IN THE SUPREME COURT OF FLORIDA

Case No. 94,180

JOSEPH HODGE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S AMENDED BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type.

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the appeal proceedings and the defendant at trial in the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County. The Respondent, State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court.

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STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's Statement of the Case and Facts for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the modifications set forth below and in the argument portion of this brief.

The district court, in Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), rev. granted, Case No. 93,966, held that sentencing issues not objected to in the trial court and not challenged in a post trial motion [pursuant to rule 3.800(b)] were not cognizable on appeal as they did not constitute fundamental error.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate that fundamental error continues to exists in sentencing matters where the amendments to the rules of criminal and appellate procedure provide adequate remedies for correction of any sentencing errors. Petitioner failed to take advantage of those remedies, and therefore, he has waived the right to challenge the amount of the attorney's fees assessed against him or the imposition of statutorily mandated costs.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT'S FAILURE TO ORALLY INFORM A DEFENDANT OF THE DEFENDANT'S RIGHT TO CONTEST THE AMOUNT OF ATTORNEY'S FEES CONSTITUTES FUNDAMENTAL ERROR WHICH MAY BE RAISED ON APPEAL WITHOUT BEING RAISED IN THE TRIAL COURT?

The State readopts its argument set forth in Maddox v. State, Case No. 92,805, and for the convenience of the reader and court, paraphrases that argument herein.

The Fifth District Court of Appeal ruled *en banc* that only sentencing errors which have been preserved can be raised on direct appeal. This includes any sentencing errors which previously may have been labeled "fundamental." It is the position of the State that this is a correct interpretation of the recent changes to the appellate process. To understand how the Fifth District reached its conclusion, some background review of the previous law in this area is necessary.

First, an examination of case law prior to the Criminal Appeal Reform Act shows an inconsistent approach to whether an objection was needed to preserve a sentencing error. In the case Walcott v. State, 460 So. 2d 915, 917-921 (Fla. 5th DCA 1984),

approved, 472 So. 2d 741 (Fla. 1985), Judge Cowart wrote a detailed analysis of the application of the contemporaneous objection rule to sentencing errors in his concurring opinion which pointed out many of the inconsistencies in the sentencing error cases. Adding to the inconsistencies of the necessity of a contemporaneous objection was the expansive definition of fundamental error when used in the sentencing context.[1] Case law held that an illegal sentencing error was fundamental error since it could cause a defendant to serve a sentence longer than is permitted by law; however, cases have called sentencing errors fundamental which ranged from sentences in excess of the statutory maximum to jail credit to improper costs to conditions of probation. See, Larson v. State, 572 So. 2d 1368 (Fla. 1991) (illegal conditions of probation can be raised without preservation), Wood v. State, 544 So. 2d 1004 (Fla. 1989), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (failure to provide defendant notice and opportunity to be heard as to costs imposed constitutes fundamental error), Vause v.

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[1] The Second District Court recently wrote in a case which will be reviewed in more detail later in this brief that "It is no secret that the courts have struggled to establish a meaningful definition of 'fundamental error' that would be predictive as compared to descriptive." Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998).

State, 502 So. 2d 511 (Fla. 1st DCA 1987) (improper imposition of mandatory minimum sentence constituted fundamental error); Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984) (error in jail credit fundamental since defendant may serve in excess of sentence), Jenkins v. State, 444 So. 2d 947 (Fla. 1984), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (costs could not be imposed without notice).

Eventually it seems, case law evolved which provided that sentencing errors apparent from the record could be reviewed by the appellate court whether preserved or not. See, Taylor v. State, 601 So. 2d 540 (Fla. 1992), Dailey v. State, 488 So. 2d 532 (Fla. 1986), State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In Rhoden, the defendant was sentenced as an adult despite the fact he was seventeen years old. Id. at 1015. However, the trial court never addressed the requirements of the statute necessary to sentence a juvenile as an adult. There was no objection at the trial level. Id. The State's argument that the error was not fundamental and that an objection was needed was rejected by this Court which wrote:

> If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made **at the time of sentencing**, the defendant could not

> appeal the illegal sentence. (emphasis added).

Id. at 1016.

