State**, 575 So. 2d 181 (Fla. 1991); **Dowell v. Sunmark Industries**, 521 So. 2d 377 (Fla. 2d DCA 1988).

It has long been the rule in Florida that it is the duty of the Appellant to provide an adequate record to the appellate court. **Brice v. State**, 419 So. 2d 749 (Fla. 2d DCA 1982); **Holland v. State**, 39 Fla. 178, 22 So. 298 (1897); **Nelson v. State**, 85 So. 2d 832 (Fla. 1956); **Beasley v. Beasley**, 463 So. 2d 1248 (Fla. 5th DCA 1985); **Carter v. Carter**, 504 So. 2d 418 (Fla. 5th DCA 1987). While **Florida Rule of Appellate Procedure 9.200**

(a) (2) provides that the Appellee may have additional documents and exhibits included in the record, the Appellee has no such duty. **Florida Rule of Appellate Procedure 9.200 (e)** makes it clear that the burden of supplying a proper record remains on the Appellant. Appellee has no duty to supply the omitted portions of the record. *See* **Strickland v. State**, 391 So. 2d 222 (Fla. 1st DCA 1980). Appellant's failure to provide a record compels affirmance. **Holland**; **Nelson**; **Beasley**; **Carter**. *See also* **McDonald v. State**, 23 Fla. L. Weekly D232 (Fla. 5th DCA 1998)("[T]he defendant has failed to sustain his burden of presenting a record demonstrating reversible error.")

Moreover, counsel for Appellant has failed to even allege (let alone provide a record which shows) that Appellant entered a plea of *guilty* rather than *nolo contendere*. If Appellant entered a plea of nolo contendere and reserved a right to appeal, then he has no standing to raise the issue under review and this appeal is moot. Unless and until he provides a record that reflects otherwise (as is his burden), Appellee is entitled to all reasonable inferences and deductions which support the lower court's ruling. *See* **Medina v. State**, 466 So. 2d 1046, 1049-1050 (Fla. 1985); **State v. Wells**, 308 So. 2d 163 (Fla. 1st DCA 1974), **cert. denied**, 326 So. 2d 175 (Fla. 1976); **Hewitt v. State**, 575 So. 2d 273 (Fla. 4th DCA 1991); **Moody v. State**, 574 So. 2d 260 (Fla. 4th DCA 1991). *See also* **Pertz v. Zohar**, 556 So. 2d 459

(Fla. 2d DCA 1990)("Because this court was not furnished with a transcript of the hearing which generated the order being challenged in this appeal appellants have failed to demonstrate a basis for reversal in the record, and we must affirm therefor. [] In appellate proceedings, the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.")

SUMMARY OF THE ARGUMENT

Criminal indigents do not have a constitutional right to full and automatic appellate review of all guilty pleas. The second district's decision in **Zdunia k v. State**, 620 So. 2d 1083 (Fla. 2d DCA 1993) should be upheld, and the first district's decision in **Trowell v. State**, 706 So. 2d 332 (Fla. 1st DCA 1998) should be overruled.

ARGUMENT

ISSUE I

CRIMINAL INDIGENTS DO NOT HAVE A CONSTITUTIONAL RIGHT TO FULL AND AUTOMATIC APPELLATE REVIEW OF ALL GUILTY PLEAS. (Restated).[1]

A. Statement of conflict:

In **Zduniak v. State**, 620 So. 2d 1083 (Fla. 2d DCA 1993), the Second District Court of Appeal held that a defendant who enters a nolo contendere plea without reserving any issues for appellate review has no right to an appeal. "Counsel's failure to file a notice, even if Zduniak requested he do so, is immaterial."

Five years later in **Trowell v. State**, 706 So. 2d 332 (Fla. 1st DCA 1998), the first district certified conflict with **Zduniak** by holding that a defendant who enters a plea or is convicted after trial need not make a preliminary merit showing in order to seek a belated appeal. "[T]he only relevant inquiry, once a request for a belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request from an appeal to his or her attorney[.]"

B. The First District's Trowell opinion was wrongly decided:

In reaching its decision in **Trowell**, the first district court relied on two lines of cases: from this Court, **Baggett v. Wainwright**, 229 So. 2d 239 (Fla. 1969), and, from the United

---

[1]This exact issue is currently pending before this Court in **State v. Trowell**, Case No. 92,393 (appeal from First District); and **Gonzalez v. Singletary**, Case No. 93,547 (appeal from the Third District).

States 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 represent him in an 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[2]. In so holding, this Court cited to and 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).

The **Trowell** court's reliance on **Baggett**, **Douglas**, **Anders**, and **Rodriquez**, (as pointed out by the dissenters in **Trowell**), 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 was an appeal from a guilty plea, and none presented the issue of whether the defendant had a right to appeal from a guilty plea. Thus, by misapplying the cases, (and specifically **Baggett**) to a set of facts unlike **Baggett**, the **Trowell** 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."), **on remand**, 388 So. 2d 55 (Fla. 3d DCA 1980).

