IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,630

**STATE OF FLORIDA**

Petitioner,

-vs-

**JAMES ANTHONY JEFFERSON**,

Respondent.

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# RESPONDENT'S AMENDED BRIEF ON THE MERITS

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

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---

## RESPONDENT'S AMENDED BRIEF ON THE MERITS

## INTRODUCTION

Respondent, James Anthony Jefferson, was the appellant in the district court of appeal and the defendant in the Circuit Court. Petitioner, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" indicates the record on appeal, the symbol "TR" indicates the transcripts of hearings, the symbol "SR" indicates the supplemental record on appeal, and the symbol "A" indicates the appendix attached to this brief.

## STATEMENT OF THE CASE AND FACTS

The State of Florida charged the Respondent, James Jefferson, with three counts of sexual battery with a firearm and one count of kidnapping with a firearm. (R. 5-8). The information alleged that all the offenses occurred on April 13, 1996. All the offenses arose out of a single incident. Mr. Jefferson pled not guilty and proceeded to trial on March 3, 1997.

The jury acquitted the Respondent of armed sexual battery as charged in count one of the information. (R. 43). With respect to counts two and three, the jury acquitted the Respondent of armed sexual battery, but convicted him of the lesser included offense of sexual battery with slight force. (R. 44-45). Although count four alleged kidnapping with a firearm, (R. 8), the verdict form submitted to the jury provided only for a verdict of guilty of simple kidnapping or not guilty. (R. 46). The verdict forms for counts two and three both submitted the question of whether Mr. Jefferson was armed to the jury. (R. 44, 45). The jury acquitted the Respondent of using a weapon on both counts. *Id.*

Nevertheless, the trial court adjudicated the Respondent guilty of armed kidnapping, enhancing kidnapping to a life felony pursuant to section 775.087, Florida Statutes. (R. 48). The trial court also adjudicated the Respondent guilty of two counts of first-degree felony sexual battery, even though sexual battery with slight force is a second degree felony. *Id.* Respondent's attorney did not object to any of these errors.

The trial court sentenced the Respondent on June 13, 1997. The trial judge relied on a scoresheet prepared by the prosecutor. (SR. 8); (R. 52-53). Although the scoresheet contains many errors, some of them obvious (e.g. the prosecutor failed to subtract 28 from the total sentencing points before calculating the recommended sentence), Respondent's attorney did not object. The scoresheet errors added as much as sixteen years to the Respondent's guidelines sentence. *See* Initial Brief of Appellant, p. 7 (Appendix A).

The court sentenced the Respondent to thirty years on each of the sexual battery counts, and thirty years as an habitual offender on the kidnapping count. (SR. 10-11). The written sentence, however, indicates that the Respondent was sentenced as an habitual offender on all three counts. (R. 55).

The court reporter completed the transcript of the sentencing hearing on July 24, 1997. No motion pursuant to Florida Rule of Appellate Procedure 3.800(b) was filed on the Respondent's behalf.

The Respondent filed his initial brief on July 24, 1998. In that brief, the Respondent raised the following errors:

1. The trial court erred in enhancing kidnapping to a life felony pursuant to section 775.087 without a jury finding that the Respondent used a firearm;

2. In preparing the guidelines scoresheet, the state failed to subtract 28 from the total sentence points before calculating the recommended sentence;

3. The guidelines scoresheet reflects points for sexual penetration, while the record only supports a finding of sexual contact;

4. The guidelines scoresheet retroactively applies changes in the scoring of victim injury points in violation of the constitutional prohibition against ex post facto laws;

5. The guidelines scoresheet erroneously includes an habitualized offense as the primary offense;

6. The judgment erroneously classifies sexual battery with slight force as a first degree felony; and

7. The written sentence fails to conform to the oral pronouncement.

*See* Initial Brief of Appellant (A. 1).

On August 11, 1998, the Petitioner filed its Motion to Dismiss for Lack of Jurisdiction. (A. 2). Without discussing any of the specific errors raised in the Respondent's brief, the Petitioner alleged that the Respondent "failed to demonstrate that a properly preserved claim of prejudicial error was raised or ruled on in the trial court." Respondent filed a motion opposing the Petitioner's Motion to Dismiss. (A. 3) In his motion, Respondent pointed out that several of the claims raised in his brief constituted fundamental error, including the enhancement of the kidnapping count based on use of a weapon, the ex post facto application of changes in the sentencing guidelines, *see Swinson v. State*, 588 So. 2d 296 (Fla. 5th DCA 1991), and the errors in the written judgment and sentence, *see Johnson v. State*, 701 So. 2d 382 (Fla. 1st DCA 1997). The

Respondent also pointed out that under *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), the district court could consider other "serious patent" sentencing errors once it had acquired jurisdiction over the case through preserved or fundamental error. Moreover, the Respondent urged the court to consider the failure to object to these errors as ineffective assistance of counsel apparent on the face of the record, citing *Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998).

