IN THE SUPREME COURT OF FLORIDA

RICHARD SECCIA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,138

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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, Richard Seccia, the defendant in the DCA and the defendant in the trial court, will be referenced in this brief as defendant or by proper name.

The record on appeal consists of three volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

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.

JURISDICTION

The State asserts that the First District Court erroneously certified conflict between the decision in this case at 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998), and the decision in Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA August 26, 1998). The Mizell court held that the ineffective assistance of counsel claim was addressable on direct appeal, even though the underlying error was unpreserved, because it clearly constituted fundamental error as it appeared on the face of the record. Adversely, in the case at bar, the First District specifically determined that the alleged error was not fundamental and that as such, where there is a failure to preserve the error in the trial court, it is not addressable on Direct Appeal nor is the accompanying claim of ineffective assistance of counsel. The State contends that this crucial distinction between the two cases negates the basis for certified conflict and therefore, the basis for jurisdiction in this Court.

STATEMENT OF THE CASE AND FACTS

The State supplements with the following significant facts:

1. S.H.'s 8th birthday was on September 16, 1997 (II 27-28). The competency hearing was July 7, 1997 (II 9). S.H. indicated it is a "bad thing" to tell a lie (II 30). He said that it was, in his words, "[r]eal bad" to tell a lie in the courtroom (II 30). It was wrong to tell a lie "[b]ecause something bad could happen" (II 40). S.H. acknowledged that he would "get in trouble for lying" in the courtroom. (II 37) He would be punished by the Judge if he told a lie in court. (II 40-41) He would be punished by his parents if he does wrong at home (II 37, 40) and, in his words, by "[t]he judge" if he does wrong in the courtroom (II 40). The punishment at home for lying included "a spanking," in his words (II 30). S.H. agreed that a person is supposed to tell the truth in a courtroom (II 30). He agreed that he was "going to tell the truth today" (II 31) and that it is important to tell the truth in the trial (II 31). In his words, "I won't tell a lie" (II 39).

Early in the hearing, S.H. responded to the following questions:

> Q Now, [S.H.], what happens if you tell a lie in the courtroom?
> A Maybe the person that you're talking about will get out of jail.
> Q Would get out of jail?
> A Yes.
> Q Would anything happen to you if you told a lie in the courtroom?
> A I don't know.

(II 34). S.H. indicated that the prosecutor would be lying if the prosecutor said that "there was a dinosaur walking down the hall"

(II 31) and twice indicated that the prosecutor would be lying if he stated that a particular person had on a green coat:

> Q Now, if I were to tell you that this lady right here with this machine had a green coat on would that be the truth or a lie?
> A A lie.
> Q Okay. What if I told you that this gentlem[a]n right here had a green coat on, would that be the truth or a lie?
> A A lie.

When the judge asked S.H., "Do you like my red robe?," S.H. responded, "Red robe?" (II 40) The judge then asked, "What color is my robe?" S.H. responded, "Black." (II 40). S.H. discussed numerous other matters (at II 27-41).

After the attorneys and trial judge questioned S.H., the trial court found:

> Well, I think [S.H.] demonstrated this morning that he is a bright little seven year old who will soon be in the second grade. And, obviously pursuant to case law his competency is being judged at this time as opposed to the type of incident he is going to relate to. But I think he has demonstrated that he can recite factual matters. And the issue of Santa Claus is really a question of -- we're not really sure just what information has been provided to him by his parents.
>
> But I was impressed by his ability to recollect his visit with Santa Claus this past year and how he described his outfit. And also the fact as [the prosecutor] pointed out that he hasn't had the opportunity to observe the defendant, Mr. Seccia, for two years. And he also had no difficulty recalling his name, as well as pointing him out. He is certainly familiar and seems to be well oriented as far as his present location, his family, and reflecting on his own progress in school. He also understands the difference between the truth and a lie. And I think he has reflected and obviously understands he is under an obligation at this time to tell the truth in court. He also recognizes that at home he can be punished by his parents for lying and in court he would be punished by the Judge. I wouldn't necessarily expect him to understand [what] the punishment would be. But he does

> recognize that there would be a consequence for telling a lie in court.
>
> So for those reasons I'm going to determine that he is competent to testify at this time in this trial. And it's certainly up to the jury as to what credibility to give his testimony.

(II 44-45)

2 The First District Court found:

> The child, who was nearly eight years old at the time of the second trial, demonstrated that he knew the difference between the truth and a lie. He also stated that it was wrong to tell a lie, particularly in court, because "something bad" could happen; that one is punished when one lies; that one has an obligation to tell the truth, particularly in court; and that the judge would punish him if he did not tell the truth in court. Finally, he promised to tell the truth. Based upon the child's responses (which were considerably more positive, and less equivocal, than those given during the first trial) to the questions asked, and considering the child's age, we are unable to say that the trial court's finding constituted an abuse of discretion. See Baker v. State, 674 So.2d 199 (Fla. 4th DCA 1996) (the trial court did not abuse its discretion in finding that a 6-year-old child was competent based upon the child's testimony that she knew that it was wrong to lie, that one gets into trouble for lying, and that she would tell the truth).

Seccia V State, 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998).

3. At sentencing, defense counsel requested that defendant be sentenced concurrently on the Lewd Act count:

> Judge, we just point out, I believe the State has redone the sentencing guidelines to reflect the one less lewd conviction, and I believe his guidelines on that are 3.7 to 6.2 years, and I would ask the Court to sentence him concurrently and within that guideline range.