Moreover, the **Trowell** court not only misapplied **Baggett** to a materially different factual situation, it also failed to follow

---

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

other case law from this Court which is directly on point, and which explicitly addressed the conditions under which an appeal may be taken from a guilty plea. In **Robinson v. State**, 373 So. 2d 898, 902-903 (Fla. 1979), decided ten years after **Baggett**, this Court held that there was no general right to an appeal on unknown and unidentified grounds:

> 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* §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.

Appellee further points out that the **Trowell** court 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 concerns the right to appeal from guilty pleas. Moreover, contrary to Appellant's assertion, the United States Supreme Court has repeatedly held that there is no constitutional right to an appeal of 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, 94 S. Ct. 2437, 41 L. Ed 2d 341 (1974)("[I]t is clear that the State need not provide any appeal at all."); **Abney v. United States**, 431 U.S. 651, 656, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (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, 105 S. Ct. 830, 83 L. Ed. 2d 821 (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, contrary to the decision in **Trowell**, 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.") Thus, although conflict with decisions of the United States Supreme Court is not a basis for conflict jurisdiction, this Court's interpretation of those 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.

Ross v. Moffitt is particularly relevant. Contrary to the **Trowell** court's 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 **Florida Statutes Chapter 924.06(3) (1995)** or its successor, **Florida Statutes Chapter 924.051(4) (Supp. 1996)**, draws any distinctions between the indigent and the non-indigent. Neither group has 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.

The **Trowell** decision relies in part on the uncontroverted principle set out in **Baggett** that a petitioner with a timely right to an appeal, who loses that right because of the ineffectiveness of counsel, does not have to show that he will prevail on the merits in order to obtain a belated appeal. This was a "straw man" argument created by the district court which Appellee expressly disavows. As the state argued in **Trowell** in its motion for rehearing, clarification, or other relief[3] and

---

[3]The first district's decision in **Trowell** was an appeal of a summary denial of a rule 3.850 motion and was reviewed pursuant to **Fla. R. App. P. 9.140 (I)**, which does not require briefing by the parties. Thereafter the first district convened a semi en banc proceeding and issued its decision without any input from the state, which was completely unaware that an appeal had been taken. The state's only option was to petition for rehearing, clarification or other relief. The first district's procedural

argues now:

> The simple two-part showing a petitioner for belated appeal must make is (1) I had a right to appeal which I timely wished to exercise and (2) my attorney lost it. If that showing is made, a belated appeal is appropriate regardless of the lack of merit of any of the issues which might be raised. Appellant Trowell's problem is that he has not moved to withdraw his plea, and thus cannot, as a matter of law, challenge his conviction. Similarly, his sentence is demonstrably legal, and, as Judge Miner shows, it is both statutorily mandated and pursuant to a plea bargain.[4]

Appellee's position (that the second district's **Zduniak** holding is the correct interpretation of existing law, and **Trowell** was wrongly decided) is supported by other decisions of the second, third and fourth district courts of appeal. These cases 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

---

management of the **Trowell** case denied the State its due process right to be heard on significant issues which were not encompassed within the narrow scope of a rule 9.140(g), (now 9.140(I)), appeal.

[4]See the State's motion for rehearing in **Trowell**, footnote 5 and associated text.

appeal from a guilty plea."); **Harrell v. State**, 710 So. 2d 102 (Fla. 4th DCA 1998); **Bridges v. State**, 518 So. 2d 298, 300 (Fla. 2d 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.

Accord **Loadholt v. State**, 683 So. 2d 596 (Fla. 3rd DCA 1996).

C. The effect of the Criminal Appeals Reform Act:

Apparently the Second District Court of Appeal construed Appellant's petition for writ of habeas corpus as a Petition Seeking Belated Appeal pursuant to **Florida Rule of Appellate Procedure 9.140(j)**. This rule became effective January 1, 1997 as part of the revised Rules of Appellate Procedure which this Court adopted in **Amendments**. Those revised rules, along with the revised Rules of Criminal Procedure,[5] implement the Criminal Appeal Reform Act of 1996[6]. The Reform Act, this Court's holdings in **Amendments**, and the implementing criminal and appellate rules are directly on point. By their terms, they are

---

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

[6]Enacted by **1996 Fla. Laws Ch. 96-248.**

contrary to the **Trowell** holding that there is a unfettered right to appeal from guilty pleas despite failure to meet 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 July 1, 1996, and implemented by this Court in its revised rules of criminal and appellate procedure which became effective January 1, 1997. It should be noted that

the Court Commentary on the 1996 amendment of Rule 9.140 states that the rule was substantially rewritten "so as to harmonize with the Criminal Repeal Reform Act of 1996[.]" The Committee Notes on the 1996 amendment of the rule, citing this Court's decision in **Robinson** and the second district's decision in **Counts v. State**, 376 So. 2d 59 (Fla. 2d DCA 1979), states, "Rule 9.140(b)(2)(B) was added to accurately reflect the ***limited*** right of direct appeal after a plea of guilty or nolo contendere." [Emphasis added].