The district court of appeal denied the Petitioner's Motion to Dismiss. *See Jefferson v. State*, 23 Fla. L. Weekly D2305 (Fla. 3d DCA 1998) (A. 4). Assuming in the Petitioner's favor that the appeal presented only unpreserved, nonfundmental sentencing errors, the court held:

> [C]hapter 924 does not limit our jurisdiction to hear the defendant's appeal. Whether 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.

On motion for rehearing or certification, the court certified that it had passed upon the following question 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?

(A. 5).

The district court subsequently denied the Petitioner's motion for a stay, and ordered the Petitioner to file its brief. (A. 6). The Petitioner filed its brief on February 8, 1999, (A. 7), and the district court set the case for oral argument on March 2, 1999, (A. 8).

## SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative. The legislature did not intend the Criminal Appeals Reform Act to create a jurisdictional bar which must be addressed on a motion to dismiss. In fact, the legislative history of the Act shows that the legislature considered and rejected just such a jurisdictional bar and two-step process. The Criminal Appeals Reform Act, as introduced, contained the following language:

> (4) When no prejudicial error is alleged and properly preserved, the state may not appeal and the defendant may only seek relief by collateral review.
>
> (5) Jurisdiction of an appellate court over an appeal is substantive and must be satisfactorily demonstrated by the appellant before the court can consider the merits of the appeal. When appellate jurisdiction is challenged, all other appellate proceedings in the case are stayed until the challenge is resolved.

HB 211, § 4 (1996); SB 2, § 4 (1996). **The legislature struck this language before it enacted the bill.** The staff analyses to the bills demonstrate that the legislature rejected the idea of a jurisdictional bar and a two-step procedure after the judiciary voiced concerns that such a procedure could actually increase appellate workloads.

The First, Third, and Fourth District Courts of Appeal have all correctly interpreted section 924.051 as a codification of the court-created contemporaneous objection rule. *See Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA), *review denied* 697 So. 2d 512 (Fla. 1997); *Jefferson v. State*, 23 Fla. L. Weekly D2305 (Fla. 3d DCA

1998); *Thompson v. State*, 708 So. 2d 289 (Fla. 4th DCA) *review gtd.* 718 So. 2d 171, *dismissed* 721 So. 2d 287 (Fla. 1998). Consideration of the legislative history and staff analyses reinforces this conclusion.

Though the Second District in *Bain v. State*, No. 97-02007, 1999 WL 34708 (Fla. 2d DCA January 29,1999) (en banc), concludes that section 924.051 creates a jurisdictional bar, it correctly points out that the Florida Constitution does not grant the legislature the power to alter the jurisdiction of the district courts of appeal over direct appeals from final orders. Indeed, the legislative history of the Act suggests that the legislature may have been aware of this and dropped the jurisdictional language cited above because of it. If this Court finds that the legislature intended to change the jurisdiction of the district courts of appeal when it enacted section 924.051, the Respondent submits that section is unconstitutional.

Florida Rule of Appellate Procedure 9.140(d) does not create a jurisdictional bar to the consideration of unpreserved sentencing error, since the Constitution does not empower the court to alter the jurisdiction of the district courts except as to interlocutory appeals.

Even if the Court answers the certified question in the affirmative and finds that the Criminal Appeals Reform Act creates a jurisdictional bar to unpreserved, nonfundamental sentencing error, the district court nevertheless has jurisdiction over the

Respondent's appeal. The Respondent has identified fundamental errors in the judgment of conviction, as distinct from his sentence. The Respondent has also identified fundamental errors in his sentence.

## ARGUMENT

### I. THE TWO-STEP SYSTEM PROPOSED BY THE ATTORNEY GENERAL

Before analyzing The Criminal Appeals Reform Act of 1996 with regard to the certified question, it is important to understand the benefit the Petitioner pursues. The Petitioner seeks to establish that section 924.051 creates (1) a jurisdictional bar to the consideration of unpreserved, non-fundamental sentencing error by the District Courts of Appeal; and (2) a two-step appellate process in criminal cases. *See, e.g.,* Amended Initial Brief of Petitioner on the Merits, pp. 6, 24-28, 29. The Petitioner argues, for instance:

> 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.

*Id.* at 25. Thus, the Petitioner alleges that the legislature intended to create an appellate process wherein the Appellee (typically the Attorney General) could avoid filing a brief on the merits, interposing instead a motion to dismiss for lack of jurisdiction where it believes the error on appeal is neither preserved nor fundamental. *See Id.*; Appellee's Motion to Dismiss for Lack of Jurisdiction (A. 2) (alleging that the Petitioner "has failed to demonstrate that a properly preserved claim of prejudicial error was raised or ruled on in the trial court."). The certified question embraces within its scope this two-step

process. (A. 5).