(I 125-26) Defense counsel then contended that defendant deserved concurrent time on the Lewd Act count (Count 2) because it and the Sexual Battery

> did happen, according to the child's testimony, on the same day or at least arguably during the same course of time that the child spent the night at Mr. Seccia's house ... .

(I 126)

4. The First District Court held that a claim of ineffective assistance of counsel is not addressable on direct appeal where the underlying error is both unpreserved and nonfundamental.

Seccia V State, 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998).

SUMMARY OF ARGUMENT

Defendant claims that his ineffective assistance of counsel claim should be addressable on direct appeal. The State adamantly disagrees.

As stated in the court below, to address the ineffective assistance of counsel claim on direct appeal "would effectively nullify the preservation requirement contained in section 924.051, Florida Statutes (1997). Seccia V State, 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998).

It is well settled law that an ineffective assistance of counsel claim cannot be raised on direct appeal. The Second District in Dennis v. State, 696 So.2d 1280 (Fla. 4th DCA 1997), summarized the law and the rationale behind it:

> The general rule is that the adequacy of a lawyer's representation may not be raised for the first time on a direct appeal. The rationale for the rule is that issue has not been raised or ruled on by the trial court. State v. Barber, 301 So.2d 7, 9 (Fla. 1974). An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. Id.
>
> The case law basis for the rule has been reinforced by the passage of section 924.051, Florida Statutes (Supp. 1996). . . . Section 924.051(3) provides that:
>
> [a]n 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.
>
> * * *
>
> Under both the statute and case law, the proper procedural vehicle for an ineffective assistance of counsel claim is a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850.

Id. at 1282.

Thus, defendant's request for direct-appeal review of an ineffective-assistance-of-counsel claim, based on alleged error that is both unpreserved and nonfundamental, fails to allow the trial court to rule on it, for example, to determine whether there was, in fact prejudice, or whether, in fact, defense counsel had a tactical reason for not challenging the score sheet, or whether, any reasonable lawyer would have acted this way.

However, even if an ineffective assistance of counsel claim is held addressable on direct appeal, defendant's claim must fail because it does not meet the two-prong test that was set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984). Defendant's claim fails the first prong in Strickland because there was no sentencing error thus, defense counsel was not deficient when he failed to object to the scoring of victim injury points on the lewd and lascivious score sheet. There was no error because Rule 3.701(d)(7) Fla. R. Crim. P. (1997), was amended in 1987 to allow the scoring of victim injury even if it is not an element of the crime as long as a the victim was injured as part of the criminal episode.

Moreover, scoring the victim injury points based on a capital felony is non-prejudicial because the capital felony itself offers the trial court a reason for upward departure. The prejudice prerequisite is further negated because defendant's contested six-year sentence for count two runs concurrent with the minimum-mandatory, nondisputed sentence defendant is serving for count one.

The State reiterates that the facts of this case overwhelming illustrate why this Court should not nullify the requirement for preservation of issues set out in statutes, rules, and case law by permitting unpreserved issues to be litigated under the subterfuge of ineffective assistance of counsel. Accordingly, the order of the First District court should be affirmed and the Decision by the Third District Court in Mizell reversed.

ISSUE II:

Defendant claims that the First District Court failed to address the issue presented in its holding that the trial court did not abuse its discretion by finding that the child victim had the moral sense of the obligation to tell the truth. The defendant's claim must fail for several reasons.

First, it is well established practice for this Court to decline to address issues which are not within the scope of the certified conflict or certified question for which the court has granted jurisdiction. The issue of the child's competency is not within the scope of the certified conflict nor is it even remotely related. For this reason the State requests this Court to decline addressing the issue.

Second, even if the court deems it proper to address this issue, the defendant's claim is erroneous and therefore, must fail. Defendant contends that the First District Court did not squarely address the issue presented. However, the record reveals defendant's claim is groundless. Defendant's stated issue in his initial brief filed in the First District Court reads as follows:

ISSUE I: The competency examination conducted during appellants second trial failed to establish that Samuel had the moral sense of the obligation to tell the truth and thus appellant's convictions and sentences must be reversed and the case remanded for a new trial.

Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988) held that it is

"within the discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness. Except when there is an abuse of that discretion, the trial court's decision will not be disturbed."

(IB-10). The First District Court in following the proper standard

of review held:

The child, who was nearly eight years old at the time of the second trial, demonstrated that he knew the difference between the truth and a lie. He also stated that it was wrong to tell a lie, particularly in court, because "something bad" could happen; that one is punished when one lies; that one has an obligation to tell the truth, particularly in court; and that the judge would punish him if he did not tell the truth in court. Finally, he promised to tell the truth. Based upon the child's responses (which were considerably more positive, and less equivocal, than those given during the first trial) to the questions asked, and considering the child's age, we are unable to say that the trial court's finding constituted an abuse of discretion. See Baker v. State, 674 So.2d 199 (Fla. 4th DCA 1996) (the trial court did not abuse its discretion in finding that a 6-year-old child was competent based upon the child's testimony that she knew that it was wrong to lie, that one gets into trouble for lying, and that she would tell the truth).

Seccia V State, 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998). Clearly, the District Court ruled on the issue presented.

Third, if this court determines that the First District Court did not address the issue presented, the State reasserts the argument made below that the trial court had sufficient facts on which to base its order of competency and that defendant has failed to show that the trial court abused its discretion.