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, §3, 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.

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, Appellee 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 **Trowell**.

Florida Statutes Chapter 924.051(3) (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. [Emphasis added].

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. [citation 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.*** [Emphasis added].

Amendments at 775.

This Court similarly construed subsection 924.051(4) as consistent with subsection 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* **Florida Rule of Criminal Procedure 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)***. [Emphasis added].
>
> 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.
> [Emphasis added].

This Court did not overlook the substantive requirement that sentencing errors must be first raised in the trial court. **Florida Rule of Appellate Procedure 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.

Appellee also invites this Court's attention to the provisions of **Florida Rule of Appellate Procedure 9.020(h)(1) and 9.020(h)(3).** The first rule 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 rule 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 *supra*.

This 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**, 708 So. 2d 617 (Fla. 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. At the same time, because they prohibit unauthorized appeals, parties with legitimate issues and an authorized right to an appeal will not have to compete for scarce judicial resources with parties such as here who have no cognizable issues and no right to an appeal. Moreover, Florida taxpayers will not have to fund such wholly frivolous, abusive judicial proceedings as the instant case.

In sum, consistent with what the Florida Legislature and this Court have mandated, there is no right to an appeal from a guilty or unreserved no contest plea unless either a motion to withdraw the plea pursuant to rule 3.170(l) or a motion to correct the sentence pursuant to rule 3.800 has been filed and ruled on by the trial court. *See* **Florida Rules of Appellate Procedure** 9.140(b)(2) and (d).

Appellant has failed to supply a record demonstrating that

he preserved any claims of error in the trial court, and there is no constitutional or statutory authorization for this appeal. He, and others similarly situated, have remedies under the Reform Act and the implementing rules which are far superior to the unauthorized appeal of guilty pleas where no cognizable issues are present. There is no rational reason, and no authority in law, for permitting Appellant and others similarly situated to abuse the judicial system by appeals such as the one he seeks.

D. The primacy of jurisdiction:

The **Trowell** court not only misapplied the law controlling appeals from guilty pleas. It also misapplied the law on the primacy of jurisdiction. The first district court announced a policy in **Stone v. State**, 688 So. 2d 1006 (Fla. 1st DCA 1997), **pet. for rev. den.**, 697 So. 2d 512 (Fla. 1997), which it continued in **Trowell**, of refusing to address jurisdiction to entertain appeals from guilty pleas, even when raised by the parties, until the parties have exhausted the briefing process and appellate review has been conducted on the merits. In doing so, the first district places itself in direct and express conflict with decisions of this Court, other district courts of appeal, and its own previous decisions on the question.

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) [Emphasis added]; **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 (Fla. 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.' [citations omitted]". This holding was followed in **Mendez v. Ortega**, 134 So. 2d 247, 248 (Fla. 1961), **app. after remand dism.**, 143 So. 2d 586 (Fla. 3d DCA 1962), 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 also 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 **Polk County**, the parties entered into a bargain under which they agreed that a final judgment would be entered in favor of Sofka and that the county could then seek appellate review of merits issues in the district court. The district court duly conducted appellate review, resolved the contested issues on the merits, and certified questions to this Court. This Court, *sua*

sponte, directed the parties to brief the threshold issue of whether the district court had jurisdiction to hear the appeal. After briefing by the parties in which both argued for jurisdiction, the Court concluded there was no jurisdiction, quashed the decision of the district court, and remanded with directions that the district court dismiss the appeal for lack of jurisdiction:

> It is clear that the parties have stipulated to the district court's jurisdiction. However, it is equally clear 'that the parties cannot stipulate to jurisdiction over the subject matter where none exists.' **Cunningham v. Standard Guar. Ins. Co.**, 630 So. 2d 179, 181 (Fla. 1994). *See also* **Snider v. Snider**, 686 So. 2d 802, 804 (Fla. 4th DCA 1997)('Subject matter jurisdiction is conferred upon a court by a constitution or statute, and cannot be created by waiver, acquiescence or agreement of the parties.'). . . .
>
> . . . Thus, based upon the record to which the parties agreed, the district court lacked jurisdiction to hear the appeal, notwithstanding the parties' attempt to confer such jurisdiction.
>
> It is true, as the parties state, that this conclusion 'will result in a waste of judicial resources.' However, '[c]ourts 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.' **West 132 Feet v. City of Orlando**, 80 Fla. 233, 239, 86 So. 197, 198-

> 99 (1920). This is because the limits of a court's jurisdiction are of 'primary concern,' requiring the court to address the issue '*sua sponte* when any doubt exists.' **Mapoles v. Wilson**, 122 So. 2d 249, 251 (Fla. 1st DCA 1960). Thus, while the resulting 'waste of judicial resources' is regrettable, in the absence of jurisdiction, it is unavoidable.