The Respondent submits that the Petitioner ultimately seeks a second benefit from this two-step procedure, though it does not discuss it in the case at bar. The Petitioner's claim that the legislature intended the Criminal Appeals Reform Act to create a jurisdictional bar and a two-step appellate process depends primarily on the following language:

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

§ 924.051(3), Fla. Stat. (1997). If this Court holds that the first sentence of section 924.051(3) was intended to create a jurisdictional bar and a two-step process, the Court's holding will necessarily apply to the requirement of "prejudicial error" just as forcefully as it applies to the requirement that the error be preserved or fundamental. *Compare Weiss v. State*, 720 So. 2d 1113, 1115 (Fla. 3d DCA 1998).

As a result, in future appeals the Attorney General would be able to file a motion to dismiss alleging that the error on appeal was not prejudicial. District Courts of Appeal would be forced to consider, without benefit of full briefing, the questions of preservation, fundamental error, *and* harmless error. If a court tentatively concluded that

the error alleged was preserved or fundamental and not harmless, then the appeal would proceed, and the appellate court could revisit the error after briefing by the state.

## II. THE LEGISLATIVE HISTORY OF THE CRIMINAL APPEALS REFORM ACT

The plain language of the Criminal Appeals Reform Act does not clearly reflect a legislative intention to interfere with the courts' jurisdiction to hear appeals, nor does it plainly evince a desire to create the two-step procedure urged by the Petitioner. *See Thompson v. State*, 708 So. 2d 289 (Fla. 4th DCA) ("[O]ur review of Chapter 924, the amended Rules, and the Final Staff Analysis does not reveal to us any clear legislative intent to restrict appellate jurisdiction.") *review gtd.* 718 So. 2d 171, *dismissed* 721 So. 2d 287 (Fla. 1998); *Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA), *review denied* 697 So. 2d 512 (Fla. 1997). In construing an ambiguous statutory provision, it is appropriate to consider legislative intent. *See, e.g., Broward v. Jacksonville Medical Center*, 690 So. 2d 589 (Fla. 1997). "When construing a statutory provision, legislative intent is the polestar that guides [the Court's] inquiry." *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). "To determine legislative intent, [the Court] must consider the act as a whole, the evil to be corrected, the language of the act, including its title, the history of its enactment and the state of the law already in existence bearing on the subject." *State*

*v. Webb*, 398 So. 2d 820 (Fla. 1981). The legislative history and the overall purpose of the Criminal Appeals Reform Act make it abundantly clear that, far from intending the cumbersome process the Petitioner now urges upon the Court, the legislature considered and rejected it.

### A. The History Of Amendments To The Criminal Appeals Reform Act Shows That The Legislature Did Not Intend To Create A Jurisdictional Bar And A Two-Step Procedure.

It should surprise no one to learn that the Petitioner wants a jurisdictional bar to unpreserved error and a two-step appellate procedure to litigate that bar. The Attorney General has repeatedly asked the Florida Legislature for just that. In 1994 and 1995, the Attorney General supported bills which required the motion-to-dismiss procedure that the Petitioner seeks here. *See* HB 2155 (1994); SB 2078 (1995). Neither of these bills was enacted.

The Petitioner again sought a jurisdictional bar and two-step procedure in 1996. The Office of the Attorney General supported SB 2 and HB 211. Both bills proposed to create section 921.051, Florida Statutes. As introduced, both bills contained the following language:

> (4) When no prejudicial error is alleged and properly preserved, the state may not appeal and the defendant may only seek relief by collateral review.

> (5) Jurisdiction of an appellate court over an appeal is substantive and must be satisfactorily demonstrated by the appellant before the court can consider the merits of the appeal. When appellate jurisdiction is challenged, all other appellate proceedings in the case are stayed until the challenge is resolved.

HB 211, § 4 (1996); SB 2, § 4 (1996). Had this language been enacted, it would have given the Petitioner everything it now asks this Court to grant. These sections are clearly intended to operate on the jurisdiction of the appellate court, and they specifically create the two-step procedure the Petitioner wants.

These provisions did not last long, however. The committee substitute for HB 211 amended the proposed 924.051(4) and (5) as follows:

> (4) ~~When no prejudicial error is alleged and properly preserved, the state may not appeal and the defendant may only seek relief by collateral review.~~ An appeal may not be taken from a judgment or sentence entered after a defendant pleads guilty and the trial court imposes a legal sentence. An appeal may not be taken from a judgment or sentence entered after a defendant pleads nolo contendere and the trial court imposes a legal sentence, without expressly reserving the right to appeal a legally dispositive issue.
>
> (5) ~~Jurisdiction of an appellate court over an appeal is substantive and must be satisfactorily demonstrated by the appellant before the court can consider the merits of the appeal. When appellate jurisdiction is challenged, all other appellate proceedings in the case are stayed until the challenge is resolved.~~ A party who appeals from a judgment or sentence entered after a defendant pleads guilty or nolo contendere must satisfactorily demonstrate to the appellate court, on or before filing the initial brief or original petition, that the party has a right to appeal under s. 924.06 or s. 924.07 and that the appellate court may consider the appeal under this section.