The appellate system became more and more clogged with sentencing errors which were either raised for the first time on direct appeal or were not even raised at all by appellate counsel but were simply apparent on the record. As Judge Cowart wrote in his concurrence in the previously referenced Walcott:

> Those who legislate substantive rights and who promulgate procedural rules should consider if the time has not arrived to take action to improve the present rules and statutes. The first step might be to eliminate these vexatious questions, perhaps by eliminating the right of direct appeal of sentencing errors with the injustice that necessarily attends application of the concept of implied waiver to the failure of counsel to timely, knowingly, and intelligently present appealable sentencing errors for direct appellate review. **Perhaps it would be better to have one simple procedure**, permitting and requiring, any legal error in sentencing that can result in any disadvantage to a defendant, to be presented once, specifically, explicitly, but at any time to the sentencing court for correction with the right to appeal from an adverse ruling.(emphasis added).

460 So. 2d at 920. More than a decade later, the better, simpler approach urged by Judge Cowart was attempted with an extensive overhaul of the appellate system in regards to criminal

appeals. Included in this process was the Criminal Appeal Reform Act (Reform Act) which was codified in section 924.051, Fla. Stat. (Supp. 1996) as well as changes to the Rules of Criminal and Appellate Procedure.

It should be noted there is no right under the United States Constitution to an appeal in a non-capital criminal case. This point was specifically recognized by this Court when it recently wrote:

> The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 834, 83 L.Ed.2d 821 (1985) ("Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors."). Accord, Abney v. United States, 431 U.S. 651, 656, 97 S. Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977); Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L.Ed.2d 341 (1974).

See, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). However, this Court also noted that article V, section 4(b) of the Florida Constitution was a constitutional protection of the right to appeal. Id. This Court wrote:

> . . . we believe that the legislature may

> implement this constitutional right and place **reasonable conditions** upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, **this Court continues to have jurisdiction over the practice and procedure relating to appeals**.(emphasis added)(footnote omitted).

Id.

Immediately after the passage of section 924.051, which was the Legislature's implementation of reasonable conditions upon the right to appeal, this Court exercised its jurisdiction over the appellate process and extensively amended Florida Rule Appellate Procedure 9.140 to work with the Reform Act. As applied to appeals after a plea of guilty or nolo contendere,[2] the amended Rule provides:

> (2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with

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[2] Many of the appeals being taken occurred after a defendant had negotiated a plea and was sentenced pursuant to his agreement. It is not coincidental that the instant case as well as several of the cases which will be discussed later in this brief were written after defense counsel on appeal had filed an Anders brief. See, Anders v. California, 386 U.S. 738 (1967).

Additionally, the State will point out that the case of State v. Trowell, 706 So. 2d 332, rev. gr., 718 So. 2d 172 (Fla. 1998), is currently pending review by this Court as to the issue of appeals after a defendant has entered a plea.

> particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower tribunal's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> (iv) **a sentencing error, if preserved**; or
>
> (v) as otherwise provided by law.

(emphasis added).

The Rule was further changed to specifically refer to sentencing errors:

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

Rule 3.800(b), referred to above, has itself been completely rewritten to provide that a "defendant may file a motion to correct the sentence or order of probation within thirty days

after the rendition of the sentence."

It was these specific changes that led the Fifth District Court to find that the concept of fundamental sentencing errors no longer exist.[3] As the court noted, only "preserved" errors can be appealed. Sentencing issues become much more like other issues with there now being a specific requirement that they be preserved in order to be presented on appeal. See, Section 90.104(1)(a), Fla. Stat. (1997) (requiring a specific objection to preserve an evidentiary issue); Fla. R. Crim. P. 3.390(d) (requiring an objection to preserve a jury instruction issue). Further, the situation that was of concern in Rhoden (that the subject matter of the objection would not be known to the defendant until the moment of sentencing) is solved by the fact that there is still a thirty (30) day window in which to present any sentencing issues to the trial court for remedy and for

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[3] As additional support for the fact that fundamental errors only apply to trial errors, the Fifth District Court relied on the case of Summers v. State, 684 So. 2d 729 (Fla. 1996). In Summers, this Court analyzed the issue whether failure to file written reasons to sentence a juvenile as an adult constitutes fundamental error. This Court wrote that:

> 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.

Id.

preservation.

As the Fifth noted:

> The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be 'fundamental' error where the courts have created a 'failsafe' procedural device to correct any sentencing error or omission at the trial court level? Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d 617, 620 (Fla. 5th DCA 1998).

