OA 5-11-99

IN THE SUPREME COURT OF FLORIDA

HERBERT JONES,

Petitioner,

v. CASE NO. 93,805

STATE OF FLORIDA,

Respondent.
_____/

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

STATUTES

RULES

CONSTITUTIONS

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I PRELIMINARY STATEMENT

This brief is submitted pursuant to the Court's order dated February 24, 1999, requesting supplemental briefs addressing the issue of whether Section 924.051(7) of the Criminal Appeal Reform Act applies retroactively to appellate review of convictions for crimes committed before the effective date of the Act. All references will be as designated in the Amended Merit Brief of Petitioner.

Pursuant to the Court's Administrative Order dated July 13, 1998, this brief has been printed in 12 point Courier New, a font that is not proportionately spaced.

II SUMMARY OF ARGUMENT

Section 924.051 became effective on July 1, 1996. The legislature designated the effect date of the statute as July 1, 1996, without any expression that it was to apply to cases pending on that date. Case law mandates that the statute be presumed to operate retroactively. Moreover, because the statute impairs pre-existing appellate rights, retroactive application of the statute would violate ex post facto.

Sections 924.051(1)(a), (3) and (7), Fla. Stat., alter a defendant's pre-existing appellate rights by imposing a new duty to allege of prejudice as a condition to the right to appeal and by shifting to the complaining party the burden of proving that the error complained of harmfully affected the judgment or sentence, contrary to this Court's holding in State v. DiGuilio, infra. Subsection (7) further abrogates the presumption of prejudice when collateral crime evidence is introduced and appears to relieve the reviewing court of its duty to independently examine all the evidence in determining whether the error might have influenced the jury's verdict. If the Act is substantive, it cannot be applied retroactively to interfere with the right to and scope of appellate review.

III ARGUMENT

ISSUE PRESENTED

WHETHER SECTION 924.051(7) OF THE CRIMINAL APPEAL REFORM ACT APPLIES RETROACTIVELY TO APPELLATE REVIEW OF CONVICTIONS FOR CRIMES COMMITTED BEFORE THE EFFECTIVE DATE OF THE ACT

The Criminal Appeal Reform Act ["Act"], Section 924.051, Fla. Stat. (1996), was created by Chapter 96-248, Laws of Florida, and took effect on July 1, 1996. The Court's order requesting supplemental briefing concerns the applicability of the Act to petitioner, whose crimes were committed on May 22, 1996, six weeks before the Act went into effect.

The question of whether the Act applies retroactively is inextricably related to whether the Act is substantive or procedural in nature. Before July 1, 1996, Jones had the right to appeal his conviction without any condition that he allege prejudicial error before exercising his appellate rights. In addition, once he established that an error was committed in the lower court, the state, as beneficiary of that error, had the burden of proving on appeal that the error was harmless. The Criminal Appeal Reform Act dramatically altered both the right to appeal and remedy for an asserted error by imposing two new burdens on the appealing party. First, Section 924.051(3), Fla. Stat. (1996), created a condition to the right to appeal by requiring

that an appeal may not be taken "unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error."[1] The legislature defined prejudicial error in Section 924.051(1)(a), Fla. Stat., as an error which "harmfully affected the judgment or sentence." Second, Section 924.051(7), Fla. Stat., shifted the burden of proving prejudicial error to the party challenging the judgment or order of the trial court.

The determination of whether a law may be applied retroactively or prospectively depends on its impact, i.e., whether it is purely procedural in nature or affects a substantive right. This Court has repeatedly explained the difference between substantive and procedural law in varying terms. Generally, a substantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights. Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975). Stated differently,

> As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.

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[1]The issue Jones raised in the District Court was properly preserved for appellate review, and the requirement that he establish preservation as a prerequisite to the right to appeal is not at issue here.

State v. Garcia, 229 So. 2d 236, 239 (Fla. 1969).

