11-13

IN THE SUPREME COURT OF FLORIDA

HERBERT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,805

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

DENISE O. SIMPSON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0981486

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, HERBERT JONES, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of five volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "MB" will designate Petitioner's Amended Merits Brief, followed by any appropriate page number. "A" will designate the appendix attached to the State's brief.

The decision below was reported as Jones v. State, 23 Fla. L. Weekly D2020 (Fla. 1st DCA August 19, 1998).

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case, except for the addition of the following for clarification:

1. Petitioner's issue raised on appeal before the First District Court of Appeal was as follows:

> The trial court erred in allowing the State to present evidence of an unrelated crime, subsequently committed by Appellant, the prejudicial impact of which was outweighed by any probative value.

(Appendix. A2)

The State also adds its own statement of the facts relating to the issue raised by Petitioner before the First District Court of Appeals as follows:

Appellant was charged and tried by Amended Information with Sexual Battery and Armed Robbery for the events occurring on May 22, 1996 involving the victim, Ms. Linda Smith. (I. 45) Linda Smith was thirty-nine years old at the time of the crimes, and the crimes occurred when she was working at her brother's CPA office in Jacksonville, Florida. (I. 45, 52, III. 207) A jury trial was held before the Honorable L. Haldane Taylor in Duval County on February 4-5, 1997.

The State presented the testimony of the victim, Ms. Linda Smith,[1] who testified that on May 22, 1996 at approximately 5:30 p.m., after entering her office under the guise of wanting to conduct business, Appellant threatened her with a knife, forced

---

[1] The victim in this case, Ms. Linda Smith, and the victim/witness, Ms. Melodie Smith, are not related. (III. 228)

her into the bathroom, and told her to lie on her stomach. (III. 157-160) Appellant then tied Linda Smith's hand behind her back with his shoestrings. (III. 160) Despite claims that he would not hurt her, Appellant used liquid soap from the bathroom, and forced his penis into Linda Smith's vagina for ten minutes until he ejaculated. (III. 161-164) Appellant's forcing himself into Ms. Smith caused him to move Ms. Smith body so that her head constantly hit the wall, however he did not show any concern over this. (III. 163-164) Linda Smith further testified that after Appellant ejaculated, he "hog-tied" her hands and feet behind her back, and left her half-naked in the bathroom. (III. 164-165) Appellant took the $20 Linda Smith had told him to take earlier when he asked for money, her beeper, the gold chain from around her neck, and her First Union ATM card.

The State presented the testimony of Patricia Wilson and Benita Pelsey, who worked next door to Linda Smith's office, and who discovered Ms. Smith after she was sexually battered by Appellant. (III. 186-191, 193-200) Dr. Kelly Gray-Eurom testified as an expert in sexual assault examination, and testified that the injuries she observed on Linda Smith were consistent with forcible sexual penetration. (III. 203-212)

Outside the presence of the jury, the State informed the trial court that it would be calling Ms. **Melodie** Smith, Mr. Cecil Hiden, and Jacksonville Sheriff's Deputy Ivan Pena to establish the chain of events leading to the recovery of Linda Smith's ATM card. (III. 227-229) The State argued also that a photograph of

Appellant from his May 23, 1996 arrest involving Melodie Smith was relevant because the clothing he was wearing that day, including the manner in which he wore one of his sweatpants leg rolled up was consistent with the description Linda Smith gave of the man who attacked her on May 22, 1996. (III. 230) Appellant objected to this evidence as prejudicial and irrelevant. (III. 231) The trial court found the evidence relevant because it "goes to (the) very key points and key issues of this case. Especially to the question of identity, which...is...the main point that is contested by the (Appellant)." (III. 236) The trial court also held that,

> this would appear to be disjointed if we just tried to put all this -- the State tried to put all this in a vacuum and the jury not having the total circumstances. I realize it's not only prejudicial to (Appellant) as to the case in chief, if he is in fact in possession of these items afterwards and dressed in very similar clothing, and the other events that took place also, -- they certainly reflect conduct of a subsequent crime.
>
> I would just ask -- I'm going to admit the testimony and I'm going to instruct you as to this Melodie Smith...that you (the State) don't elicit a whole lot of details with all the transactions. Just more or less the encounter and what subsequently occurred. And not to go into a whole lot of detail.