This leads to a review of the facts of the instant case. The defendant pled nolo contendere; only preserving his right to appeal a suppression issue. His appellate counsel filed an Anders brief. The court sua sponte ordered the record supplemented with the sentencing hearing, and, the court's review showed there was a $1.00 cost imposed for the police academy and $205 imposed for court costs. The $1.00 was no longer authorized by statute, and the court costs exceeded the statutory maximum by $5.00. See, Laughlin v. State, 664 So. 2d 61 (Fla. 5th DCA 1995); section 27.3455, Fla. Stat. (Supp. 1996). Under previous case law each of these costs would be found to be "fundamental" sentencing errors. However, as previously noted, the Fifth found neither to be preserved, and each to be waived. Obviously, these

are some of the exact types of errors that the reforms intended to be presented to the trial courts prior to them being reviewed by the appellate courts. No such preservation was done in this case, and the Fifth ruled that the issues could not be raised on direct appeal.

Complicating the analysis in this area is the fact that despite its relatively young age, the Reform Act has already led to multiple exceptions and interpretations. A review of just some of the First District Court of Appeals' cases shows a complete lack of consistency in its application of the Reform Act and helps highlight some of the perceived confusion:

> Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), rev. denied, 698 So. 2d 543 (Fla. 1997):
>
> -- improper departure issue was not preserved for appeal and is barred from review
>
> -- however, imposition of attorney fees is fundamental sentencing error which can be raised for first time on direct appeal
>
> Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997):
>
> -- imposition of a twenty year sentence for a second degree felony is an illegal sentence which must be classified a fundamental error and can be raised with no objection

State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997):

-- case discusses whether the sentencing issue was unlawful or illegal (with illegal being equated to fundamental); determines that issue of withholding adjudication with no probation was question of an unauthorized sentence which had to be preserved and was not.

Pryor v. State, 704 So. 2d 217 (Fla. 1st DCA 1998):

-- despite defendant's claim that the sentence was illegal since it exceeded the statutory maximum for a youthful offender, issue is barred from review since not fundamental and not preserved.

Mason v. State, 710 So. 2d 82 (Fla. 1st DCA 1998):

-- sentence imposed exceeded statutory maximum, was fundamental, and could be raised on appeal although not preserved.

Dodson v. State, 710 So. 2d 159 (Fla. 1st DCA 1998):

-- imposition of discretionary costs without oral pronouncement and of a public defender's fee is fundamental and reversible error although not preserved.

-- issue was certified.

Matthews v. State, 714 So. 2d 469 (Fla. 1st DCA 1998):

-- despite being decided only seven days after Dodson, held cost issue was not preserved and could not be raised on direct appeal.

Mike v. State, 708 So. 2d 1042 (Fla. 1st DCA 1998):

-- six days later, public defender fee and costs reversed with citation to Dodson and again certifying issue.

Copeland v. State, 23 Fla. L. Weekly D1220 (Fla. 1st DCA May 12, 1998):

-- as to fact defendant habitualized on possession charge, issue is fundamental and sentence illegal.

-- as to fact, defendant did not even qualify to be found a habitual offender, sentences not illegal and issue not preserved.

Speights v. State, 711 So. 2d 167 (Fla. 1st DCA 1998):

-- one day after Copeland, the court again finds imposition of habitual sentence for which the defendant did not qualify not to be illegal and not to be preserved; however, this time court issue is certified.

These are just some of the cases applying the new appeals process.

Additionally, several of the other district courts have

reviewed the Reform Act in *en banc* panel decisions. Much like in the instant case, the Fourth District Court reviewed an appeal from a plea which had led the appellate attorney to file an Anders brief. See, Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998). The State had filed a motion to dismiss which the court had initially denied but which it ultimately granted. The Fourth specifically agreed with the majority of the Fifth's approach in Maddox; however, it noted disagreement with Maddox when holding that an illegal sentence exceeding the statutory maximum[4] was "fundamental error" which could be raised at any time. In a footnote, the Fourth also agreed with Maddox that costs type issues could not be raised without being preserved; however, it viewed such sentences as being unlawfully imposed - not illegal.

Next, the Second District Court of Appeal in the case Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998), reviewed the Reform Act and held that when an appellate court has jurisdiction through the proper appeal of a preserved error it could then address all other errors which it referred to as "serious,

[4] This definition of illegal sentence is being taken from this Court's holding in Davis v. State, 661 So. 2d 1193 (Fla. 1995).

patent" errors[5] creating yet another exception for review. Interestingly, the court wrote:

> . . . there is little question that 'fundamental error' for purposes of the Criminal Reform Act is a narrower species of error than some of the errors previously described as fundamental by case law. Because the sentencing errors in this case could have been challenged by a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) prior to appeal and because they may still be challenged by postconviction motions, neither of the sentencing errors in this case fits within this definition of fundamental error. **Indeed, although we do not reach the issue, the Fifth District may be correct in concluding that no sentencing error is fundamental for purposes of this new act.**

Id. at 1229.