The decision, the holding, and the reasoning in **Polk County** that jurisdiction is primary are the very antithesis of the decision, holding, and rationale of **Trowell** and **Stone** that full appellate briefing and review on the merits is required prior to determining if there is jurisdiction. It should also be noted that in **Polk County** the absence of jurisdiction might well result in a waste of judicial resources. That is not the case where there is no authorization for appealing from guilty pleas. Both the judicial system and the public benefit from the enforcement of this cardinal principle.

In summary, **Trowell**'s 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 including the second district. **Trowell** should be overruled.

E. <u>The effect of a lawyer's ethical obligations</u>:

Counsel for Appellant's assertion that the second district's holding in **<u>Zduniak</u>** contravenes the ethical considerations of an attorney is without merit. Appellant in effect contends that an attorney has an ethical duty to file a notice of appeal when ordered to do so by a client regardless of whether there is a right to such appeal and cites an ethics opinion from The Florida Bar, **<u>State v. Meyer</u>**, 430 So. 2d 440 (Fla. 1983), **<u>The Florida Bar v. Dingle</u>**, 220 So. 2d 9 (Fla. 1969), and **<u>Thames v. State</u>**, 549 So. 2d 1198 (Fla. 1st DCA 1989). Counsel for Appellant does not point out to this Court that these cases are not on point in that they do not involve appeals from guilty pleas, such as here, where filing a notice of appeal when there is no good faith basis for such pleading violates relevant provisions of the oath of office taken by all members of The Florida Bar[7], **Florida Rule of Judicial Administration 2.060(d)**[8], and this Court's direct holding in **<u>Robinson</u>**, 373 So. 2d at 903 on the impropriety of an

---

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

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

attorney appealing from guilty pleas where there is no identified, and authorized, ground for the appeal:

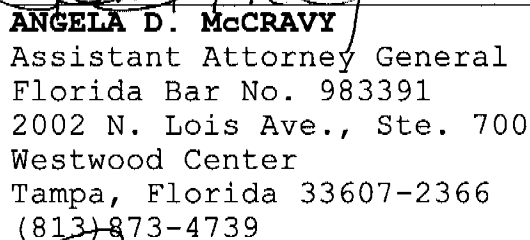
> There is clearly no authority to seek an appellate review upon unknown or unidentified grounds, and ***it is improper to appeal on grounds known to be nonappealable.*** (e.s.)
>
> . . .
>
> Attorneys have a responsibility to ensure that our system of justice functions properly. If counsel believes that the plea proceedings are defective or improper, he is ethically bound to immediately advise the trial judge of that fact. It is ethically wrong to ignore or cause technical or procedural errors to ensure an opportunity for reversal on appeal. We reiterate our holding in **Hall v. State**, 316 So. 2d 279 (Fla. 1979), that both the prosecutor and the defense counsel are ethically bound to see that proper procedural steps are followed when a guilty plea is entered by a defendant.

CONCLUSION

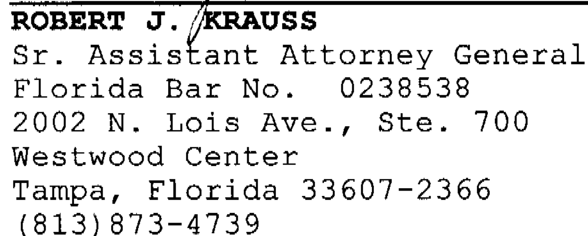
Based on the foregoing facts, argument, and citations to authority, the denial of Appellant's petition for writ of habeas corpus (treated as a petition for belated appeal) should be affirmed. The first district's decision in **Trowell** should be overruled.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ANGELA D. McCRAVY
Assistant Attorney General
Florida Bar No. 983391
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739

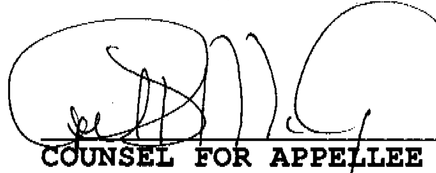


ROBERT J. KRAUSS
Sr. Assistant Attorney General
Florida Bar No. 0238538
2002 N. Lois Ave., Ste. 700
Westwood Center
Tampa, Florida 33607-2366
(813)873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Bernard F. Daley, Jr., Esq. 1210 E. Park Avenue, Tallahassee, Florida 32302, this 19th day of November, 1998.



COUNSEL FOR APPELLEE