Moreover, it is clear that the sense of "moral obligation" to tell the truth cannot constitutionally require a belief in the supernatural or other religious belief. "Moral obligation" simply means a sense that the truth **should be** told, regardless of the witness's motivation for that feeling. Of paramount importance, therefore, is that when the witness testifies there has been a sufficient showing of a desire to tell the truth: The witness knows the difference between the truth and a lie and **wants to** tell the truth.

Here, S.H. provided the requisite assurance that he was motivated to tell the truth. Any imperfections in S.H.'s proffered and subsequent testimony went to "witness's credibility, for the trier-of-fact to consider," Terry v. State, 668 So.2d 954, 962 n. 9 (Fla. 1996). Accordingly, because the defendant has failed to show that the District Court improperly addressed the issue or that the trial court abused its discretion, the holding of the First District Court that the trial court did not abuse its discretion in finding the child victim competent to testify should be affirmed.

ARGUMENT

ISSUE I

IS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ADDRESSABLE ON DIRECT APPEAL WHERE THE ALLEGED ERROR IS NOT FUNDAMENTAL? (RESTATED).

Defendant claims that his ineffective-assistance-of-counsel claim, based on the allegation that defense counsel failed to object during the sentencing phase when victim injury points where included on the guidelines score sheet prepared for the lewd act conviction, should be addressable on direct appeal. The State adamantly disagrees.

As stated in the court below, to address the ineffective assistance of counsel claim on direct appeal "would effectively nullify the preservation requirement contained in section 924.051, Florida Statutes (1997). Seccia V State, 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998).

It is well settled law that an ineffective assistance of counsel claim cannot be raised on direct appeal. See, e.g., Consalvo v. State, 697 So.2d 805, 811 n. 4 (Fla. 1996) ("As for appellant's ineffective assistance of counsel claim, it is not reviewable on direct appeal and is more properly raised in a motion for post-conviction relief") revised on other grounds Oct. 3, 1997; Lawrence v. State, 691 So.2d 1068 (Fla. 1997), Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996)("argument constitutes a claim of ineffective assistance of counsel not cognizable on direct appeal, but only by collateral challenge"). See Also, McKinney v. State, 579 So.2d 80, 82 (Fla. 1991); Kelley v. State, 486 So.2d 578, 585

(Fla. 1986), cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977), cert. denied, 435 U.S. 1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978). The Second District in Dennis v. State, 696 So.2d 1280 (Fla. 4th DCA 1997), summarized the law and the rationale behind it:

> The general rule is that the adequacy of a lawyer's representation may not be raised for the first time on a direct appeal. The rationale for the rule is that issue has not been raised or ruled on by the trial court. State v. Barber, 301 So.2d 7, 9 (Fla. 1974). An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. Id.
>
> The case law basis for the rule has been reinforced by the passage of section 924.051, Florida Statutes (Supp. 1996). Section 924.051(2) provides that the right to direct appeal "may only be implemented in strict accordance with the terms and conditions" of section 924.051. Section 924.051(3) provides that
>
> > [a]n 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.
> >
> > An issue is not "preserved" within the meaning of the statute unless it was "timely raised before, and ruled on by, the trial court." § 924.051(1)(b), Fla. Stat. (Supp.1996).
>
> Under both the statute and case law, the proper procedural vehicle for an ineffective assistance of counsel claim is a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Rule 3.850 procedures allow for full development of the issue of counsel's incompetence under the standards of Downs v. State, 453 So.2d 1102 (Fla.1984) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When a motion for postconviction relief is first raised in the trial court, trial counsel and the state have a full opportunity to refute the claim that the representation of a defendant amounted to a constitutional violation. See Williams v. State, 438 So.2d 781, 787 (Fla.1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed. 2d 146 (1984).

Id. at 1282. The Dennis court, expounding on the difficulty of addressing an ineffective assistance claim on direct appeal,

signified that the record does not contain counsel's thinking concerning their action or lack of action.

The First District in Loren v. State, 601 So.2d 271,272-273, (Fla. 1st DCA 1992), held that the reason for requiring an ineffective assistance claim to be raised in a motion for postconviction relief rather than on direct appeal is that

> [T]he trial court never had the opportunity to consider the issue below and the issue often involves collateral questions of fact that cannot be determined by the trial record.

Id. at 272. See also, Johnson v. State, 697 So.2d 1245 (Fla. 1st DCA 1997)(alleged sentencing error unpreserved and not fundamental); Middleton v. State, 689 So.2d 304, 305 (Fla. 1st DCA 1997)("The statute on its face does not make exception for sentencing errors apparent on the face of the record."); Neal v. State, 688 So.2d 392, 396 (Fla. 1st DCA 1997) (claim that sentence constituted upward departure from guidelines; "Any error in appellant's sentence might easily have been corrected, thereby avoiding expenditure of the time and money associated with this appeal"; "Because he failed to do so, his complaint about his sentence has not been preserved for appellate review"; "error would not be 'fundamental'"; sentence affirmed);

Thus, defendant's request for direct-appeal review of an ineffective-assistance-of-counsel claim fails to allow the trial court to rule on it, for example, to determine whether there was, in fact prejudice, or whether, in fact, defense counsel had a tactical reason for not challenging the score sheet, or whether, any reasonable lawyer would have acted this way.