HB 211c, § 4 (1996).[1] The committee substitute for SB 2 makes nearly identical changes. *See* SB 2c, § 4 (1996).[2] The effect of the committee substitutes is to eliminate the Petitioner's proposed jurisdictional bar and two-step procedure for appeals from convictions and sentences entered after trial. The committee substitutes scale back the two-step procedure, limiting it to appeals from guilty pleas.

Things grew still worse for the Petitioner when section 924.051 reached the floor. The first engrossed version of HB 211 further amended section 924.051(4), and it eliminated entirely the erstwhile two-step procedure even as it related to guilty pleas:

> (4) ~~An appeal may not be taken from a judgment or sentence entered after a defendant pleads guilty and the trial court imposes a legal sentence. An appeal may not be taken from a judgment or sentence entered after a defendant pleads nolo contendere and the trial court imposes a legal sentence,~~ If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue~~.~~, or if a defendant pleads guilty, the defendant may not appeal the judgment or sentence.
>
> (5) ~~A party who appeals from a judgment or sentence entered after a defendant pleads guilty or nolo contendere must satisfactorily demonstrate to the appellate court, on or before filing the initial brief or original petition,~~

[1] Additions are indicated by underlining. ~~Deletions~~ are ~~stricken-out~~.

[2] The Senate Committee Substitute adds the words "and the trial court imposes a legal sentence," at the end of the proposed 924.051(3).

~~that the party has a right to appeal under s. 924.06 or s. 924.07 and that the appellate court may consider the appeal under this section.~~

*See* HB 211e, § 4 (1996).[3] The second engrossed version revised subsection 4 to permit defendants to reserve grounds for appeal on guilty pleas as well as pleas of nolo contendere. *See* HB 211e2, § 4 (1996).[4] The two-step process embodied in subsection (5) was never revived, and HB 211 was enacted as Ch. 96-248, Laws of Fla., without further change to section 924.051.

### B. The Staff Analyses Further Demonstrate That The Legislature Did Not Intend To

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[3] This amendment did not replace subsection 5. It simply renumbered as 5 what had been subsection 6 in the prior version. That subsection ultimately became section 924.051(5) as it was enacted. It reads, "Collateral relief is not available on grounds that were or could have been raised at trial and, if properly preserved, on direct appeal of the conviction and sentence."

[4] "If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty <u>without expressly reserving the right to appeal a legally dispositive issue</u>, the defendant may not appeal the judgment or sentence."

**Create A Jurisdictional Bar And A Two-Step Procedure.**

The history of amendments discussed above demonstrates that the legislature intended to do away with the jurisdictional bar and two-step procedure. But the Court need not rely on the obvious intent of the amendments alone. Although not determinative of the legislature's final intent, staff analyses are "one touchstone of the collective legislative will." *White v. State*, 714 So. 2d 440, 443 n. 5 (Fla. 1998), *quoting Sun Bank/South Florida N.A. v. Baker*, 632 So. 2d 669, 671 (Fla. 4th DCA 1994); *accord Pinder v. State*, 678 So. 2d 410 (Fla. 4th DCA 1996). The staff analyses for the House and Senate bills show that the legislature intended to do away with the two-step process at issue in this appeal.

The Staff Analysis of the Senate bill as it was introduced shows a clear appreciation for the impact of the bill's original language. *See* Senate Staff Analysis and Economic Impact Statement, SB 2, September 27, 1995.[5] (A. 9). The staff describes the relevant part of the bill as follows:

> Jurisdiction is a dispositive issue. Absence of jurisdiction precludes the court's authority to hear the case. The bill creates s. 924.051(5), F.S., to

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[5] Hereafter, staff analyses will simply be identified as "Staff Analysis," together with the bill-version analyzed and the date of the report.

> require that the jurisdictional issue be addressed as a threshold question in the case. If the court's jurisdiction is challenged, the proceedings would be stayed until the question is resolved, thereby, preventing needless expense, wasted time, and irreparable harm to the parties if a lack of jurisdiction is determined.

Staff Analysis, SB 2, September 27, 1995, p. 6. Under the heading "Economic Impact and Fiscal Note," the Staff Analysis goes on to point out the fears of the courts and the Public Defenders Association that this provision would be counterproductive. For instance:

> Government Sector Impact
>
> 1. Judicial Branch Impact
>
> The Office of the State Courts Administrator, while recognizing that the intent to the bill is to reduce appellate workloads, observes that the effect of the bill may be to increase workloads in certain respects. The office anticipates the following judicial impact:
>
> By creating essentially a "two-step" procedure where jurisdiction must be established before a decision is made on the merits, appellate involvement will be increased. The bill appears to require the appellate court to study the case twice. The first instance would occur at a time when the trial court record might not even be available. If it were determined that the defendant raised even an arguable point, the court would then have to let the appeal proceed and would later have to consider the case again in order to decide it on the merits.