(III. 236-237)

When the jury returned the trial court instructed the jury as follows:

> Members of the jury, I want to give you some instructions pertaining to the testimony that you are about to receive from various other witnesses.
>
> This testimony contains information that is relevant to the charges from which (Appellant) is presently being tried in this case. And for that reason I'm going to allow it to be admissible. However, it's also evidence involving this particular offense that pertains only to crimes allegedly also committed by

(Appellant). You are not to be concerned so much with the nature of the crime that is alleged to have taken place that has to do with the testimony that is being presented. But you will consider that as to the relevant portions that has to do with the identity of (Appellant) as to the crimes for which he is being charged in this case. Any other crime -- you should not take that into consideration when you retire to deliberate as to whether or not the evidence proves that the defendant committed the crimes for which he is being tried in this case beyond and to the exclusion of a reasonable doubt.

(III. 242-243)

Melodie Smith testified that on May 23, 1996 at approximately 4:30 p.m. she left her job at First Union on North Hogan Street in Jacksonville. (III. 244) She originally planned on using the ATM but decided not to when she saw a black male wearing a red and white jersey using the ATM. (III. 244) She went to her car, unlocked the door, got in, and Appellant jumped in her car and pointed a gun to her side. (III. 245) Appellant told Melodie Smith to drive, and he was looking around as if he were looking for someone. (III. 245) Melodie Smith noticed that Appellant had a First Union ATM card in his wallet. (III. 246-247) She saw a police car while she was driving, and attempted to escape by crashing into the police car, but was unable to. (III. 242-243) She eventually jumped out of the car, and made contact with Deputy Pena, while Appellant jumped out of the car also. (III. 242-243) She saw Appellant cross the parking lot, where he was seen by Mr. Cecil Hiden entering the north entrance of the Market Square Mall. (III. 254) Mr. Hiden observed Appellant walk within one foot of a trash can a number of times, but did not see Appellant put anything inside the can. (III. 256-258) A bank

card was found by Jacksonville Sheriff's Deputy Mark Hatton in the trash can in the Market Square Mall which Appellant repeatedly walked by, and this card belonged to Ms. Linda Smith. (III. 176, 273-274) Melodie Smith testified that thirty to thirty-five minutes after she told Deputy Pena about Appellant, he was bought back to the scene in a police car from the mall, and she identified him. (III. 249) Melodie Smith testified that State's Exhibit P, the photograph taken of Appellant as he appeared on May 23, 1996 was the same as he appeared when he was in her car, including one pant leg was up, and one down. (III. 250-251)

SUMMARY OF ARGUMENT

The harmless error test set forth in § 924.051(7), FLA. STAT. is not unconstitutional. The Florida Legislature is permitted to place reasonable conditions on an appellant's right to appeal so long as it does not impede an appellant's legitimate right to appeal, and § 924.051(7) does not impede on an appellant's legitimate right to appeal. Furthermore, § 924.051(7) does not violate the separation of powers, because it does not unreasonably interfere with this Court's rule making power. Additionally, the statute is not vague, because an appellant's burden of proof is specifically defined in § 924.051(1)(a), FLA. STAT. The district court below was correct in finding that there was no constitutional error in this case, because the matters presented on appeal were evidentiary matters which were properly resolved under Florida's rule of evidence, and no constitutional issues were raised. Therefore, the harmless error test of Chapman v. California, 386 U.S. 18 (1967), and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) does not apply in the present case because there was no constitutional error, and the burden of persuasion could be constitutionally placed on the appellant pursuant to §§ 924.051(7) and 924.33 which place the burden on Petitioner to show that preserved, prejudicial error occurred in the trial court.

The certified question, as reworded by the state for clarity, should be answered in the affirmative because §§924.051(7) and 924.33 do not abrogate the analysis of **constitutional error** for

harmlessness (non-prejudicial) established in State v. DiGuilio; they merely augment it with a method of analyzing **non-constitutional** errors for **harmfulness** (prejudice).