Defendant should not be allowed to nullify through claimed ineffective assistance of counsel what is now well-established and well-reasoned precedent requiring a score sheet claim to be first presented to the trial court. This Court should not negate the requirement for preservation of issues set out in statutes, rules, and case law by permitting unpreserved issues to be litigated under the subterfuge of ineffective assistance of counsel. Moreover, because of various abuses of the judicial system, which had arisen primarily from exceptions to the rule that claims of error were not cognizable on appeal unless first raised in the trial court, both this Court and the Florida Legislature undertook corrective action. 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 error."). These concerns, and remedies, were subsequently addressed in the Criminal Appeal Reform Act of 1996, codified as chapter 924, Florida Statutes (Supp 1996), as approved and implemented by this Court in Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) and Amendments to Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996). See, also, Kalway v. Singletary, 708 So.2d 267 (Fla 1998) where this Court rejected a separation of powers challenge to the Reform Act and reiterated its approval of the legislature's adoption of terms and conditions of appeal set out in the Reform Act: "[W]e believe that the

legislature may implement this constitutional right [to appeal] and place reasonable conditions up on it so long as [it does] not thwart the litigant's legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals."

The State suggests that there is not, and cannot be, a legitimate constitutional right to forego the preservation of claimed errors in the trial court and to raise such claims for the first time on appeal. That is particularly true when, in fact, the statute and implementing rules provide ready remedies for every legitimate claim of error to be first raised in the trial court either contemporaneously, by post-sentencing motion, or by post-conviction motion.

The seminal significance of the Reform Act and the implementing rules of this Court was recognized by the Fifth District Court of Appeals in an en banc decision, Maddox. Because that decision and opinion by Chief Judge Griffin so clearly analyzes all the relevant factors, the State quotes portions of it at length and adopts the reasoning as its own.

> In a direct appeal from a conviction or sentence in a nonplea case, the Criminal Appeal Reform Act permits review of only those errors which are (1) fundamental or (2) have been preserved for review. §924.051(3), Fla. Stat. The word "preserved," as used in the statute, means that the issue has been presented to, and ruled on by the trial court. §924.051(1)(a), Fla. Stat.
>
> . . . .
>
> Recognizing that, in the sentencing arena, the new legislation would preclude the appeal of many sentencing errors which formerly were routinely corrected on direct appeal (such as nonfundamental sentencing errors apparent on the fact of the record)(FN5)(omitted) the supreme court set about creating a method for the criminal defendant to obtain relief from sentencing errors not preserved at the time of sentencing. In essence, the court created a sort of

post-hoc device for preserving such sentencing error for appeal. Fla. R.Crim.P. 3.800(b). Any error not complained of at the time of sentence could be complained of in the trial court after sentencing, if done in accordance with the new rule. Thus, at approximately the same time section 924.051 became effective, the Florida Supreme Court, by emergency amendment to Florida Rule of Criminal Procedure 3.800, permitted the filing of a motion to correct a sentence entered by the trial court, provided the motion was filed with ten days (now thirty) of the date of rendition of the sentence. See, Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla.1996). Only then, if not corrected by the trial court, could it be raised on appeal because it had been "preserved." Although rule 3.800 by its terms traditionally had been limited to illegal sentences, subsection (b) of the rule, as amended, more broadly applies to any sentencing error. 675 so.2d at 1375. (FN6)(omitted). The rule 3.800(a) procedure remains available to correct an illegal sentence at any time.

....

The net effect of the statute and the amended rules is that **no** sentencing error can be considered in a direct appeal unless the error has been "preserved" for review, i.e., the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record. And it applies across the board to defendants who plead and to those who go to trial. As for the "fundamental error" exception, it now appears clear, given the recent rule amendments, that "fundamental error" no longer exists in the sentencing context. The supreme court has recently distinguished sentencing error from trial error, and has found fundamental error only in the latter context. Summers v. State, 684 So.2d 729 (Fla. 1996)("The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived."); Archer v. State, 673 So.2d 17, 20 (Fla.)("Fundamental error is 'error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'"), cert. denied, ___ U.S. ____, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996). It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors. **The high court could have adopted a rule that paralleled the Criminal Appeal Reform Act, which would allow for review of fundamental errors in nonplea cases, but the court did not do so and made clear in its recent amendment to rule 9.140 that unpreserved sentencing errors cannot be raised on appeal.** (Emphasis by State).

Maddox, 708 So.2d 618-620.

The Fifth District Court's analysis of the policy considerations underlying the Reform Act, the implementing rules adopted by this

Court, its own decision in Maddox, and the benefits to the judicial system is particularly penetrating.

At the intermediate appellate level, we are accustomed to simply correcting errors when we see them in criminal cases, especially in sentencing, because it seems both right and efficient to do so. The legislature and the supreme court have concluded, however, that the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief of appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. **Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing. Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion with thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formally have been characterized as "fundamental" would not support an "ineffective assistance" claim.** (Emphasis supplied by State).

The Fourth District Court of Appeal has taken a similar approach to sentencing errors. In an en banc decision now under review in this Court, Hyden v. State, 23 Fla. L. Weekly D1342 (Fla. 4th DCA 3 June 1998), Judge Warner for en banc unanimous court agreed with the policy benefits of Maddox and adopted a similar, almost identical, position on sentencing errors and the therapeutic effects of requiring that trial counsel effectively perform their responsibility by preparing for sentencing hearings and by properly presenting to the trial court any claims of error.

We use this appeal to impress upon the criminal bar of this district the essential requirement of the new Florida Rule of Appellate Procedure 9.140(d). In order for a sentencing error to be raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b). In this district, we will no longer

entertain on appeal the correction of sentencing errors which are not properly preserved.