*Id.* at 9. (The Staff Analysis also reported the Petitioner's claims that the bill would reduce the burden on the courts, public defenders, and the Office of the Attorney General. *Id.* at 10.)

The Senate and House plainly got the message. The committee substitutes in both chambers eliminated the two-step procedure as it applied to criminal appeals generally. Instead, the revised bills limited two-step appeals to guilty and nolo contendere pleas. *See* HB 211c, § 4 (1996); SB 2c, § 4 (1996). The staff analyses of these committee substitutes reflect an unmistakable intent to eliminate the two-step procedure. Appended to the Staff Analysis of the committee substitute for SB 2 is a document entitled "Statement of Substantial Changes Contained In Committee Substitute for Senate Bill 2." This statement informs legislators,

> The CS makes the following changes to the original bill by …
>
> 5. Deleting a requirement that the appellant demonstrate appellate jurisdiction before the appellate court may consider the appeal

Staff Analysis, SB 2c, November 16, 1995. (A. 10). Similarly, the Staff Analysis of the committee substitute for HB 211 notes:

> The CS differs from HB 211 as follows …
>
> HB 211 set forth a 2-step process by which an appellate court's jurisdiction over an appeal would have to be satisfactorily demonstrated by the appellant before the Court could consider the merits of the appeal. CS/HB 211 retains this 2-step process, but only for those cases in which the defendant has pled guilty or nolo contendere.

Staff Analysis, HB 211c, March 21, 1996, p. 12; (A. 11). The Staff Analysis reported that the State Courts Administrator was concerned by the creation of even this more limited

two-step process. *Id.* at 9. The House did away with the two-step procedure altogether in the next version of the bill. *See* H.B. 211e, § 4 (1996).

### C. Considered As A Whole, The Legislative History Of The Criminal Appeals Reform Act Demonstrates That The Legislature Did Not Intend To Create A Jurisdictional Two-Step Procedure.

As stated above, "To determine legislative intent, [the Court] must consider the act as a whole, the evil to be corrected, the language of the act, including its title, the history of its enactment and the state of the law already in existence bearing on the subject." *State v. Webb*, 398 So. 2d 820 (Fla. 1981). The "evil" which the legislature intended to correct when it enacted section 924.051, is that of increased appeals court caseloads. *See, e.g., Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998); *Denson v. State*, 711 So. 2d 1225, 1228 (Fla. 2d DCA 1998). The history of amendments to the Criminal Appeals Reform Act and the related staff analyses demonstrate that the legislature considered a jurisdictional bar and two-step procedure as one possible cure for this evil. But the same aids to statutory construction reveal that the legislature ultimately rejected this solution, at least in part because it took seriously the judiciary's concerns about the creation of a two-step procedure. The legislature enacted section 924.051 to unburden the courts, and it discarded provisions that would have been inimical to that

purpose.

## III. THE CRIMINAL APPEALS REFORM ACT IN THE FLORIDA COURTS

Spurned by the legislature, the Petitioner has turned to the courts in its quest for a jurisdictional bar and a two-step procedure. The Petitioner has met with mixed results in the District Courts of Appeal. *See Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA) (no jurisdictional bar), *review denied* 697 So. 2d 512 (Fla. 1997); *Bain v. State*, No. 97-02007, 1999 WL 34708 (Fla. 2d DCA January 29,1999) (en banc)[6] (finding jurisdictional bar, but questioning constitutionality of that restriction and finding jurisdiction over unpreserved, nonfundamental sentencing errors may be acquired where there is any preserved issue); *Jefferson v. State*, 23 Fla. L. Weekly D2305 (Fla. 3d DCA 1998) (the opinion now on review) (no jurisdictional bar); *Thompson v. State*, 708 So. 2d 289 (Fla. 4th DCA) (no jurisdictional bar), *review gtd.* 718 So. 2d 171, *dismissed* 721 So. 2d 287(Fla. 1998). The Fifth District Court of Appeal has not squarely considered the issue. *Compare Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA) (en banc), *review gtd.* 708 So. 2d 617 (Fla. 1998). Litigation in that district has focused instead on the district court's

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[6]The Second District Court of Appeal did not issue its opinion in *Bain* until after the Amended Initial Brief of Petitioner on the Merits was filed.

holding that the Criminal Appeals Reform Act and amended Rules of Appellate Procedure have eliminated the doctrine of fundamental error in the sentencing context. *Id.*

### A. Opinions Rejecting a Jurisdictional Bar

The First, Third, and Fourth Districts have all rejected the Petitioner's claim that the Criminal Appeals Reform Act was intended to interfere with the jurisdiction of the appellate courts. The core reasoning supporting all three decisions is reflected in *Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA 1997), *review denied* 697 So. 2d 51, as quoted by the Third District Court of Appeal in the opinion now under review:

> "Jurisdiction over the subject matter refers to a court's power to hear and determine a controversy.... Generally, it is tested by the good faith allegations, initially pled, and is not dependent upon the ultimate disposition of the lawsuit." *Calhoun v. New Hampshire Ins. Co.*, 354 So.2d 882, 883 (Fla. 1978) (citations omitted). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." *Lusker v. Guardianship of Lusker*, 434 So.2d 951, 953 (Fla. 2d DCA 1983). The rule that error must, except when it is "fundamental," be presented to, and ruled on by, the lower tribunal before it will be treated as preserved for purposes of appellate review is precisely that--a rule, created by the courts to promote fairness and judicial economy. See, e.g., *Castor v. State*, 365 So.2d 701 (Fla. 1978) (rule that claimed error must be presented to and ruled upon by lower tribunal to be preserved for appeal based on considerations of basic fairness and judicial economy). We do not perceive chapter 924, as recently amended, as intended to limit appellate subject matter jurisdiction in direct criminal appeals. Rather, it seems to us that the

> recent amendments were intended merely to make clear that, except with regard to "fundamental" error, all claimed error must first be presented to and ruled upon by the trial court. If it is not, the issue will not be deemed preserved for appellate review. To accept the state's argument to the contrary would result in the conclusion that the recent amendments to chapter 924 were intended to interfere with what the supreme court has concluded is a defendant's constitutional right to appeal.

*Jefferson v. State*, 23 Fla. L. Weekly D2305 (Fla. 3d DCA 1998) (A. 4), *quoting Stone v. State*, 688 So. 2d 1007-08. Neither the First District nor the Third could discern a clear legislative intent to restrict appellate jurisdiction from the facial language of the Criminal Appeals Reform Act. With the benefit of a detailed understanding of the legislative history of the Act, *see* Argument II, *supra*, we can see the wisdom of the courts' approach. There was no legislative intent to restrict jurisdiction. In the context of the Act, section 924.051(3) is best understood as a codification and reinforcement of the traditional preservation requirements. *See Stone*, 688 So. 2d at 1007.

The Fourth District reasoned similarly in *Thompson v. State*, 708 So. 2d 289 (Fla. 4th DCA) *review gtd.* 718 So. 2d 171, *dismissed* 721 So. 2d 287 (Fla. 1998), concluding "[O]ur review of Chapter 924, the amended Rules, and the Final Staff Analysis does not reveal to us any clear legislative intent to restrict appellate jurisdiction." 708 So. 2d at 292. The Fourth District, like the First and the Third, concluded that the Criminal Appeals Reform Act codified the traditional, non-jurisdictional preservation requirement. *See* 708 So. 2d 291. The court supported this conclusion by analyzing the Final Bill

Analysis and Economic Impact Statement to HB 211: "The Analysis goes on to describe the purposes behind the traditional contemporaneous objection rule and suggests that the statutory amendments are merely intended to codify the traditional rule." *Id.* The court went on to quote the Staff Analysis:

> *In an effort to enforce the contemporaneous objection rule*, the bill expressly prohibits a court from reversing a judgment or sentence on appeal, unless the court determines that a prejudicial error occurred that was properly preserved in the trial court, but allows courts to reverse on the basis of "fundamental errors," despite the failure of defense counsel to object in the trial court.

*Id. quoting* Final Staff Analysis, p. 5 (emphasis added by the Fourth District).

### B. The Second District's Opinion In *Bain v. State* And the Constitutionality Of A Jurisdictional Bar

The Second District Court of Appeal is the only court to accept the Petitioner's jurisdictional argument. In *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), the court concluded without discussion that section 921.051(3) does deny appellate courts jurisdiction over unpreserved, non-fundamental sentencing error. *See* 711 So. 2d at 1228. The court concluded, however, that it nevertheless had the power to address "serious, patent" sentencing errors, so long as it had legitimately acquired jurisdiction over the appeal through some preserved or fundamental error. *See* 711 So. 2d 1229-30.

In *Bain v. State* the Second District, sitting en banc, reluctantly reaffirmed the

*Denson* panel's conclusion that the Criminal Appeals Reform Act creates a jurisdictional bar. *Bain v. State*, No. 97-02007, 1999 WL 34708 (Fla. 2d DCA January 29,1999) (en banc). The court felt bound to this result by this Court's conclusion that the legislature could reasonably condition a defendant's constitutional right to appeal. Nevertheless, the *Bain* court questioned the constitutionality of legislative interference with the jurisdiction of the District Courts of Appeal, and certified the question to this Court. *Id.* As in *Denson*, the court held that it had jurisdiction over serious, patent sentencing errors.

The Second District's conclusion that the section 921.051 erects a jurisdictional bar cannot stand in light of the full legislative history of that section. The court may well have reached a different conclusion had it known that the legislature considered and removed language which would have clearly demonstrated an intention to limit appellate jurisdiction. *See* Argument II, *supra*.