A substantive statute is presumed to operate prospectively rather than retroactively unless the legislature clearly expresses its intent that the statute is to operate retrospectively. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239 (Fla. 1996); Alamo Rent-a-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994); State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983). See also, Lynce v. Mathis, 519 U.S. 433, 439 (1997) ("The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen."). This is especially true when retrospective operation of a law would impair or destroy existing rights. Alamo Rent-a-Car, Inc. v. Mancusi. However,

> A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment, . . ., or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf v. USI Film Products, 511 U.S. 244, 269-270 (1994) [citations and footnote omitted].

In Lavazzoli, the Court concluded that Article I, Section 12 of the Florida Constitution, the constitutional amendment mandating conformity of interpretation of the state constitutional exclusionary rule with the United States Supreme Court's interpretation of Fourth Amendment, had to be given prospective effect since nowhere in either the constitutional provision as amended or in the statement placed on the ballot pursuant to which amendment was approved was there manifested any intent that amendment be applied retroactively. The Court further noted that the amendment could not be applied retrospectively because it altered a substantive right. The Court reasoned:

> While as a general rule it is true that disposition of a case on appeal is made in accordance with the law in effect at the time of the appellate court's decision rather than the law in effect at the time the judgment appealed was rendered, . . ., this rule is not applicable when a substantive right is altered. Prior to the amendment, the right of a citizen of the State of Florida to be free from unreasonable searches and seizures was guaranteed independently of the similar protection provided by the fourth amendment to the United States Constitution. Under article I, section 12 as it existed prior to the amendment, the courts of this state were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution. . . . . The new amendment, however, links Florida's exclusionary rule to the federal exclusionary rule, making it also nothing more than a creature of judicial decisional policy and removing the independent protective force of state law.' When faced with constitutional amendments not clearly expressing an intent to the contrary, this Court has repeatedly refused to construe the amendment to affect detrimentally the

> substantive rights of persons arising under the prior law.

434 So. 2d at 323-324 [Footnotes omitted; citations omitted].

More closely on point, in Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995), the Court held that the 1990 statutory amendment governing noncompete clauses applied prospectively because it made a substantial change in the law governing such agreements. Under the pre-1990 statute, irreparable injury need not be proven but could be presumed when a noncompete clause was violated. In addition, the court's only authority over the terms of the noncompete agreement was to determine the reasonableness of the time and area limitations. The 1990 amendment required evidence of irreparable injury and extended the definition of unreasonableness beyond time and geographic area. The Court concluded that these were substantive changes and said:

> We have held that a substantive law that interferes with vested rights--and thus creates or imposes a new obligation or duty--will not be applied retrospectively. *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985). Statutes that relate only to procedure or remedy generally apply to all pending cases.

656 So. 2d at 477.

The Criminal Appeal Reform Act similarly imposes new obligations, first by requiring the appealing party to allege prejudicial error, Section 924.051(3), and then by shifting the

burden of proving prejudice to the complaining party. Section 924.051(7). Prior to the enactment of the Act, this Court and the district courts of appeal consistently placed the burden of proving harmlessness on the beneficiary of the error. State v. DiGuilio, 491 So. 2d 1129 (1986). Section 924.051(7) reversed that long-standing, judicially-created rule by requiring that "the party challenging the judgment or order of the court has the burden of demonstrating that a prejudicial error occurred in the trial court."

This Court has previously recognized that "[t]he authority of the legislature to enact harmless error statutes in unquestioned." DiGuilio, 491 So. 2d at 1134.[2] Indeed, there has been a harmless error statute in Florida since 1939. Section 924.33, Fla. Stat., provides:

> 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.

Notwithstanding this statute, the DiGuilio Court recognized its inherent authority to establish a rule of per se reversal.

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[2]See Kotteakos v. United States, 328 U.S. 750, 758-759 (1946), discussing the policy and history of the federal harmless error statute.

> Section 924.33 respects the constitutional right to a fair trial free of harmful error but directs appellate courts not to apply a standard of review which requires that trials be free of harmless errors. The authority of the legislature to enact harmless error statutes is unquestioned. Contraposed to this legislative authority, the courts may establish the rule that certain errors always violate the right to a fair trial and are, thus, per se reversible.