Id.

This Court has, as both Maddox and Hyden recognize, provided ready and efficient remedies for claims of sentencing errors which, without any denial of rights, requires that sentencing errors be raised and ruled on in the trial court with a subsequent right to appeal. The State submits that there is simply no reason why defendants and their counsel cannot be required to preserve all sentencing issues in the trial court and to use the efficient and well-considered remedies which this Court has provided for such claims.[1]

The practical wisdom of the above State position, and of Maddox, is aptly illustrated by this case. The State points out that defendant has failed to show that the alleged underlying error constitutes prejudicial error, so that, as a matter of law, any claim of ineffective assistance of trial counsel is subject to instant denial under the test that was set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984).[2] There the Court held that:

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[1] It should be noted that a rule of law permitting ineffective assistance of counsel claims to be raised on direct appeal necessarily creates the corollary rule that such claims are not cognizable in rule 3.850 proceedings. The State gently suggests that defendants/appellants are better served by presenting such claims in a rule 3.850 motion where fact-finding can be had.

[2] The State and federal standards are essentially the same. Jackson v. State, 452 So.2d 533 (Fla. 1984)

Judicial security of counsel's performance must be highly deferential and... [B]ecause of the difficulties inherent in making the evaluation a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

The Court in Strickland, also formulated the legal test to be employed by a court reviewing these claims. The United States Supreme Court articulated the test in the following way:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. **First, the defendant must show that counsel's performance was deficient.** This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Second, the defendant must show that the deficient performance prejudiced the defense.** This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). (Emphasis added). Thus, in order to prove ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient and (2) there exists a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would be different. Further, a defendant must establish both prongs of the test in order to be entitled to relief. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. d. 674 (1984).

Another important principle applicable to these claims is that the defendant is the moving party and has the burden of affirmatively proving deficient conduct and prejudice. Strickland

v. Washington, 466 U.S. at 694. In Rogers v. Zant, 13 F. 3d 384 (11th Cir. 1994), the court stated:

A jury trial is, by its nature, an enterprise that is filled with imponderables from the viewpoint of a trial lawyer. It is an undertaking that calls not only on the lawyer's head, but also on his heart and nerve. At times in the trial arena, audacity or imagination or patience accomplish more than pure logic might suggest is possible. The truth is that it is often hard for even a good lawyer to know what to do. Trying cases is no exact science. And, as a result, we must never delude ourselves that the fair review of a trial lawyer's judgment and performance is an activity that allows for great precision or for a categorical approach. When reviewing whether an attorney is ineffective, courts "should always presume strongly that counsel's performance was reasonable and adequate." Atkins v. Singletary, 965 F.d. 952, 958 (11th Cir. 1992). And, "a court should be highly deferential to those choices . . . that are arguably dictated by a reasonable trial strategy." Devier v. Zant, 3 F. 3d 1445, 1450 (11th Cir. 1993).

Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one. And, "[w]e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial . . . worked adequately." See White v. Singletary, 972 F.d. 1218, 1221 (11th Cir. 1992). Therefore, the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.

See also Bolender v. Singletary, 16 F. 3d 1547 (11th Cir. 1994), ("As we have explained, [i]n practice this means that courts will not find that an attorney is incompetent for using a particular approach to a case so long as that approach was reasonable. . . . ([A] court should be highly deferential to those choices . . . that are arguably dictated by a reasonable trial strategy.")

In addition, defendant, as the moving party, has the burden of affirmatively proving prejudice. In Strickland, the Court said:

The defendant must show that there is a reasonable probability that but for counsel's unprofessional error the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. at 694.

In the instant case, defendant has not only failed to show that he was prejudiced by the alleged error (scoring the victim injury points attributable to the capital sexual battery on the guidelines score sheet prepared for the lewd act conviction) but also that there was any error in the first place. Rule 3.701(d)(7) Fla. R. Crim. P. (1997), was amended in 1987 to allow the scoring of victim injury even if it is not an element of the crime as long as a the victim was physically injured as part of the criminal episode. Rule 3.701(d)(7) Fla. R. Crim. P. (1997) provides in pertinent part:

> (7) Victim injury shall be scored for each victim physically injured during a criminal episode or transaction, and for each count resulting in such injury whether there are one or more victims.

In affirming the 1987 amendment, the Florida Supreme Court stated:

> The present guidelines score physical victim injury if that injury is an essential element of the crime for which the defendant is convicted. They exclude nonphysical injury and physical injury if the injury is not an element of the crime. The commission recommends that victim injury be scored whether or not it is an element of the crime if, in fact, injury occurred during the offense which led to the conviction.

Florida Rules of Criminal Procedure re Sentencing Guidelines (rules 3.701 and 3.988), 509 So.2d 1088, 1089 (Fla. 1987).

Moreover, scoring the victim injury points based on a capital felony is non-prejudicial because the capital felony itself offers the trial court a valid reason for upward departure. Bedford v. State, 589 So.2d 245 (Fla.1991), cert. denied, 503 U.S. 1009, 112

S.Ct. 1773, 118 L.Ed.2d 432 (1992); Torres-Arboledo v. State, 524 So.2d 403 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). Defendant received a six-year concurrent sentence for lewd and lascivious. He could have received a departure sentence up to the statutory maximum. Thus, under the current sentencing doctrine, there can be no prejudice as a matter of law. Furthermore, the prejudice prerequisite is further negated because defendant's contested six-year sentence for count two is concurrent with the minimum-mandatory, nondisputed sentence defendant is serving for count one. In summary, the State reiterates that the facts of this case overwhelming illustrate why this Court should not negate the requirement for preservation of issues set out in statutes, rules, and case law by permitting unpreserved issues to be litigated under the subterfuge of ineffective assistance of counsel. Accordingly, the order of the First District court should be affirmed and the Decision by the Third District Court in Mizell reversed.

