**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 94,630**

**THE STATE OF FLORIDA,**

Petitioner,

-vs-

**JAMES ANTHONY JEFFERSON,**

Respondent.

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**ON PETITION FOR DISCRETIONARY REVIEW FROM CERTIFICATION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

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# AMENDED INITIAL BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

The Petitioner, the State of Florida will be referred to as the State. The Respondent, the Defendant below, **JAMES ANTHONY JEFFERSON**, was prosecuted by the State. In this brief, Mr. Jefferson will be referred to as the Defendant. All references to the attached appendix will be designated by "Exhibit" followed by the appropriate letter.

This appeal results from a denial of the State's motion to dismiss for lack of jurisdiction to review a direct appeal raising unpreserved nonfundamental, alleged sentencing errors following conviction and sentence. The Third District Court of Appeal denied the State's motion to dismiss and passed to this Honorable Court the following question as one of great public importance:

> **UNDER SECTION 924.051(3), FLORIDA STATUTES (Supp. 1996), IS THE FAILURE TO PRESERVE FOR APPEAL AN ALLEGED SENTENCING ERROR THAT IS NOT FUNDAMENTAL A JURISDICTIONAL IMPEDIMENT TO AN APPEAL THAT SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NONJURISDICTIONAL BAR TO REVIEW THAT SHOULD RESULT IN AN AFFIRMANCE?**

## CERTIFICATE OF TYPE SIZE AND STYLE

This brief is formatted to print in 12 point Courier New type size and style.

## JURISDICTIONAL STATEMENT

Article V, Section 3(b)(4) of the Florida Constitution provides, in pertinent part, that the Supreme Court, "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance..."

Similarly, Fla.R.App.P. 9.030(a)(2)(v) provides that the discretionary jurisdiction of this Court may be sought to review decisions of a district court of appeal which "pass upon a question certified to be of great public importance."

## STATEMENT OF THE CASE AND FACTS

On May 16, 1996, the State filed an Information against the Defendant charging him with Counts I - III, Sexual Battery with Deadly Weapon or Force, in violation of § 794.011(3), Fla. Stat. 1996, alife felony, and Count IV, Kidnaping, in violation of § 787.01, Fla. Stat. 1996, a life felony. (Exhibit A).

At the conclusion of the trial, the jury found the Defendant guilty on two[1] (2) counts of Sexual Battery with Slight Force, a lesser included offense, and Kidnaping, as charged in the

[1] The trial court acquitted the Defendant on Count I. (Exhibit D).

Information. (Exhibit B). Subsequently, the trial court adjudicated the Defendant guilty of Counts II - IV. (Exhibit C).

In the judgment sheet, the trial court inadvertently listed Counts II and III, Sexual Battery with Slight Force, as a first degree offense. (Exhibit C). Subsequently, the trial court sentenced the Defendant to thirty (30) years for Counts II - IV, as a habitual felony offender. (Exhibit E). The sentencing guideline scoresheet assessed eighty (80) points for sex penetration on the victim. (Exhibit F).

Defense counsel failed to raise any objections at the sentencing hearing. (Exhibit G). Neither the Defendant nor defense counsel filed a motion to correct sentence in the trial court pursuant to either Fla.R.Crim.P. 3.800(a) or (b) nor a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. (Exhibit H).

The Defendant filed notice of appeal from the judgment and sentence orders. (Exhibit I). On July 24, 1998, the Defendant filed an initial brief in the Third District Court. (Exhibit J).

In response, on August 11, 1998, the State filed a motion to dismiss for lack of jurisdiction pursuant to § 924.051(3), Fla. Stat. (1997).

On October 14, 1998, the Third District denied the State's motion. In support of its denial, the court held that "...[w]hether the claimed sentencing errors have been preserved and, if so, whether the claims have merit are issues to be decided on appeal rather than on the basis of a motion to dismiss for lack of jurisdiction." (Exhibit K).

Subsequently, the State filed a motion for rehearing and/or certification of question. (Exhibit L). The Defendant filed a response. (Exhibit M).

On November 18, 1998, the Third District denied the motion for rehearing but passed on the following question as one of great public importance:

> **UNDER SECTION 924.051(3), FLORIDA STATUTES (SUPP. 1996), IS THE FAILURE TO PRESERVE FOR APPEAL AN ALLEGED SENTENCING ERROR THAT IS NOT FUNDAMENTAL A JURISDICTIONAL IMPEDIMENT TO AN APPEAL THAT SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NONJURISDICTIONAL BAR TO REVIEW THAT SHOULD RESULT IN AN AFFIRMANCE?**

(Exhibit N).