The Fourth, then, again issued an *en banc* opinion again addressing the Reform Act in the case in the case of Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), rev. granted, Case No. 93,966. Perhaps finally seeing the wisdom of the changes and the need for preservation, the court issued an aggressive decision in which it attempted to stress the fact the new changes existed and

[5] There are also references in the opinion to "serious" errors, "patent" errors, and "illegal" sentence.

that they would be utilized. For example, the court used some of the following language:

> In this district, **we will no longer** entertain on appeal the correction of sentencing errors not properly preserved.
>
> Although in the past we have corrected such deviations from oral pronouncement of sentences, w**e will do so no more.** (as to the imposition of a condition of probation without that condition being oral pronounced).
>
> It is for the benefit of the criminal system as a whole, as well as the individual defendants, that this expeditious remedy of sentence correction has been made available. Our strict enforcement of Rule 9.140(d) should have the effect of alerting the criminal bar of the absolute necessity for reviewing the sentencing orders when received to determine whether correction is necessary. **If they do not, relief will not be afforded on appeal.** (emphasis added).

The court continued its analysis and held that the rule changes had *sub silentio* overruled the Wood issue finding that costs and fees now have to be preserved in order to be presented on appeal.

Also, quite recently, the Third District wrote that a sentence in excess of the statutory maximum was a fundamental

error which it could review even if not preserved; evidently, the court equates the definition of an illegal sentence with that of a fundamental sentencing error. See, Jordan v. State, 23 Fla.L.Weekly D1230 (Fla. 3rd DCA September 16, 1998). Still yet, another twist was added by the Third District in the case Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), wherein it was confronted with the issue of whether the imposition of a fourteen year sentence for a misdemeanor could be corrected on appeal absent presenting the issue to the trial court. (seven felony counts were run concurrently; however, on one count the jury had found the defendant guilty of the lesser included misdemeanor and a fourteen year sentence had been improperly imposed). The defendant argued that the sentencing error was fundamental and reviewable; whereas, the State submitted that Maddox was controlling. The Third District noted some of the above cited conflicting decisions such as Harriel and Denson, and wrote that "Because we are able to reach what we think is the correct result without doing so, we respectfully decline, at least in this case, to involve ourselves in this fratricidal warfare." The court, then, sua sponte found ineffective assistance of counsel on the face of the appellate record and ordered correction upon remand. The court continued and stated that while it agreed with Maddox

that lack of preservation is an ineffective assistance of counsel issue it "strongly disagree(d) that anything is accomplished by not dealing with the matter at once."

There are several problems with this approach. First, assuming Maddox is correct, the changes to the process require all sentencing issues to be preserved by having been presented to the trial court before appellate review. As to cases involving pleas, this requirement might be jurisdictional. There is no exception in the rules for errors apparent on the face of the record. Additionally, to allow the appellate courts to circumvent the preservation requirement by use of ineffective assistance on its face could completely destroy the Reform Act. Despite some case law otherwise, it would seem obvious that at the very least the changes were intended to eliminate from initial appellate review issues such as costs, attorney fees, and improper conditions of probation. However, under Mizell, even if the error is found not to be fundamental and not to be illegal (assuming these to be different for sake of argument), an appellate court could sua sponte find these errors to be the product of ineffective assistance.[6] Again, such an approach

[6] Such an approach also is a concern given the fact the State is omitted from the process and is deprived of the opportunity to respond in any manner. As the United States Supreme Court noted,

could basically destroy the entire Reform Act.

These cases show that in just the space of a few months, attempts to get sentencing issues preserved by presentation to the trial court is being eroded by exceptions. We have the "patently serious error" exception, the "illegal sentence error" exception, the "fundamental sentencing error" exception, and now even the "apparent on the face of the record thus ineffective assistance" exception. Additionally, none of these is defined. Basically, the exceptions will consume the reforms unless the Fifth District's interpretation is correct- that only preserved sentencing issues can be raised, or if exceptions do exist, they must be extremely limited and well-defined.[7]

Instead of being captured by some exception, sentences like that of seven years for a misdemeanor in Mizell are to be presented to the trial court so that they are preserved, or they

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the analysis for prejudice involves the question of whether the proceeding was fundamentally unfair and is not merely outcome determinative. See, Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 122 L.Ed.2d 180 (1993).