ISSUE II

DID THE FIRST DISTRICT COURT ERR IN FINDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE CHILD VICTIM HAD THE MORAL SENSE OF THE OBLIGATION TO TELL THE TRUTH? (Restated)

Defendant claims that the First District Court did not address the issue presented in its holding that the trial court did not abuse its discretion by finding that the child victim had the moral sense of the obligation to tell the truth. The defendant's claim must fail for several reasons.

First, it is well established practice for the court to decline to address issues which are not within the scope of the certified conflict or certified question for which the court has granted jurisdiction. McMullen v. State, 714 So.2d 368 (Fla. 1998); Allstate Ins. Co. v. Reliance Ins. Co., 692 So.2d 891 (Fla. 1997); Ratliff v. State, 682 So.2d 556 (Fla. 1996). In the present case, the court certified conflict between the decision in this case at 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998), and the decision in Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3d DCA August 26, 1998), concerning whether an ineffective-assistance-of-counsel claim, based on unpreserved allegations of error during the sentencing phase, could be raised on direct appeal. The issue of the child's competency is not within the scope of the certified conflict nor is it even remotely related. For this reason the State requests this Court to decline addressing the issue.

Second, even if the court deems it proper to address this issue, the defendant's claim is erroneous. Defendant contends that the

First District Court did not squarely address the issue presented. However, the record reveals that allegation to be false. Defendant's stated issue in his initial brief reads as follows:

> ISSUE I: The competency examination conducted during appellants second trial failed to establish that Samuel had the moral sense of the obligation to tell the truth and thus appellant's convictions and sentences must be reversed and the case remanded for a new trial.

(IB-10).

Simmons v. State, 683 So.2d 1101, 1103 (Fla. 1st DCA 1996), summarized the standard of appellate review:

Unless otherwise provided by statute, every person is presumed competent to testify. §90.601, Fla.Stat. A person may be disqualified to testify if the court determines that the person is incapable of expressing himself or herself so as to be understood, or is incapable of understanding the duty of a witness to tell the truth. §90.604, Fla.Stat. It is within the sound discretion of the trial judge to determine the competence of a witness to testify. Rutledge v. State, 374 So.2d 975 (Fla.1979), cert. denied, Rutledge v. Florida, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Kaelin v. State, 410 So.2d 1355 (Fla. 4th DCA 1982).

Accord Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988) ("within the discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness. Except when there is an abuse of that discretion, the trial court's decision will not be disturbed"); Baker v. State, 674 So.2d 199, 200 (Fla. 4th DCA 1996) ("competency of a witness to testify is a determination left to the sound discretion of the trial court, and absent an abuse of discretion, the trial court's decision will not be disturbed"). See also §90.601, Fla. Stat. ("Every person is

competent to be a witness, except as otherwise provided by statute").

Because the standard of appellate review is abuse of discretion, defendant, as the non-prevailing party below, bears the burden of establishing that the trial court's ruling was "arbitrary, fanciful, or unreasonable," Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). See Operation Rescue v. Women's Health Center, 626 So. 2d 664 (Fla. 1993); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) (presumption of correctness).

Under the abuse of discretion standard, there is no "bright line" or other litmus to establish competency. Instead, the trial court observes all the nuances of the child, in contrast to the "cold record" on appeal. Fernandez v. State, 328 So.2d 508, 509 (Fla. 3d DCA 1976), interrelated these concepts:

A decision upon the competency of a child to testify is one peculiarly within the **discretion** of the trial judge because the evidence of intelligence, ability to recall, relate and to appreciate the nature and obligations of an oath are **not fully portrayed by a bare record.** Clinton v. State, 1907, 53 Fla. 98, 43 So. 312; Swain v. State, Fla.App.1965, 172 So.2d 3; Davis v. State, Fla.App.1972, 264 So.2d 31. *** From the totality of the record, including voir dire examination and the child's answers to the questions of the prosecutor and of defense counsel on direct and cross-examination we find that there was sufficient evidence to warrant the judgment of the trial court that the child was competent to testify.

In following the appropriate standard of review, the First District Court in the instant case held:

The child, who was nearly eight years old at the time of the second trial, demonstrated that he knew the difference between the truth and a lie. He also stated that it was wrong to tell a lie, particularly in court, because "something bad" could happen; that one is punished when one lies; that one has an obligation to tell

the truth, particularly in court; and that the judge would punish him if he did not tell the truth in court. Finally, he promised to tell the truth. Based upon the child's responses (which were considerably more positive, and less equivocal, than those given during the first trial) to the questions asked, and considering the child's age, we are unable to say that the trial court's finding constituted an abuse of discretion. See Baker v. State, 674 So.2d 199 (Fla. 4th DCA 1996) (the trial court did not abuse its discretion in finding that a 6-year-old child was competent based upon the child's testimony that she knew that it was wrong to lie, that one gets into trouble for lying, and that she would tell the truth).

Seccia V State, 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998).

Third, if this court determines that the First District did not address the issue presented, the State reasserts the argument made below.