On November 18, 1998, the State filed notice to invoke discretionary jurisdiction and a motion to stay proceeding pending review. (Exhibit O, P & Q).

This initial Brief follows

## QUESTION PRESENTED

**UNDER SECTION 924.051(3), FLORIDA STATUTES (SUPP. 1996), IS THE FAILURE TO PRESERVE FOR APPEAL AN ALLEGED SENTENCING ERROR THAT IS NOT FUNDAMENTAL A JURISDICTIONAL IMPEDIMENT TO AN APPEAL THAT SHOULD RESULT IN A DISMISSAL OF THE APPEAL, OR IS IT A NONJURISDICTIONAL BAR TO REVIEW THAT SHOULD RESULT IN AN AFFIRMANCE?**

## SUMMARY OF ARGUMENT

The enactment of the Criminal Appeals Reform Act of 1996 and the recent amendments to the Florida Rules of Appellate and Criminal Procedure, indicate that both the Legislature and this Court view the trial court as the best suited judicial body to investigate and make an initial determination as to whether a sentencing error has occurred and, if so, to correct the error.

The State respectfully submits that where it is apparent on the face of the record that the claims raised on direct appeal constitute unpreserved, nonfundamental alleged sentencing errors, the court should grant a motion to dismiss for lack of jurisdiction, rather than delay the determination *via* a direct appeal. A motion to dismiss, showing that the defendant failed to preserve a nonfundamental alleged sentencing error by either an objection or a motion in the lower tribunal, should be sufficient to restrict appellate courts' jurisdiction to review the sentencing error on direct appeal. The dismissal of the direct appeal for lack of jurisdiction would clearly be without prejudice to the defendant to seek relief in the trial court.

The State requests that this Court answer the question in the affirmative by holding that pursuant to § 924.051(3), Fla. Stat. (1997), appellate courts no longer have jurisdiction to review

unpreserved, nonfundamental sentencing errors, and must dismiss the direct appeal pursuant to a motion to dismiss.

## ARGUMENT

### I.

### A DEFENDANT'S RIGHT TO APPELLATE REVIEW

Historically, the right to appeal in criminal cases has been a matter of statutory substantive law. The State Legislature sets the terms and conditions under which the right may be exercised, and prescribes the conditions under which reversals are permitted. *Ross v. Moffitt*, 417 U.S. 600, 611 (1974)("[I]t is clear that the State need not provide any appeal at all"); *Abney v. United States*, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal"); *McKane v. Durston*, 153 U.S. 684 (1894)("The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute."); *Evitts v. Lucey*, 469 U.S. 387, 393 (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. McKane").

In *Booker v. State*, 514 So. 2d 1079, 1081-1082 (Fla. 1987), this Court held that "[t]he rule in Florida has historically been that a reviewing court is powerless to interfere with the length of

a sentence imposed by the trial court so long as the sentence is within the limits allowed by the relevant statute." This Court concluded, "...that there is no inherent judicial power of appellate review over sentencing." *Id.* at 1082.

**II.**

**SECTION 924.051, FLORIDA STATUTES (1997)**

The enactment of § 924.051, Fla. Stat. (1997), restricts appellate courts' jurisdiction to entertain alleged sentencing errors on direct appeal to cases where the alleged error has been properly preserved in the lower tribunal or where the alleged error constitutes a "fundamental error.[2]"

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[2] The State subscribes to the opinion authored by the Honorable Chief Judge Griffin in *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), where the court concluded that, under § 924.051, Fla. Stat. (1997), fundamental error no longer exists in the sentencing context.

The State submits that the *Maddox* conclusion is supported by both the pivotal significance of the definition of fundamental error, the enactment of § 924.051, Fla. Stat. (1997), and this Court's recent amendments to the Florida Rules of Criminal and Appellate Procedure.

Fundamental error goes "...to the foundation of the case or the merits of the cause of action and can be considered on appeal without objection." *Crump v. State*, 622 So. 2d 963 (Fla. 1993). This Court has distinguished sentencing errors from trial error and found that fundamental error exists **only** in the latter context. *See Summers v. State*, 684 So. 2d 729, 729 (Fla. 1996)(Emphasis added).