[7] If some exception is found to be required by the changes, it should only be for those rare errors so fundamental that the process itself is tainted. Even an illegal sentence is simply a violation of statute which in some situations is now even proper since the clear definition of illegal sentence seems to be one which is beyond the statutory maximum; however, a sentence actually can legally exceed the so-called statutory maximum if such sentence is warranted by the guideline scoreheet.

could be corrected as an illegal sentence under Florida Rule of Criminal Procedure 3.800(a). They are not to be raised on direct appeal without preservation. Some of the other sentencing errors could be addressed in a collateral motion for postconviction relief such as Rule 3.850 or petitions for writ of habeas corpus. Finally, some of the errors will be permanently waived if not preserved.

To repeat the point well made by the Fifth District Court as to the fact that only preserved sentencing errors can be raised on appeal:

> Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d at 620. It is the State's position that the very reason that this Court amended the appellate rule was specifically to address the appeal of sentencing errors and, to repeat the previously cited amendment of Rule 9.140(d) which specifically addresses the appeal of sentences:

> (d) Sentencing Errors. **A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:**
>
> **(1) at the time of sentencing; or**

(2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

(emphasis added).

Based upon this, it is the State's position that this Court has clearly limited appeals of sentencing errors to only those which are preserved by presentation to the trial court; thus, eliminating the potentially expansive exception of fundamental error.

End paraphrase.

The State makes the following additional points.

This argument applies with equal force to claims like the one raised herein. In the trial court, Appellant did not object to the imposition of attorney's fees, neither at the sentencing hearing nor by use of a motion pursuant to rule 3.800(b), Fla.R.Crim.P. Moreover, Appellant did not request a hearing to contest the amount of the fees.[8] Appellant, by virtue of Section 27.56(7), Florida Statutes (1995), as amended in, 938.29 Florida Statutes (1997), and rule 3.720(d)(1), was fully aware that he had the right to contest the amount of the attorney's fees. See generally, State v. Beasley, 580 So. 2d 139 (Fla.

[8] Prior to the amendments discussed herein, this case would have been controlled by Bull v. State, 548 So. 2d 1103 (Fla. 1989).

1989)(Publication in the statutes provides constructive notice of mandatory costs); Texas v. Short, 454 U.S. 516, 531 102 S. Ct. 781, 793 (1982)(Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply); and Breath v. Cronvich, 729 F.2d 1006, 1011 (5th Cir. 1984)(Notice is constructively given by publication of a statute... Persons owning property within a state are charged with knowledge of relevant statutory provisions affecting control or disposition of that property). Yet despite this notice, he did not object to the assessment of attorney's fees nor did he request a hearing to contest the amount when the fees were orally pronounced. Even though Petitioner had the right to contest any sentencing issue within 30 days of rendition of his sentence, he did not file a motion pursuant to rule 3.800(b) requesting the right to a hearing. Having failed to raise the issue in the trial court, he raised it on appeal. This should not be condoned. Trial counsel are presumed to be competent and diligent in protecting the interests of their clients. If trial counsel failed to provide competent legal representation, including matters pertaining to sentences, a defendant may file a motion under rule 3.850 attacking that representation. In either

event, the proper remedy is in the trial court, hence the phrase, “Criminal Appeal Reform Act of 1996.”

If defendants are permitted to appeal sentencing issues like statutory costs, attorney’s fees, and conditions of probation, without presenting those issues to the trial court, i.e., as occurred prior to promulgation of the Criminal Appeal Reform Act of 1996 and the amendments to the Florida Rules of Criminal and Appellate Procedure, there is absolutely no effect given to the changes in the governing law. "Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.' " Johnson v. Feder, 485 So.2d 409, 411 (Fla. 1986) (quoting Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803, 813 (9th Cir. 1975). There is no reason why this Court should construe rule 9.140(d) so as to render its effect negligible. Adoption of Petitioner’s position would do just that.

Accordingly, Respondent asks that this Court adopt the position of the Fifth District Court of Appeal as interpreted in Maddox.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Respondent respectfully requests that this Court decline to exercise its discretionary jurisdiction to review the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondent's Amended Brief on the Merits was sent by courier to Louis G. Carres, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401 on April 22,

1999.

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