ARGUMENT

ISSUE

> **CERTIFIED QUESTION:** IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN DIGUILIO V. STATE (SIC), 491 SO.2D 1129 (FLA. 1986)?
>
> **RESTATED FOR CLARITY BY THE STATE:** ARE SECTIONS 924.051(7) AND 924.33, FLORIDA STATUTES, WHEN APPLIED ONLY TO CLAIMS OF NON-CONSTITUTIONAL ERROR, CONSTITUTIONALLY COMPATIBLE WITH STATE V. DIGUILIO, 491 SO.2D 1129 (FLA. 1986)?

Petitioner incorrectly argues that §§ 924.051(7) and 924.33, FLA. STAT. (1995) are unconstitutional, and should not have been applied in his case by the First District Court of Appeals.

Decision Below

In affirming Appellant's conviction on direct appeal, the First District Court of Appeals found that under § 924.051(7), Florida Statutes, and Goodwin v. State, 23 Fla.L.Weekly D918 (Fla. 4th DCA June 24, 1998), on rehearing denied D1538 (Fla. 4th DCA June 24, 1998), Petitioner failed to demonstrate that any prejudicial error took place at his trial. (Appendix. A1) The First District Court of Appeal certified the following question to this Court:

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN DIGUILIO V. STATE, 491 So.2d 1129 (FLA. 1986)?

Merits

§ 924.051(7), FLA. STAT. (1997) states that in

> a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

As acknowledged by Petitioner, the Florida Legislature has the authority to enact harmless error statutes. (MB. 7) However, the State acknowledges that there is an exception to the legislature's power to create harmless error statutes. That exception is set forth in this Court's DiGuilio decision and the U.S. Supreme Court's decision in Chapman v. California, 386 U.S. 987, 87 S.Ct. 1283, 17 L.Ed.2d 705 (1967). Legislatures cannot create a harmless error test for **constitutional** error which is contrary to holdings of this Court in DiGuilio and the United States Supreme Court in Chapman. State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986) ("The authority of the legislature to enact harmless error statutes is unquestioned," but "for constitutional reasons," the court can "override the legislative decision").

In Palmes v. State, 397 So. 2d 648 (Fla. 1981), this Court emphasized the difference between the two tests:

> A judgment will not be reversed unless the error was prejudicial to the substantial rights of the appellant. This long standing decisional rule has also been enacted as a statute. S.924.33, Fla. Stat. (1977). Although, in a capital case, this Court will carefully scrutinize any error before determining it to be harmless, it will not presume that there was prejudice.
>
> In determining whether an erroneous ruling below caused harm to the substantial rights of the defendant, an appellate court considers all the relevant circumstances, including any curative ruling or event and the general weight and quality of the evidence. In

> other words, the court inquires generally whether, but for the erroneous ruling, it is likely that the result below would have been different.
>
> When the error affects a constitutional right of the defendant, the reviewing court may not find it harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt. Even such constitutional error, however, may be treated as harmless where the evidence of guilt is overwhelming. (internal quotation marks and citations omitted)

In Chapman v. California, 386 U.S. 18 (1967) the United States Supreme Court noted that the "application of a state harmless-error rule is, of course, a state question where it involves only error of state procedure or state law." Id. at 21.

In DiGuilio, this Court addressed the issue of whether a constitutional error, comment on a defendant's silence, could be found to be harmless. Relying squarely on Chapman, this Court held that **constitutional** errors could be harmless provided the state proved beyond a reasonable doubt that the constitutional error "did not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the conviction." DiGuilio, 491 So.2d at 1135. However, while establishing the rule for analyzing constitutional error, this Court recognized the authority of the legislature to enact section 924.33, which, then as now, provides that there shall be no presumption that error injuriously affects the substantial rights of the accused. Moreover, this Court held that section 924.33, and other harmless error statutes enacted by the

various statutes, were consistent with Chapman. See, footnotes 9 and 10 and associated text, to DiGuilio, 491 So.2d 1134:

> (FN9). In this connection, see Chapman ... where the Court recognized that Congress and the fifty states had the authority to enact harmless error statutes, or rules, and had done so. Note, also that, although section 924.33 was enacted prior to Chapman, it is consistent with Chapman.
> (FN10). The prohibition of prosecutorial comment on failure to testify is constitutional, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). However, there is no constitutional right to per se reversal. Chapman and progeny.