In *Denson v. State*, 711 So. 2d 1225, 1229 (Fla. 2d DCA 1998), the Second District also described fundamental error pursuant to section 924.051(3), Fla. Stat. (1997), as an error that is "...so egregious and without alternative remedy that it warrants the

Section 924.051(1)(b), Fla. Stat. (1997) provides in pertinent part:

> 'Preserved' means that an issue, legal argument, or objection to evidence **was timely raised before, and ruled on by, the trial court**, and that the issue, legal argument or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and grounds thereof.

(Emphasis added).

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appellate courts exercising **jurisdiction** in the case solely for the purpose of correcting that error." The *Denson* court further stated that "there is little question that 'fundamental error' for purposes of the Criminal Appeals Reform Act is a narrower species of error than some of the errors previously described as fundamental in case law." *Denson*, 711 So. 2d at 1229.

Although the *Denson* Court did not ultimately reach a conclusion as to whether a sentencing error could satisfy the fundamental error definition, the court stated, "...the Fifth District may be correct in concluding that no sentencing error is fundamental for purposes of this new act." *Denson,* 711 So. 2d at 1229, *citing*, *Maddox v. State,* 708 So. 2d 617, 619-620 (Fla. 5th DCA 1998).

The State respectfully submits that in light of the recent changes in the law, a sentencing error no longer constitutes fundamental error under § 924.051, Fla. Stat (1996). An illegal sentence cannot and should not constitute fundamental error for purposes of the Criminal Appeals Reform Act because it can be corrected in **the trial court at any time** pursuant to Florida Rules of Criminal Procedure 3.800(a). Moreover, since a defendant receives ample opportunities and alternative methods by which to raise alleged sentencing errors in the trial court for up to two (2) years after the final conviction under a Rule 3.850 motion, a motion to dismiss is the proper and efficient vehicle for disposing of an unpreserved alleged sentencing error raised on direct appeal.

Section 924.051(3), Fla. Stat. (1997) provides in pertinent part:

> **An appeal may not be taken** from a judgment or order of a trial court unless a prejudicial error is alleged **and** is properly preserved or, if not properly preserved, would constitute fundamental error.

(Emphasis added).

## III.

## STATUTORY CONSTRUCTION

When the language of a statute is clear and unambiguous, it should be given effect without resort to extrinsic guides to construction. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)(When statutory language conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction.)

In construing a statutory requirement, an appellate court must attribute to it a rational and sensible meaning. Furthermore, the controlling principle of statutory construction is that words of common usage are construed in their plain and ordinary sense. *Zuckerman v. Alter*, 615 So. 2d 661 (Fla. 1993); *Seaboard System R.R., Inc. v. Clemente for and on Behalf of Metropolitan Dade County*, 467 So. 2d 348 (Fla. 3d DCA 1985).

Construction of a statute which leads to an unreasonable or ridiculous conclusion, or a result obviously not designed by the legislature, will not be adopted. *Galbut*, 626 So. 2d 192*; Carawan v. State*, 515 So. 2d 161 (Fla. 1987); *Drury v. Harding*, 461 So. 2d 104 (Fla. 1984); *Lloyd Citrus Trucking, Inc. v. State Dept. of Agriculture*, 572 So. 2d 977 (Fla. 4th DCA 1990)(when reading a statute, a court should give the language its plain and ordinary meaning). Finally, the fact that the instant controversy deals with a penal statute does not alter the analysis, because penal statutes, as a fundamental rule, must be strictly construed. *Perkins v. State*, 576 So. 2d 1310, 1312-13 (Fla. 1991).

The Florida Legilasture expressly defined the term "preserved." § 924.051(1)(b), Fla. Stat. (1997). Thus, it appears futile to explain or assign any other meaning to the term preserved, which, coincidentally, has been historically used in the same manner as prescribed in § 924.051(1)(b), Fla. Stat. (1997). General rules of statutory construction compel the conclusion that the term "preserved" was intended to apply, as the Legislature expressly and unambiguously prescribed, to all cases where the error is not fundamental. § 924.051(3), Fla. Stat. (1997).

General rules of statutory construction also compel the conclusion that the term "may not be raised on direct appeal" was

intended to restrict appellate courts' jurisdiction to review unpreserved, nonfundamental alleged sentencing errors[3]. § 924.051(3), Fla. Stat. (1997). The State submits that the plain language of the statute supports this construction, otherwise the phrase "may not be raised on direct appeal" would be rendered invalid.