Moreover, the constitutional analysis in *Bain* clearly demonstrates that the legislature was without power to alter the appellate jurisdiction of the district courts. As the court pointed out, the Florida Constitution is remarkably clear in describing the jurisdictions of the courts. Article V, section 6 grants the legislature the power to set the jurisdiction of the county courts. *See* Art. V. § 6(b), Fla. Const. Section 5 permits the legislature to determine the appellate jurisdiction of the circuit courts. *See* Art. V, § 5(b), Fla. Const. In contrast, Article V, section 4 provides the legislature with only a limited

authority over the jurisdiction of the district courts of appeal. *See* Art. V, § 4(b). Section 4(b)(2) permits the legislature to determine the district courts' jurisdiction to hear appeals in administrative matters, and the second sentence of section 4(b)(1) permits this Court to prescribe by rule the jurisdiction of the district courts over interlocutory appeals. *Id.* But the Constitution does not delegate the authority to determine the district courts' jurisdiction over appeals from final orders to anyone:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of the trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court.

This unrestricted grant of jurisdiction, surrounded as it is by provisions expressly permitting the legislature or this Court to determine jurisdictions in other areas, makes it very difficult to conclude that the Constitution empowers the legislature to alter the jurisdiction of the district court over direct appeals as of right. *See Bain*, 1999 WL 34708; *compare Health Care Associates, Inc., v. Brevard Physicians Group, P.A.*, 701 So. 2d 118 (Fla. 5th DCA 1997) (statute purporting to provide for interlocutory appeal invalid where Constitution vests supreme court with power to determine jurisdiction of district courts of appeal to review interlocutory orders); *see also R.J.B. v. State*, 408 So. 2d 1048 (Fla. 1982).

It is reasonable to presume that the legislature was aware of these constitutional

provisions. Indeed, the legislative history of the Act shows that this was so. The staff analysis of the committee substitute to HB 211 notes:

> Appellate jurisdiction is the power of a court to review and correct material error of the proceedings in a lower court. The appellate jurisdiction of courts in Florida is defined by the Constitution and the Florida Rules of Appellate Procedure. Pursuant to Article V of the Florida Constitution, the Florida Supreme Court has mandatory jurisdiction to hear appeals from final judgments of trial courts imposing the death penalty and decisions of district courts of appeal that declare as invalid a state or federal statute or a provision of the State Constitution. In addition, the Florida Supreme Court has discretionary jurisdiction to hear decisions of district courts of appeal that construe a provision of the state or federal Constitution or that expressly and directly conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law. Article V, Section 3(b), Fla. Const.; See also Fla. R. App. P. 9.030 (a).
>
> The district courts of appeal have jurisdiction of appeals from final judgments in all other cases in which the circuit court has original jurisdiction and from all other final judgments except those that may be appealed directly to the Supreme Court or a circuit court. Article V, Section 4, Fla. Const.; Fla. R. App. P. 9.030(b). The circuit courts have jurisdiction of appeals from final judgments in misdemeanor cases tried by the county courts. See Article V, Section 5, Fla. Const.; Fla. R. App. P. 9.030(c); and s. 924.08, F.S.

Staff Analysis, HB 211c, March 21, 1996, p. 2.; (A. 11).

Thus the Staff Analysis gives no suggestion that the legislature could constitutionally alter the district courts' jurisdiction over direct appeals from final orders of the circuit court. Jurisdiction, according to the Staff Analysis, is "defined by the Constitution and the Florida Rules of Appellate Procedure." The analysts immediately

contrast appellate jurisdiction with a defendant's right to appeal: "The right of defendants to appeal lies solely within the prerogative of the Legislature. Ross v. Moffit, 417 U.S. 600, 611 (1974); State v. Creighton, 469 So. 2d 735, 741 (Fla. 1985)." *Id.*

The most reasonable conclusion is that the legislature did not attempt to alter the appellate jurisdiction of the circuit courts. It knew it could not. Instead the legislature sought to selectively do away with a defendant's right to appeal, which it reasonably – though erroneously[7] – believed to be the creature of statute. In light of the legislative history of section 924.051, it strains logic to suggest otherwise.

If, in spite of the foregoing, this Court determines that the legislature intended the Criminal Appeals Reform Act to create a jurisdictional bar, the Act is unconstitutional. For the reasons discussed above, and for the reasons set forth by the Second District, the legislature is without power to alter the jurisdiction of the district courts. Any attempt to do so violates article V, section 4, article II, section 3 (separation of powers), and article I, section 21 (access to courts) of the Florida Constitution. *See Bain*, 1999 WL 34708.

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[7] *See Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996) (Florida Constitution guarantees right to direct appeal), *receding from State v. Creighton*, 469 So. 2d 735 (Fla. 1985).