Id. While the Court retreated from the per se reversible error rule with regard to comments on silence, the Court adopted the harmless error analysis set forth in Chapman v. California, 386 U.S. 18 (1967):

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. . . . Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135 [footnoted omitted]. The Court emphasized that the harmless error analysis is not a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence and determines that the evidence of guilt is sufficient or even overwhelming.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all

> concerned and for the benefit of further appellate review. The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139. The Court reaffirmed this analysis in Ciccarelli v. State, 531 So. 2d 129, 131 (Fla. 1988), noting that DiGuilio "established the components of the harmless error test in Florida."

Although DiGuilio involved a constitutional error, this Court has consistently applied the harmless error analysis enunciated in DiGuilio to nonconstitutional errors, such as the introduction of collateral crimes evidence. Keen v. State, 504 So. 2d 396 (Fla. 1987); State v. Lee, 531 So. 2d 133 (Fla. 1988); Henry v. State, 574 So. 2d 73 (Fla. 1991). In State v. Lee, the Court answered in the affirmative a certified question whether the erroneous admission of evidence of collateral crimes required reversal where the state failed to demonstrate beyond a reasonable doubt that there was no reasonable possibility that the error affected the verdict. The Court affirmed that the erroneous admission of

collateral crime evidence is subject to the harmless error analysis set forth in DiGuilio and expressly rejected the state's contention that it was the burden of the court rather than the state to prove harmlessness:

> The state offered no argument in support of harmless error in its brief to the district court and during oral argument before the district court, counsel for the state erroneously insisted it was an obligation of the court to apply the harmless error test without argument or guidance from the state. The district court stated that after an examination of the record, it was 'unable to conclude that there is no reasonable possibility that the erroneous admission of the [collateral crime evidence] did not, under the DiGuilio test, affect the verdict,' 508 So.2d at 1303. The district court was therefore correct in reversing the conviction and remanding for a new trial.

Id., at 136. In Ciccarelli, 531 So. 2d at 129, the Court further explicated that if the state has not presented a prima facie case of harmlessness in its argument, "the court need go no further."

While DiGuilio makes clear that the legislature has the authority to enact a harmless error statute, the Court's opinions in DiGuilio, Lee and Ciccarelli suggest that the application, i.e., "components", of the harmless error analysis is within the court's prerogative. See Ciccarelli v. State, 531 So. at 132 (Grimes, J., specially concurring)(the standard of review for harmless error is properly established by the Supreme Court). It that sense, the

Criminal Appeal Reform Act is both substantive and procedural.[3] It is substantive by imposing a duty on the appellant to allege prejudice as a condition precedent to appeal and imposing a duty on the appellate court to find prejudicial error, Section 924.051(3), (7), Fla. Stat.; it is procedural in prescribing the method for determining whether an asserted error is harmless or prejudicial by reallocating the burden of proof and relieving the court of its duty to examine the record. Section 924.051(7), Fla. Stat. ("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.").

If this Court concludes that Section 924.051, in whole or in part, is substantive, the substantive portions cannot be applied to crimes occurring before the date the law took effect. First, as

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[3]A statute may contain provisions which are both substantive and procedural in nature. For instance, in Landgraf v. USI film Products, 511 U.S. 244 (1994), the Supreme Court held that a section of the Civil Rights Act of 1991, which created the right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964, was substantive and could not be applied retroactively to a case which was pending on appeal when the 1991 act was enacted, while a subsection of the same act which provided the right to jury trial was "plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date." 511 U.S. at 280. The Court found "no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes." Id.