Defendant claims that S.H. was incompetent to testify because he did not demonstrate that he had a 'moral sense of the duty to tell the truth

S.H. was almost 8 years old at the time of this trial. (Compare 8th birthday on September 16, II 27-28, with July 7 date of competency hearing) S.H. indicated at the competency hearing that:

- It is a "bad thing" to tell a lie (II 30).
- In his words, it is "[r]eal bad" (II 30) to tell a lie in the courtroom. (See II 37).
- A person is supposed to tell the truth in a courtroom (II 30).
- He intended to tell the truth in the trial (II 31).
- It is important to tell the truth in the trial (II 31).
- He would not tell a lie in court (II 39), in his words, "I won't tell a lie" (II 39).

- He would get in trouble if he lied in the trial (II 37).[3]
- It is wrong to tell a lie "[b]ecause something bad could happen" (II 40).
- He would be punished by his parents if he does wrong at home (II 37, 40) and, in his words, by "[t]he judge" if he does wrong in the courtroom (II 40).
- He would be punished by the Judge if he tells a lie in court (II 40).
- His willingness to correct authority figures' misstatements of fact as he questioned the trial judge's indication that he had on a red robe and then corrected the trial judge's misstatement (See II 40). Similarly, he indicated that the prosecutor would be lying if the prosecutor said that "there was a dinosaur walking down the hall" (II 31) and twice indicated that the prosecutor would be lying if he stated that a particular person had on a green coat (II 30).

S.H. also testified to numerous other matters (at II 27-41), indicating his ability to observe, recollect, and narrate facts.

Accordingly, having personally observed S.H. at the competency hearing, and supported by the record, the trial court found:

Well, I think [S.H.] demonstrated this morning that he is a bright little seven year old who will soon be in the second grade. And,

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[3] Earlier in the hearing, S.H. stated that he did not know if anything would happen to him if he told a lie in the courtroom (II 34), but this question immediately followed his statement that if he lied in court, defendant may "get out of jail," (II 34) suggesting that S.H. did not know if defendant would do anything to him if he (S.H.) lied by testifying at trial that defendant did not sexually abuse him.

obviously pursuant to case law his competency is being judged at this time as opposed to the type [sic] of incident he is going to relate to. But I think he has demonstrated that he can recite factual matters. . . . He is certainly familiar and seems to be well oriented as far as his present location, his family, and reflecting on his own progress in school. He also understands the difference between the truth and a lie. And I think he has reflected and obviously understands he is under an obligation at this time to tell the truth in court. He also recognizes that at home he can be punished by his parents for lying and in court he would be punished by the Judge. I wouldn't necessarily expect him to understand [what] the punishment would be. But he does recognize that there would be a consequence for telling a lie in court.

So for those reasons I'm going to determine that he is competent to testify at this time in this trial. And it's certainly up to the jury as to what credibility to give his testimony.

(II 44-45).

In contrast to the facts here, in the first trial, Seccia v. State, 689 So.2d 354 (Fla. 1st DCA 1997) (SeciaI), the victim, who was then, much younger, repeatedly indicated that he did not perceive the importance of telling the truth in the trial:

> Q ... [D]o you know why it's important for you to tell the truth today?
> A No.
> Q You don't?
> A (Indicating affirmative)
> ....
> Q Let me ask you again ...; Do you know why it's important to tell the truth today?

See 689 So.2d at 356. Here, by contrast, a more mature victim indicated that it was "real bad" to tell a lie in court, that he fully intended to tell the truth, and that he would be punished if he did not tell the truth. Moreover, the victim even questioned or corrected the prosecutor's and judge's misstatements of fact, passing their tests. S.H. demonstrated his sense of duty to tell the truth. Baker v. State, 674 So.2d 199, 200-201 (Fla. 4th DCA 1996), is on point:

In the case at bar, we find no abuse of that discretion. Under the two prong test in *Lloyd* [supra] the child proved her intelligence by knowing her age, where she went to school, where she went to church and could identify the colors of people's clothing. Additionally, she met the second prong of the *Lloyd* test by **showing she possessed a sense to tell the truth.** She testified that she **knew it was wrong to lie**, and that **people get into trouble for lying.** Additionally, when asked by the judge, she **agreed to answer questions as truthfully as possible.** From these responses, we find competent evidence to support the trial court's determination of competency and find no abuse of discretion.

Here, S.H. **"knew it was wrong to lie"** by indicating: it is a "bad thing" to tell a lie (II 30); "[r]eal bad" (II 30) to tell a lie in the courtroom (See II 37); wrong to tell a lie "[b]ecause something bad could happen" (II 40). S.H. knew that **"people get into trouble for lying"** by indicating: He would be punished by the Judge if he tells a lie in court (II 40); he would get in trouble if he lied in the trial (II 37); he would be punished by his parents if he does wrong at home (II 37, 40) and, in his words, by "[t]he judge" if he does wrong in the courtroom (II 40). S.H. **"agreed to answer questions as truthfully as possible"** by indicating: A person is supposed to tell the truth in a courtroom (II 30); he intended to tell the truth in the trial (II 31); it is important to tell the truth in the trial (II 31); he would not tell a lie in court (II 39), in his words, "I won't tell a lie" (II 39). A fortiori, here, unlike Baker, S.H. in the courtroom questioned or corrected the prosecutor's and judge's test-lies, that is, showed his commitment to the truth in the courtroom setting.