Moreover, the second sentence of § 924.051(3) reinforces the conclusion that the Legislature intended to restrict appellate courts' jurisdiction to cases where the error has been preserved or is fundamental. The second sentence states in pertinent part:

> A judgment or sentence may be reversed on appeal **only** when an appellate court determines after a review of the complete record that prejudicial error occurred and **was properly preserved in the trial court** or, if not properly preserved, would constitute fundamental error.

(Emphasis added).

It is apparent from the plain language of the statute that the Legislature permits appellate review **only** where the sentencing error "...was properly preserved in the trial court..." or where the error is fundamental. § 924.051(3), Fla. Stat. (1997). The plain and unambiguous language of the statute cannot be overlooked or deemed a legislative oversight or accident. If, according to

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[3] This brief only discusses sentencing errors.

statutory construction, words are to be given their plain meaning, it is clear that the Legislature specifically intended to restrict appellate review to preserved alleged sentencing errors or fundamental errors. § 924.051(3), Fla. Stat. (1997). To read or interpret the statute differently would contravene, and make a mockery of, the express language and would defeat the intent of the Legislature.

## III.

## LEGISLATIVE INTENT

Although the controlling principle of statutory construction consists of construing words according to their common usage, legislative intent must be given effect even though it may contradict the strict letter of a statute. *Vildibill v. Johnson*, 492 So. 2d 1047 (Fla. 1986). "It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute." *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981).

In determining legislative intent, the Court must consider the act as a whole, the language of the act including its title, and the history of its enactment. *Id.* However, the words used are the best evidence of legislative intent where they are plain and

unambiguous. *City of Delray Beach v. Barfield*, 579 So. 2d 315 (Fla. 4th DCA 1991). The intent of the Legislature is the paramount consideration. *Lloyd Citrus Trucking, Inc.*, 572 So. 2d 977.

It is apparent from the clear and unambiguous wording of the statute that the Legislature intended that appellate courts comply with all terms and conditions of the statute. § 924.051(8), Fla. Stat. (1997) provides in pertinent part:

> It is the **intent of the Legislature** that all terms and conditions of **direct appeal** and collateral review **be strictly enforced**, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also **the Legislature's intent that all procedural bars to direct appeal** and collateral review be fully enforced **by the courts of this state**.

(Emphasis added). These words should be construed according to their plain and ordinary meaning, and, in conjunction with the other sections of the statute. The Legislature intended that appellate courts abide by all the terms and conditions set forth in the statute.

Although legislative intent is determined primarily from the language of the statute itself, a literal interpretation need not be given when to do so would lead to unreasonable conclusions or would defeat clear legislative intent. *Vildibill*, 492 So. 2d 1047;

*Winemiller v. Feddish*, 568 So. 2d 483 (Fla. 4th DCA 1990). Several District Courts have assigned to the statute an unreasonable conclusion by refusing to restrict appellate jurisdiction to preserved and/or fundamental alleged sentencing errors, clearly defeating the Legislature's intent. These courts have taken numerous and alternative directions in their approach to § 924.051 by adopting either a moderate or extreme path to follow in its interpretation.

For example, some courts first review the merits of the alleged sentencing error on direct appeal, regardless of whether the alleged error was preserved and/or fundamental, and then affirm the sentence. See *Hart v. State*, 710 S. 2d 1047 (Fla. 3d DCA 1998). Other districts, regardless of whether the alleged sentencing error was properly preserved and/or fundamental, review the claim on the merits and then remand the case to the trial court with instructions on resentencing. *Dodson v. State*, 710 So. 2d 159 (Fla. 1st DCA 1998); *Sanders v. State*, 698 So. 2d 377 (Fla. 1st DCA 1997).

The Fifth District Court, on the other hand, is the only district which has properly construed the language of the statute in its plain and ordinary sense. This court restricts appellate jurisdiction to cases where the alleged sentencing error was

properly preserved. *See Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998). Clearly, the Fifth District has correctly interpreted the words "[a]n appeal may not be taken" as was intended by the Legislature in § 924.051(3), Fla. Stat. (1997).

The Legislature's intent in enacting § 924.051(3) was to provide the trial court with an opportunity to review the matter in the first instance so as to prevent unnecessary appeals and thereby unclog the appellate courts' dockets. In fact, subsection (2) of the statute constitutes further evidence of the Legislature's intent to restrict appellate review to preserved and/or fundamental alleged sentencing errors. Section 924.051(2) provides in pertinent part:

> The **right to direct appeal** and the provisions for collateral review created in this chapter may only be implemented in **strict accordance** with the terms and conditions of this section.