In short, sections 924.051(7) and 924.33, when applied to **non-constitutional** errors, as here, are entirely compatible with DiGuilio and Chapman, as applied to **constitutional** errors. There is no issue of abrogation involved, merely the application of compatible rules in different circumstances.

Petitioner argues that because § 924.051(7) places the burden of proving prejudice on the party claiming error this "thwarts legitimate appellate rights, ignores constitutional safeguards, and cannot be countenanced by the courts." (MB. 8) He supports this argument by arguing that since 1996 every appellate court has reversed a case under the DiGuilio standard "including the placement of the burden on the State to show harmless error." (MB. 9) Obviously, however, as shown in the decision below and in Goodwin, the district court decisions do not support this assertion. We would not be here on a certified question and a decision supporting the state's view if they did.

Moreover, in light of this court's recognition of the legislature authority to create harmless error statutes and to establish terms and conditions for appeals, the answer to the

certified question lies in the existing statutory duty to apply the harmless error test. Sections 924.33, 924.051(3) and (7), and 90.104(1), FLA. STAT. provides as follows:

> **§ 924.33.** No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. **It shall not be presumed that error injuriously affected the substantial rights of the appellant.**
>
> **§ 924.051(3).** *** A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred **and was properly preserved** in the trial court or, if not properly preserved, would constitute fundamental error.
>
> **§ 924.051(7).** In a direct appeal or a collateral proceeding, **the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court.** A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.
>
> **§ 90.104(1).** A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected.

Upon examination of the above statutory language, it is clear that nonconstitutional error is presumed harmless, the defendant has the burden of showing harmful error, and to be harmful, the error must have "injuriously affected" the defendant's "substantial rights."

Petitioner also argues that § 924.051(7) violates the separation of powers, because it interferes with this court's rule-making authority. However, "Statutes are presumed to be constitutional and should be so construed if possible."

Gulfstream Park Racing Ass'n, Inc. v. Department of Business Regulation, 441 So.2d 627, 629 (Fla. 1983). As held by this court, "the authority of the legislature to enact harmless error statutes is unquestioned." DiGuilio, at 1134. When the Criminal Appeal Reform Act, § 924, FLA. STAT. (Supp. 1996) was enacted, this Court noted that the legislature could "place reasonable conditions upon (the right to appeal provided by the Florida Constitution) so long as they do not thwart upon the litigant's legitimate appellate rights." Amendment to Fla.R.App.P, 685 So.2d 773, 774 (Fla. 1996). Section 924.051(7) does not interfere with any appellate rights, it instead reaffirms the presumption of correctness that a judgment or order has on appeal. See Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975) Despite who has the burden on appeal, the reviewing court still has to evaluate the impact of any error to see if the verdict was affected even if it is not raised as an issue on direct appeal. Heuss v. State, 687 So.2d 823, 824 (Fla. 1996). Petitioner's constitutional rights are not infringed. See, footnotes 9 and 10 to DiGuilio, 491 So.2d at 1134.

Petitioner incorrectly argues that while § 924.051(7) "places a burden on the victim of the error, it does not delineate what that burden is." (MB. 10) Prejudicial error is specifically defined under § 924.051(1)(a) as "an error in the trial court that harmfully affected the judgment or sentence." For an error to be reversible error "a judgment shall not be reversed unless the appellate court is of the opinion that the error injuriously

affected the substantial rights of the appellant." Small v. State, 630 So.2d 1087, 1089 (Fla. 1994) In United States v. Olana, 507 U.S. 725, 724 (1993), the court defined affecting "substantial rights" to mean showing that the error was prejudicial.

Petitioner argues that this case involves a violation of his constitutional right to a fair trial, therefore "the state's harmless error procedure gives way to the harmless error test in Chapman" which this court adopted in DiGuilio. (MB. 11) DiGuilio, however, as the state has shown above, involved preserved, **constitutional** error. The admission of evidence of other crimes or acts is not constitutionally barred, as comment on a defendant's silence is, and its admission does not deny a defendant the right to a fair trial, even if admission under evidentiary rules is erroneous.