noted above, there is a presumption of non-retroactivity and nothing in the statute suggests that the legislature intended the Act to apply to crimes predating its enactment. Furthermore, prospective application would keep the statute from running afoul of the ex post facto provisions of the Florida and federal constitutions. Article I, §10, Fla. Const.; Art. I, §§9, 10, U.S. Const. As a general rule, a statute which is retroactively applied to crimes committed prior to its adoption constitutes an ex post facto law. Gwong v. Singletary, 683 So. 2d 109 (Fla. 1996)(1996 statute limiting amount of incentive gain time which could be earned violated ex post facto when applied to prisoners whose crimes occurred before its effective date). In Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991), this Court explained that a law or its equivalent violates the prohibition against ex post facto laws if two conditions are met: 1) it is retrospective in effect, and 2) it diminishes a substantial right the party would have enjoyed under the law existing at the time of the alleged offense. The Court noted that there is no requirement that the substantive right be "vested" or absolute, since the ex post facto provision can be violated even by the retroactive diminishment of access to a purely discretionary or conditional advantage. Accord, Weaver v. Graham, 450 U.S. 24, 29 (1981)(law need not impair a vested right to

violate the ex post facto prohibition). The question then becomes whether the Criminal Appeal Reform Act "diminishes a substantial right [petitioner] would have enjoyed under the law existing at the time of the alleged offense."[4]

The allocation of the burden of proving harmful or harmless error, while procedural, clearly affects a substantive right in that it may have an actual bearing on the outcome of an appeal, as illustrated in State v. Lee and the instant case. In Lee, the Supreme Court held that the district court correctly reversed Lee's conviction where the state failed to demonstrate, let alone argue, harmless error, despite the lower court's belief that the evidence of Lee's guilt was overwhelming, if not conclusive, and that Lee would again be found guilty on retrial. In the instant case, where the state introduced extensive evidence of subsequent offenses that were not relevant and became a feature of the trial, the district court concluded, without any analysis whatsoever of the effect of the collateral crime evidence on the verdict, that Jones "ha[d] not demonstrated that his trial contained prejudicial error, as

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[4]There can be no question that the Criminal Appeal Reform Act diminishes a substantial right regard to the pre-existing right to appeal facially apparent albeit unpreserved sentencing errors.

required by section 924.051(7), Florida Statutes."[5] Under prior law, if the state failed to meet its burden of proving there was no reasonable possibility that the error contributed to the verdict, the court would have been compelled to reverse. Lee; Ciccarelli, 531 So. 2d at 131 ("[I]f there is error, it requires reversal unless the state can prove beyond a reasonable doubt that the error was harmless."). The burden has now shifted to the appellant, typically the defendant, to prove that the error "harmfully affected the judgment or sentence." Section 924.051(1)(a), Fla. Stat. There is a big leap between proving no reasonable possibility that the error contributed to the verdict and affirmatively proving that the error harmfully affected the judgment.

In Jackson v. State, 707 So. 2d 412 (Fla. 4th DCA 1998), the court found that the burden imposed by Section 924.051(1)(a) to demonstrate that an error "harmfully affected the judgment or sentence," read literally and in isolation, "appears virtually impossible for a defendant to meet." Id., at 414. The court concluded that Section 924.051(1)(a) should be read in conjunction

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[5]The state did not argue in the District Court that Jones had the burden of proving prejudicial error under the Criminal Appeal Reform Act, and the District Court reached its conclusion without giving Jones the benefit of briefing the question of prejudice.

with Section 924.33, Fla. Stat., noting that the prior harmless error statute was not eliminated upon enactment of the Criminal Appeal Reform Act. The court analyzed the two statutes and concluded that under Section 924.33 and DiGuilio, the defendant had the burden of proving a reasonable possibility that the error contributed to the verdict:

> We begin with the proposition that a statute must be construed so that it will be constitutional. *See Russo v. Akers*, 701 So. 2d 366 (Fla. 5th DCA 1997); *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994); *Florida Department of Education v. Glasser*, 622 So. 2d 944 (Fla. 1993). Our supreme court has held that under section 924.33, the burden imposed on the state was to show 'beyond a reasonable doubt that the error complained of did not contribute to the [jury's recommendation] or, alternatively stated, that there is no reasonable possibility that the error contributed to the [outcome].' *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). When read in conjunction with section 924.33 and *DiGuilio*, we conclude a defendant meets the burden of section 924.051(7) if he demonstrates a 'reasonable possibility' that the error complained of contributed to the verdict.