(Emphasis added). Therefore, district courts should restrict appellate review to cases where the sentencing error was either properly preserved by raising it before the trial judge and obtaining a ruling, or if unpreserved, the error constitutes fundamental error.

**IV.**

**FLORIDA RULES OF APPELLATE AND CRIMINAL PROCEDURE IMPLEMENTED TO HARMONIZE WITH THE**

**INTENT AND SPIRIT OF THE CRIMINAL APPEAL REFORM ACT OF 1996.**

In view of the Legislature's enactment of the Criminal Appeal Reform Act of 1996, and in recognition of the scarce resources being unnecessarily expended in appeals relating to sentencing errors, this Court amended the Florida Rules of Appellate and Criminal Procedure. *See Amendments to Fla.R.App.P. 9.020(g) and Fla.R.Crim.P. 3.800,* 675 So. 2d 1374 (Fla. 1996); *Amendments to the Fla.R.App.P.*, 685 So. 2d 773 (Fla. 1996); *Amendments to the Fla.R.Crim.P.*, 685 So. 2d 1253 (Fla. 1996).

The purpose of amending the Florida Rules of Appellate and Criminal Procedure was to harmonize court procedures with the intent and spirit of the Criminal Appeal Reform Act of 1996 and, to require that sentencing issues, in particular, first be raised and ruled on in the trial court. *See Amendments*, 685 So.2d at 773, 807.

This Court added a provision to Fla.R.App.P. 9.140 which it entitled "Sentencing Errors." The provision expressly and succinctly states that "[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)."[4] *Amendments*, 685 So. 2d at 801. (Emphasis added).

This Court also amended subdivisions (g) and (g)(3) of Fla.R.App.P. 9.020 to ensure that filing a motion to correct a sentence would postpone rendition of the sentencing order and that an appeal from a judgment of guilt would not waive the defendant's right to file a motion to correct a sentence. *See Amendments*, 675 So. 2d at 1375, 1376.

To further accommodate the intent and spirit of the Criminal Appeals Reform Act of 1996, this Court created Fla.R.App.P. 9.600(d),which provides the trial court with concurrent jurisdiction to review sentencing errors pursuant to Rule 3.800(a) while the appellate court reviews alleged trial claims and other preserved errors on direct appeal. *See Amendments,* 685 So. 2d 773.

It appears that this Court instituted this uncomplicated procedural scheme to alleviate congested appellate dockets with unnecessary appeals involving alleged sentencing errors. For example, a myriad of cases from different districts stand for the proposition that sentencing errors are "...easily preventable and

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[4] Fla.R.Crim.P. 3.800(b) provides that "[a] defendant may file a motion to correct the sentence . . . within thirty days after the rendition of the sentence." This Court added subdivision (b) to authorize the filing of a motion to correct a sentence, "thereby providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied." *See Amendments*, 685 So. 2d at 1271.

correctable at the trial level without recourse to the appellate courts." *See State v. Whitfield*, 487 So. 2d 1045, 1046-1047 (Fla. 1986); *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998)("Had appellant filed a motion to correct sentence, within a very short period of time --far less than the year this appeal has been pending-- the trial court could have corrected his sentence. It is for the benefit of the criminal system as a whole, as well as the individual defendants, that this expeditious remedy of sentencing correction has been made available."); *West v. State*, 718 So. 2d 908 (Fla. 1st DCA 1998)("The scriveners error might easily have been corrected, thereby avoiding expenditure of the time and money associated with this appeal, had defendant simply brought it to the trial court's attention pursuant to Fla.R.Crim.P. 3.800(b)."); *Taramona v. State*, 707 So. 2d 1194 (Fla. 3d DCA 1998)(the defendant's alleged sentencing error on appeal constitutes a "...purely ministerial act, we deem the appellant's presence to be unnecessary.").

**V.**

**THE PROPER PROCEDURE UNDER THE NEW STATUTORY AND PROCEDURAL SCHEME**

The proper procedure regarding alleged sentencing errors under the newly developed and implemented scheme by the Legislature and this Honorable Court, is to preserve the alleged sentencing

error in the trial court by either raising a contemporaneous and specific objection during the sentencing hearing or filing a motion to correct sentence, and, obtaining a ruling, pursuant to either Fla.R.Crim.P. 3.800(a) or (b).