In Kotteakos v. United States, 328 U.S. 750 (1946), the Supreme Court explained that the burden under the federal harmless error statute on the party claiming error was to show that the errors he complained about affected his substantial rights. Id. at 760. Kotteakos and the federal harmless error statute are consistent with Chapman, DiGuilio, sections 924.051(7) and 924.33, and the decision below. In the present case, the district court below correctly found that there was no prejudicial error, because no constitutional error had been committed and the appellant had failed to show prejudice.

In Dowling v. United States, 493 U.S. 342, 346-347 (1990), the trial court admitted testimony that the defendant claimed was barred by collateral estoppel. The United States Supreme Court found that a less stringent standard than the Chapman harmless error rule applied in Dowling's case, because the error was merely evidentiary and not constitutional, because the evidence was only barred by the common-law doctrine of collateral estoppel, and there was no constitutional bar to using the evidence. Id. at 350.

Th Court noted that the testimony could potentially prejudice the jury, however the Court stated that the question was whether the evidence was so extremely unfair that its admission violated "fundamental conception of justice." Id. at 352. The Court further reasoned that if the evidence did not, the testimony could be addressed through nonconstitutional sources such as the rules of evidence. The Court stated that

> (b)eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly.

Id.

In the present case and contrary to Petitioner's arguments, the alleged error was evidentiary, and not constitutional. As stated on direct appeal by Petitioner before the First District court of Appeal the issue was.

> The trial court erred in allowing the State to present evidence of an unrelated crime, subsequently committed by Appellant, the prejudicial impact of which was outweighed by any probative value.

(Appendix. A2) This is an evidentiary matter which can best be addressed under § 90.403, FLA. STAT., and is not a denial of due process. Petitioner failed to establish that any probative value of the evidence was substantially outweighed by any prejudicial effect so to have harmfully affected the verdict. Therefore, the First District Court of Appeal correctly applied the harmless error test in §§ 924.051(7) and 924.33.

In summary, the method of analyzing **constitutional error** set forth in Chapman and DiGuilio is entirely compatible with the method of analyzing **non-constitutional** error set forth in Kotteakos, §§ 924.051(7) and 924.33, and the decision below. Statutes are presumptively constitutional and should be upheld if they can be plausibly interpreted as consistent with the constitution. Applying these statutes to non-constitutional error, as urged by the state, renders them constitutional.

CONCLUSION

Based on the foregoing, the State respectfully submits that the certified question, as rephrased and qualified by the state, should be answered in the affirmative, the decision of the district court should be approved, and the judgment of the trial court affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

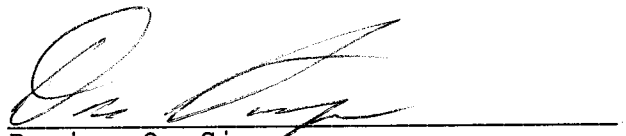
DENISE O. SIMPSON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0981486

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# L98-1-10033]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Michael A. Wasserman, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of October, 1998.



Denise O. Simpson
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\98110033\JONESBA.WPD --- 10/19/98,12:55 pm]

IN THE SUPREME COURT OF FLORIDA

HERBERT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,805

APPENDIX

As to the cocaine that Dempsey threw out, however, the trial court denied the motion to suppress. Dempsey then entered a negotiated plea to the cocaine charge, expressly reserving his right to appeal the ruling on the motion to suppress.

The State did not cross appeal the trial court's finding of an illegal search. Unauthorized police entry into a guest room at a hotel violates the Fourth Amendment. *See Wassmer v. State*, 565 So. 2d 856 (Fla. 2d DCA 1990). A hotel manager does not have the power to waive a guest's Fourth Amendment privacy rights. *Id.* Accordingly, the trial court ruled correctly that the initial entry, and ensuing discovery of drugs on a table in the room, were illegal. Nevertheless, the trial judge, relying upon *Hodari,* found that the balance of the contraband, that being the cocaine Dempsey threw over the balcony, had been abandoned, and was not subject to suppression. This ruling was erroneous.