As pointed out by Baker, the primary litmus enunciated in the controlling Florida Supreme Court precedent is whether the child "appreciates the need to tell the truth," Lloyd supra 524 So.2d at

400. Here, the record clearly shows that he "appreciate[d] the need to tell the truth." Lloyd's principle controls.

While defendant claims that the second competency hearing failed to comply with the standards set forth in SecciaI, defendant has failed to support his argument. He neither cites the record to illustrate the alleged noncompliance nor does he offer any insights as to what a trial court would have to do to establish the competency of a child to testify. Defendant offers nothing concrete because to do so would expose the logical, but extreme, implication of his argument: Young children, as a whole, would be barred from testifying because they speak in children's terms of right and wrong, good and bad, punishment for lying. Only the child prodigy or overly rehearsed child could testify in terms of, "I have a moral sense of obligation to tell the truth."

If defendant's contention that he deserves a re-trial is based on the fact that the child did not testify to some sort of religious foundation for his belief that he was obligated to tell the truth, defendant would be incorrect. This view has long been discredited:

> In admitting the child to testify in this case there was no manifest abuse of discretion by the court. The child in this case seemed to know nothing about religion, a Supreme Being, or Divine punishment, but belief in none of these is essential to competency of a witness in this state.

Cross v. State, 103 So. 636 (Fla. 1925) (citations omitted). Accordingly, Clinton v. State, 43 So. 312, 314 (Fla. 1907), advised:

> It should be borne in mind that the common-law rule has been changed in this state, and that neither belief in a Supreme Being

nor in divine punishment is requisite to the competency of a witness.

Such a requirement would make a belief in a deity a precondition for testifying, thereby establishing a religion in violation of Art. I §3, Fla. Const., and the First Amendment, U.S. Const. Such a requirement would also deprive the victim of a "right because of ... religion," Art. I §2, Fla. Const.

Accordingly, the legislature intended no religious requirement – or any belief in the supernatural. See State v. Mitro, 700 So.2d 643, 645 (Fla. 1997) ("the established precept that, if reasonably possible and consistent with constitutional rights, it should interpret statutes in such a manner as to uphold their constitutionality"); Sandlin v. Criminal Justice Standards & Training Com'n, 531 So.2d 1344, 1346 (Fla. 1988) (rejected a "literal reading" of a statute that would have rendered it unconstitutional).

The State respectfully submits that "moral obligation" simply means a sense that the truth **should be** told, regardless of the witness's motivation for that feeling. The "should" is broader than an understanding that the law, as such, requires it. The motivation could be a fear of punishment[4] from the judge or from a

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[4] Myers, 1 Evidence in Child Abuse and Neglect Cases, § 3.17 at pp. 247-48 (3rd ed. 1997) (footnotes omitted) emphasized the fear of punishment:

> Before children may testify, they must understand the obligation to tell the truth in court. As Wigmore put it, the child must possess 'a sense of moral responsibility – a consciousness of the duty to speak the truth.' Children as young as three and four

parent. It could be a fear of a deity or "devil." Or, it could be simply a feeling that the truth should be told because it is inherently good.

Moreover, the witness need not walk into the courtroom with the requisite sense of obligation. The trial court may instill it through instruction of the witness. See Harrold v. Schluep, 264 So.2d 431, 435 (Fla. 4th DCA 1972) citing Clinton supra. Of paramount importance, therefore, is that when the witness testifies there has been a sufficient showing of a desire to tell the truth: The witness knows the difference between the truth and a lie and **wants to** tell the truth.

> comprehend the duty to tell the truth. Bussey writes that young children appreciate 'the naughtiness of lying.' For young children, '"to tell the truth" means to report the facts as they saw them, not modifying their observations by inferences about nonobservable intents and beliefs of others.' If a child lacks sufficient understanding of the obligation to testify truthfully, the court may instruct the child.
>
> In addition to understanding the obligation to tell the truth, a child must realize that untruthful testimony can result in punishment. Matthews and Saywitz state that '[m]ost children over three know that in the familiar home or school setting it is wrong to tell a lie and that they can be punished for lying. ***' ***
>
> It is not necessary that the child understand or believe in divine punishment for false swearing, nor must the child comprehend the legal concept of perjury. The anticipated punishment may come from any source, including God, the judge, or a parent, and the child may describe the punishment in childlike terms.

Here, S.H. provided the requisite assurance that he was motivated to tell the truth: He was motivated by a fear of punishment from his parents and from the judge. He also had an internal sense that lying was inherently wrong. He even proved his sense of "duty" to the truth by calling attention to the prosecutor's and judge's test-lies. He was competent to testify.

Finally, the State submits that even if assuming arguendo, there was error it was harmless error.

Inter alia, defendant confessed to the police. See §§924.051(1),(3) ("prejudicial error" required), 924.33. Fla. Stat. (no reversal unless error "injuriously affected ..."); State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

Accordingly, because the issue is not remotely related to the scope of the certified conflict and because defendant has failed to show that the District Court improperly addressed the issue or that the trial court abused its discretion in finding the child victim competent to testify, the holding of the District Court should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits that the District Court erroneously certified conflict and thus jurisdiction should be denied. However, in the alternative, if this court deems that the certification was proper then, the State requests that the certified conflict should be answered in accordance with the First District Court's decision reported at 23 Fla. L. Weekly D2346 (Fla. 1st DCA October 12, 1998), and that defendant's judgement and sentence entered in the trial court should be affirmed.

Respectfully submitted,

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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 Mark Walker, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of December, 1998.

Sherri Tolar Rollison
Attorney for State of Florida

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