These options provide defendants with easy access to the trial courts. In most cases, by following the proper procedure, a defendant may obtain relief at a fraction of the time required by the burdensome and encumbered appellate process. On the other hand, by continuing to circumvent the recently established statutory and procedural scheme, appellate courts remain clogged for months, if not years, with an avalanche of appeals that raise unpreserved sentencing errors that could have easily and expediently been corrected at the trial court level.

For example, rather than burdening appellate courts, a defendant may file a motion to correct an illegal sentence[5] under Fla.R.Crim.P. 3.800(a) **at any time in the trial court.** A defendant may also bring a sentencing error to the trial court's attention

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[5] It appears with more frequency, since the effective date of the enactment of the Criminal Appeals Reform Act, and the recent amendments to the Florida Rules of Appellate and Criminal Procedure, that defendants now refer to all sentencing issues as fundamental error or illegal sentences in order to raise unpreserved sentencing errors on direct appeal, and, in an attempt to circumvent the clear intent of section 924.051(a), Fla. Stat. (1997) -- which expressly limits appellate courts' jurisdiction to review common trial errors on direct appeal.

either by raising a contemporaneous objection during sentencing or filing a motion under Fla.R.Crim.P. 3.800(b) within thirty (30) days of the rendition of the sentence. Finally, a defendant may also bring a sentencing error to the trial court's attention by filing a Fla.R.Crim.P. 3.850 motion within two (2) years of the rendition of the final judgment of conviction and sentence.

Under each of the scenarios listed above, a defendant is entitled to an appeal of the trial court's adverse ruling on the motion or objection. Thus, any concern regarding the abrogation of a defendant's right to appeal an alleged illegal or erroneous sentence should cease to exist. The Legislature and this Court have provided defendants with ample access to both the trial courts and appellate courts.

Only through the strict uniform enforcement of § 924.051, Fla. Stat. (1997) will this Court alert, and thereby begin to educate the criminal bar to the unequivocal necessity of initially presenting sentencing errors to the trial court for correction. Unless counsel and defendants follow the new available procedural scheme, relief should not be afforded on direct appeal.

The enactment of the Criminal Appeals Reform Act of 1996 and the recent amendments to the Florida Rules of Appellate and Criminal Procedure, indicate that both the Legislature and this

Court view the trial court as the best suited judicial body to investigate and make an initial determination as to whether a sentencing error has occurred and, if so, to correct the error. The efficiency of granting exclusive jurisdiction to the trial court to correct sentencing errors in the first instance becomes apparent each time that an appellate court reviews an unpreserved and nonfundamental sentencing error and then either affirms the trial court's order without prejudice to the defendant to file a motion to correct sentence or remands with instructions on resentencing. By this time, much effort and resources have been spent in the appellate process.

**VI.**

**MOTION TO DISMISS PURSUANT TO SECTION 924.051, FLA. STAT. (1997)**

The State respectfully submits that where it is apparent on the face of the record that the claims raised on direct appeal constitute unpreserved[6] alleged sentencing errors and nonfundamental[7] errors, the court should grant a motion to dismiss

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[6] In the instant case, no factual dispute exists that the Defendant failed to preserve the alleged sentencing errors, by either a contemporaneous objection or a motion in the trial court. See attached Exhibits G & H.

[7] In the instant case, all of the alleged unpreserved errors on direct appeal constitute nonfundamental errors. For example, the first issue raised on direct appeal was that the trial court had

for lack of jurisdiction, rather than delay the determination *via* a direct appeal.

A motion to dismiss, showing that the defendant failed to preserve a nonfundamental alleged sentencing error by either an objection or a motion in the lower tribunal, should be sufficient

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committed error by enhancing kidnaping to a life felony pursuant to § 775.087, Fla. Stat. (1996) without a jury finding that the Defendant used a firearm. (Exhibit C).

In *West v. State*, 718 So. 2d 908 (Fla. 1st DCA 1998), where the defendant had also failed to properly preserve the sentencing/judgment issue for appellate review, the court reviewed a similar claim and held that the fact that the written judgment listed the offense as a first-degree felony rather than a third-degree felony was not prejudicial and did not constitute fundamental error.