In *Hodari,* the United States Supreme Court held that a police officer's show of authority, coupled with pursuit of a suspect, did not result in a seizure for purposes of the Fourth Amendment. Accordingly, contraband thrown down by the suspect while fleeing the police was treated as abandoned, rather than the fruit of a seizure, and was available for use in prosecution of a suspect. The Florida Supreme Court conformed Florida law to *Hodari* in *Perez v. State*, 620 So. 2d 1256 (Fla. 1993). The facts of *Perez* were virtually identical to those of *Hodari*. In both *Hodari* and *Perez*, the courts held that the defendant abandoned the contraband before any seizure.

These cases did not, therefore, involve any analysis of an illegal search. In the present case, by contrast, the trial court found that the police officer's entry into appellant's room was illegal. That finding is supported by law and is not challenged on appeal by the State. Upon entering the room, the officer saw the drugs on the table. Only after Bridges placed appellant under arrest did appellant pick up the two baggies of cocaine and throw them out of the room. Under these facts, *Hodari* and *Perez* have no application. All the contraband discovered by the officer was the direct fruit of the initial illegal entry. That Dempsey then picked up the drugs and attempted to throw them out of the room did not amount to an abandonment and most certainly did not turn back time to a point before the Fourth Amendment violation. Because the cocaine was the fruit of the Fourth Amendment violation, the trial judge should have granted the suppression motion in its entirety. *See Robinson v. State*, 615 So. 2d 201, 203 (Fla. 3d DCA 1993) (holding that where the defendant dropped cocaine during the course of an illegal police search, no voluntary abandonment occurred); *see also U.S. v. Simpson*, 944 F. Supp. 1396, 1404 (S.D. Ind. 1996) (citing *Fletcher v. Wainwright*, 399 F.2d 62 (5th Cir. 1968) for the proposition that abandonment must be truly voluntary, and not merely the product of police misconduct).

REVERSED. (BARFIELD, C.J., and WEBSTER, J., Concur.)

* * *

Administrative law—Appeals—Petition for review of nonfinal administrative action denied where petitioner failed to show that appeal from final agency decision will not provide adequate remedy

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, Petitioner, v. EDWIN HENRY, Respondent. 1st District. Case No. 98-2578. Opinion filed August 19, 1998. Petition for Review of Nonfinal Administrative Action—Original Jurisdiction. Counsel: Linda Goodgame, General Counsel, and Lisa A. Nelson, Deputy General Counsel, Department of Business and Professional Regulation, for petitioner. No appearance for respondent.

(PER CURIAM.) Petitioner has failed to show that appeal from a final agency decision will not provide an adequate remedy. Accordingly, the petition for review of nonfinal administrative action is denied. (BOOTH, VAN NORTWICK and PADOVANO, JJ., concur.)

* * *

Criminal law—Appeals—Belated—Habeas corpus—Petition for writ of habeas corpus for belated appeal—Claim was time-barred when defendant did not file motion for post conviction relief in trial court within two years—Promulgation of new rule of appellate procedure did not revive claims which were time-barred under Rule 3.850(b)

JEFFERY RINN FINCH, Petitioner, v. STATE OF FLORIDA, Respondent. 1st District. Case No. 98-1581. Opinion filed August 19, 1998. Petition for Writ of Habeas Corpus for Belated Appeal—Original Jurisdiction. Counsel: Jeffery Rinn Finch, pro se, petitioner. Robert A. Butterworth, Attorney General, and Trisha E. Meggs, Assistant Attorney General, Tallahassee, for respondent.

(PER CURIAM.) Jeffery Rinn Finch petitions this court for a belated appeal. We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.140(j)(1). We deny the petition because it is time-barred.

Finch alleges he was convicted and sentenced in 1992 of DUI Manslaughter and that he requested his trial attorney to file a notice of appeal. Further, Finch states that when he learned the appeal had not been taken, the 30 day period for noticing the appeal had expired.

In *State v. District Court of Appeal, First District*, 569 So. 2d 439 (Fla. 1990), the court announced that thereafter claims for belated appeal on grounds such as those presented here should be made in the trial court through a motion for postconviction relief. Pursuant to Florida Rule of Criminal Procedure 3.850(b), Finch had two years to file his motion for postconviction relief and, when he did not do so, the claim was time-barred sometime in 1994.