Id., at 414.

Not only does the statute shift the burden of proof, it also purports to abrogate the presumption of prejudice when collateral crime evidence is introduced by requiring the defendant to establish prejudice. Case law recognized a presumption of prejudice in circumstances analogous to those here notwithstanding the language of Section 924.33 that "it shall not be presumed that

error injuriously affected the substantial rights of the appellant." See Straight v. State, 397 So. 2d 903, 908 (Fla. 1981)(evidence of criminal activity not charged is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged); Czubak v. State, 570 So. 2d 925 (Fla. 1990); Holland v. State, 636 so. 2d 1289 (Fla. 1994). The district court ignored that presumption below in applying Section 924.051(7). The loss of a favorable presumption is clearly disadvantageous. While there is no "vested" or absolute right to the presumption of prejudice, eliminating the rebuttable presumption of prejudice and relieving the state of any burden of proving harmlessness can violate ex post facto when applied retroactively. Dugger.

In addition, the statute appears to relieve the reviewing court of its duty to independently examine all the evidence in determining whether the error might have influenced the jury's verdict since the burden of proving prejudice is solely on the complaining party. DiGuilio (in conducting a harmless error analysis, the reviewing court must examine the entire record, including the permissible evidence on which the jury could have legitimately relied and the impermissible evidence which might have influenced the jury's verdict); Whitton v. State, 649 So. 2d 861

(Fla. 1995)(same); Ciccarelli (each appellate judge must independently read the trial record in evaluating harmless error). Presumably, if the appellate court is not convinced, based on the briefs, that prejudice has been established, the court is no longer required to conduct its independent review. While this might conserve judicial resources, it is unquestionably disadvantageous to all parties and bad policy by diluting the appellate review process and undermining the confidence in judicial decisions.

Petitioner submits that the construction of Section 924.051(1)(a) in Jackson v. State is a reasonable one given the fact that this Court has applied the concepts of per se reversible error and the presumption of prejudice in certain contexts, notwithstanding the language of Section 924.33. Clearly, the legislature was aware of Section 924.33 when it enacted the Criminal Appeal Reform Act, and yet it did not repeal that sixty year old statute when it defined prejudicial error. Thus, Sections 924.051(1)(a) and (7) can be construed as shifting the burden of proving prejudice for *non*constitutional errors to the complaining party without abrogating the DiGuilio standard of review and without imposing an impossible burden for the defendant to meet.[6]

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[6]The Act cannot constitutionally alter the harmless error standard as applied to constitutional errors. Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993)("[T]he legislature cannot enact a

The First District Court of Appeal has previously ruled that the Act is procedural and thus can be applied retroactively. In Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), *rev. denied*, 698 So. 2d 543 (Fla. 1997), the court applied the Criminal Appeal Reform Act to bar review of an alleged illegal sentence where the defendant was sentenced 18 days after the Act went into effect. The court rejected Neal's argument that retroactive application of Section 924.051 violated the prohibition against ex post facto law under the state and federal constitutions, finding that the statute did not alter the definition of criminal conduct or increase the penalty for a crime and that the Act was merely procedural in nature.

The court's narrow interpretation of an ex post facto law is patently wrong. A substantive statute may do more than merely

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statue that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional right."). The United States Supreme Court has held that the application of a state harmless error rule is a state question when it involves only errors of state procedure or state law, but states cannot formulate laws, rules or remedies designed to protect people from violations by the states of federally guaranteed rights. Chapman v. California, 386 U.S. 18 (1967). Sections 924.051(1)(a) and(7), however, do not differentiate between errors of constitutional magnitude and errors of state procedure and state law. Insofar as the act purports to adopt a new standard of reversible error and shifts the burden of proof to the complaining party with regard to constitutional errors, it violates the supremacy clause of the United States Constitution. Article VI, U.S. Const.