The Defendant's second, four-part unpreserved sentencing claim deals with an alleged incorrectly calculated guidelines scoresheet. In *Kolvinsky v. State*, 709 So. 2d 645 (Fla. 2d DCA 1998), the court held that miscalculated scoresheet does not constitute fundamental error and the defendant may raise the claim in a motion to correct sentence pursuant to Rule 3.800(a).

The Defendant also raised an unpreserved error regarding the trial court's assessment of victim points. In *Romano v. State*, 718 So. 2d 283, 284 (Fla. 4th DCA 1998), the court held that an unpreserved victim points' claim does not constitute fundamental error and cannot be raised for the first time on direct appeal. Accord *Foulds v. State*, 716 So. 2d 324 (Fla. 2d DCA 1998).

The Defendant also raised an unpreserved alleged improper habitualization claim based on an erroneous calculation in the scoresheet. In *Callins v. State*, 698 So. 2d 883 (Fla. 4th DCA 1997), where the defendant had abandoned his Rule 3.800(b) motion before obtaining a ruling from the trial court, the Fourth District held that the unpreserved claim of habitualization based on an incorrectly calculated scoresheet had to first be presented to the trial court and the defendant had to obtain a ruling before seeking appellate review. *Accord Williams v. State*, 697 So. 2d 164 (Fla. 1st DCA 1997).

to restrict appellate courts' jurisdiction to review the sentencing error on direct appeal. The dismissal of the direct appeal for lack of jurisdiction, pursuant to § 924.051(3), Fla. Stat. (1997) would clearly be without prejudice to the defendant to seek relief in the trial court.

As a result of the new changes in the law, the Second District held in *Denson v. State*, 711 So. 2d 1225, 1228 (Fla. 2d DCA 1998) that the first sentence of § 924.051(a), Fla. Stat., -- "[a]n appeal **may not** be taken" -- indicates that the Legislature intended to restrict the appellate courts' jurisdiction over sentencing errors not properly preserved in the trial court, unless the error alleged is fundamental.

Similarly in *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), the court reasoned that the new procedural scheme compels a defendant to initially present a sentencing error to the trial court. Only after the trial court has been provided with an opportunity to review and rule on the matter, should a defendant be permitted to appeal the ruling. The Fifth and Second Districts have interpreted the new procedural scheme as an express attempt, by both the Florida Legislature and this Court, to restrict appellate courts' jurisdictional authority over unpreserved

nonfundamental sentencing errors[8]. *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998); *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998).

Some districts, however, consistently continue to circumvent the newly enacted statute and implemented procedures by denying the State's motion to dismiss, and reviewing alleged unpreserved sentencing errors on the merits. Ultimately, however, the appellate court must remand the case to the trial court to make the necessary determinations and/or corrections. This is clearly the waste of resources and inefficiency that the Legislature intended to eradicate when it enacted § 924.051, Fla. Stat. (1997).

Consequently, the State respectfully submits that appellate courts no longer have jurisdiction to entertain unpreserved nonfundamental alleged sentencing errors until the trial court has been provided with an opportunity to review and rule on the matter. Where, as in the present case, neither the defendant's brief, the transcript of the sentencing hearing, the docket sheet, the sentencing order nor judgment indicate that the alleged sentencing errors were preserved and/or constitute fundamental error, the

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[8] It is noteworthy that if the alleged sentencing error constitutes an illegal, the defendant can obtain relief in the trial court, at any time pursuant to a Rule 3.800(a).

appeal should be dismissed for lack of jurisdiction pursuant to a motion by the State.

In view of the importance of the issue presented herein, the frequent recurrence of this and similar questions regarding the jurisdiction of appellate courts in reviewing unpreserved sentencing errors, the continuing problem arising in the Third District and conflict with other Districts, the unnecessary judicial and other State costs expended in litigating this matter, the State respectfully requests that this Court answer the question in the affirmative by holding that pursuant to § 924.051(3), Fla. Stat. (1997), appellate courts no longer have jurisdiction to review unpreserved, nonfundamental sentencing errors, and must dismiss the direct appeal.

## CONCLUSION

WHEREFORE, based upon the foregoing arguments and cited authorities, the State respectfully requests that this Court answer the certified question in the affirmative by holding that pursuant to § 924.051, Fla. Stat. (1997), appellate courts no longer have jurisdiction to review unpreserved, nonfundamental sentencing errors, and must dismiss the direct appeal pursuant to a State's motion.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was mailed this _____ day of January 1999, to Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125.

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