The promulgation of Rule 9.140(j), effective January 1, 1997, superseded *State v. District Court. See Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773, 807 (Fla. 1996) (Committee Notes). However, there is no basis to conclude that the new rule revived *State v. District Court* claims which were time-barred under Rule 3.850(b). Accordingly, we find this petition for belated appeal is time-barred and, for that reason, it is denied.

PETITION DENIED. (WOLF, LAWRENCE and DAVIS, JJ., concur.)

* * *

Criminal law—Appeals—Harmless error—Question certified: In appeals which do not involve constitutional error, does the enactment of section 924.051(7), Florida Statutes, abrogate the harmless error analysis announced in *DiGuilio v. State,* 491 So. 2d 1129 (Fla. 1986)?

HERBERT JONES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 97-909. Opinion filed August 19, 1998. An appeal from the Circuit Court for Duval County. L. Haldane Taylor, Judge. Counsel: Nancy A. Daniels, Public Defender; Michael A. Wasserman, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Denise O. Simpson, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Upon a thorough review of the record, we conclude that appellant has not demonstrated that his trial contained prejudicial error, as required by section 924.051(7), Florida Statutes. *Goodwin v. State*, 23 Fla. L. Weekly D918 (Fla. 4th DCA April 8, 1998) *on rehearing denied* D1538 (Fla. 4th DCA June 24, 1998). Accordingly, we affirm and certify to the Supreme Court of Florida the identical question as was certified by our sister court:

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN *DIGUILIO V. STATE,* 491 So.2d 1129 (Fla.1986)?

Goodwin, 23 Fla. L. Weekly D1538 (June 24, 1998). (MINER, ALLEN and KAHN, JJ., CONCUR.)

* * *

Insurance—Uninsured motorist—Other insurance—Where policy issued to passenger in vehicle contained clause making the coverage of that policy excess over the limit of coverage applicable to the vehicle the insured was occupying when injured, insurer which issued policy to owner of vehicle was required to pay the limit of its coverage for injuries to passenger before coverage under passenger's policy became available—Error to apportion coverage between vehicle owner's policy and passenger's policy on pro-rata basis

NATIONWIDE GENERAL INSURANCE COMPANY, Appellant, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Appellee. 1st District. Case No. 97-3774. Opinion filed August 19, 1998. An appeal from the Circuit Court for Escambia County. Laura N. Melvin, Judge. Counsel: Linda H. Wade of Schofield & Wade, P.A., Pensacola, for Appellant. Stephen F. Bolton and Charles F. Beall, Jr. of Moore, Hill, Westmoreland, Hook & Bolton, P.A., Pensacola, for Appellee.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

HERBERT JONES,

Appellant,

V. **CASE NO. 97-909**

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

I. PRELIMINARY STATEMENT

Appellant was the defendant below, and will be referred to as appellant or by proper name in this brief. A five volume transcript, including the record on appeal, motion hearings, jury selection, jury trial, and sentencing, will be referred to as "I, II, III, IV, or V." Proceedings were held in Duval County before Circuit Judge L. Haldane Taylor.

V. ARGUMENT

ISSUE PRESENTED:

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE OF AN UNRELATED CRIME, SUBSEQUENTLY COMMITTED BY APPELLANT, THE PREJUDICIAL IMPACT OF WHICH WAS OUTWEIGHED BY ANY PROBATIVE VALUE.

Herbert Jones was charged with sexual battery and armed robbery of Linda Smith. During the trial, the state introduced evidence of a subsequent kidnaping committed by Jones. This evidence was irrelevant to the charged offenses and the prejudicial impact of the multiple witnesses that testified outweighed any relevancy or probative value it may have had.

Section 90.401, Florida Statutes (1995), defines relevant evidence as evidence tending to prove or disprove a material fact. Section 90.402, Florida Statutes (1995), provides that all relevant evidence is admissible unless otherwise prohibited by law. Section 90.403, Florida Statutes (1995), prohibits the admission of even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. State v. McClain, 525 So. 2d 420 (Fla. 1988).

The trial court admitted the evidence of Melodie Smith's abduction and Jones' arrest for this abduction because it was "factual evidence germane to the case being tried (II-110)." The