define criminal conduct and establish penalties; it may also prescribe duties and rights. Insofar as the Act prescribes the duty to allege and establish prejudice, it may be substantive. The Neal court may be correct, however, in viewing the statute as procedural insofar as it concerns the means and methods to apply and enforce those duties and rights and restricts the scope of review as contemplated in Fla. R. App. P. 9.140(h). The court erred, however, in failing to recognize that even procedural laws can violate ex post facto principles depending on their impact. As noted in Dugger v. Williams, 593 So. 2d at 181:

> [I]t is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an ex post facto violation also is possible, even though the general rule is that the ex post facto provision of the state constitution does not apply to purely procedural matters. While characterizing the Act as merely procedural may save it from running afoul of the ex post facto prohibition, to the extent it encroaches on the Court's exclusive rule-making authority, it violates the doctrine of separation of powers.

If the burden of proof is a procedural matter, Section 924.051(7) violates separation of powers. Even if it is deemed substantive, it nonetheless cannot be applied retroactively as it interferes with existing appellate rights.

Two district courts have applied Subsection (7) of the Act retroactively: the First District in the instant case and the

Fourth District in Goodwin v. State, 721 So. 2d 728 (Fla. 4th DCA 1998). The Fourth District, however, declined to apply the Act retroactively in both Ford v. State, 702 So. 2d 279 (Fla. 4th DCA 1997), and Williams v. State, 692 So. 2d 1014 (Fla. 4th DCA 1997), when reversing convictions for prosecutorial misconduct in closing arguments. In Williams, the court found that the state had not overcome the presumption of harmful error when the prosecutor implicated the defendant in other crimes. In Ford, the court cited State v. DiGuilio in holding that the state did not meet its burden of demonstrating that the prosecutor's improper comments were harmless. In footnote, the court noted that the trial and sentence in the case predated the enactment of the Criminal Appeal Reform Act and that the state did not assert that the Act would be applicable. The court nonetheless offered its view that "[e]ven if we were to apply the standard of review set forth in subsection 924.051(7), we would find that the improper arguments, which were properly objected to, were preserved and that prejudicial error occurred in this case." 702 So. 2d at 282 n.1. At least two other district courts have continued to apply the DiGuilio standard to trial errors in post-Act cases. See Weiss v. State, 23 Fla. L. Weekly D2380 (Fla. 3d DCA Oct. 21, 1998), and Chaudoin v. State, 707 So. 2d 813 (Fla. 5th DCA 1998). In Weiss, the Third District

applied DiGuilio in affirming a trial error while also applying Section 924.051, Fla. Stat. (1996), to bar review of a non-preserved "technical" sentencing error. The conviction and sentence in Weiss occurred after the effective date of the Criminal Appeal Reform Act, although the date of the offense is unclear from the opinion. The offense in Chaudoin preceded the enactment of the Section 924.051.

As shown above, the courts have been inconsistent in the retroactive application of the statute. This has led to both uncertainty and inequity in the law. If the Act is deemed substantive, or if only portions of the Act are substantive, it cannot be applied retroactively to interfere with existing rights. If portions of the Act are deemed procedural, they must be stricken as vilating this Court's rule-making authority.

Section 924.051 became effective on July 1, 1996. The legislature designated the effective date of the statute as July 1, 1996, without any expression that it was to apply to cases pending on that date. The instant offenses were committed on May 22, 1996. Thus, to the extent the statute affects petitioner's substantive rights arising under prior law, it cannot be applied retroactively to his appeal. This Court should, therefore, remand the instant

IV CONCLUSION

The court below affirmed petitioner's conviction, finding that he failed to demonstrate that his trial contained prejudicial error, as required by Section 924.051(7), Fla. Stat. The district court erred in applying the statute retroactively to offenses which were committed before its effective date. This Court should, therefore, remand the instant cause to the district court to reconsider the issue on appeal in light of the harmless error standard in DiGuilio.

Respectfully submitted,

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