### C. The Fifth District's Opinion In *Maddox v. State* Does Not Support The Petitioner's Position

According to the Petitioner, the only court "which has properly construed the language of the statute in its plain and ordinary sense," is the Fifth District Court of Appeal. *See* Amended Initial Brief of Petitioner on the Merits, p.17, *citing Maddox*, 708 So. 2d 617. This is ironic given that the Fifth District is the only district which has not addressed the question of a jurisdictional bar. Far from adopting the two-step process advocated by Petitioner, the Fifth District continues to take jurisdiction of appeals, affirming rather than dismissing where it finds that the *Maddox* rule prevents them from correcting a sentencing error. *See, e.g., Kenon v. State*, No. 97-3558, 1999 WL34597 (Fla. 5th DCA January 19, 1999); *Harris v. State*, No. 98-867, 1999 WL 34688 (Fla. 5th DCA January29, 1999); *Parks v. State*, 719 So. 2d 1212 (Fla. 5th DCA 1998). The Fifth District appears to treat the Criminal Appeals Reform Act as a codification of the preservation requirement. For instance, in *Harris v. State*, the court wrote, "[The defendant's] failure to object or move to correct his sentence renders the issue unpreserved for appellate review," and affirmed. *See Maddox v. State*, 708 So.2d 617, 621 (Fla. 5th DCA 1998), *pet. for review granted*, 718 So.2d 169 (Fla. 1998).

## IV. FLORIDA RULE OF APPELLATE PROCEDURE

**9.140(D) DOES NOT CREATE A JURISDICTIONAL BAR**

Rule 9.140(d) of the Florida Rules of Appellate Procedure, requiring that sentencing errors be raised in the trial court, does not create a jurisdictional bar to review of unpreserved, nonfundamental sentencing error. This Court has power to adopt rules governing the practice and procedure in all courts. *See* Art. V, § 2(a), Fla. Const. However, as discussed above, the Florida Constitution gives the Court only limited control over the jurisdiction of the district courts of appeal. Just as the legislature can control the district courts' appellate jurisdiction only in administrative matters, *see* Art. V, § 4(b)(2), this Court may only prescribe the district court's jurisdiction over interlocutory appeals, *see* Art. V, § 4(b)(1).

The situation is comparable to that presented in *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994). In *Blore*, this Court concluded that the Florida Rules of Appellate Procedure do not govern the jurisdiction of the circuit court over interlocutory appeals because the constitution does not give the Court that authority. Comparing sections 4 and 5 of Article V, the Court wrote:

> It is important to note that, while this Court is given exclusive rulemaking authority over interlocutory appeals to the *district courts of appeal*, the Constitution does not provide this Court with such authority for appeals from the county court to the *circuit court*. The authority for appeals to the circuit court is established solely by general law as enacted by the legislature.

*Blore*, 636 So. 2d at 1331 (emphasis in the original). Here, as in *Blore*, the constitution does not give the Court the authority to prescribe jurisdiction.

## IV. THE PROCEDURE PROPOSED BY THE PETITIONER MAY FORECLOSE ALL RELIEF IN CASES WHERE SERIOUS SENTENCING ERRORS ARE UNPRESERVED.

The Petitioner argues that the enforcement of a procedural bar to sentencing errors through the granting of motions to dismiss will be without costs to the substantial rights of prisoners serving patently erroneous sentences. *See* Amended Initial Brief of Petitioner on the Merits, pp. 22-23. Even where error is not preserved for appellate review by a motion pursuant to Florida Rule of Criminal Procedure 3.800(b), Petitioner says, serious errors may still be corrected by motions pursuant to Rules 3.800(a) and 3.850.

> 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.

Amended Initial Brief of Petitioner on the Merits, pp. 22-23.

The Respondent can only hope that the Attorney General will be bound by this statement. If the Petitioner and the courts enforce section 924.051(5), however, defendants whose lawyers fail to preserve sentencing error via Rule 3.800(b) motion may

be barred from court forever. That section provides:

> (5) Collateral relief is not available on grounds that were or could have been raised at trial and, if properly preserved, on direct appeal of the conviction and sentence.

§ 924.051(5), Fla. Stat. (1997). The Second District Court of Appeal has held that Florida Rule of Criminal Procedure 3.800(a) cannot be used to correct sentencing error that could have been addressed on direct appeal but for the failure to file a motion pursuant to Rule 3.800(b). *See Chojnowski v. State*, 705 So. 2d 915 (Fla. 2d DCA 1997), *receded from on other grounds*, *Bain v. State*, No. 97-02007, 1999 WL 34708 (Fla. 2d DCA January 29,1999) (en banc). In light of section 924.051(5), the Petitioner's assurance that no one will be harmed by the strict enforcement of a jurisdictional bar by means of a motion to dismiss rings hollow.

## V. THE CERTIFIED QUESTION AS IT APPLIES TO THIS CASE

Even if the Court determines that the Criminal Appeals Reform Act created a jurisdictional bar to the consideration of unpreserved, nonfundamental sentencing errors, it must nevertheless conclude that the district court has jurisdiction over the Respondent's appeal. Two of the errors raised by the Respondent – the enhancement of the kidnapping conviction pursuant to section 775.087 in the absence of a jury finding the Respondent carried a weapon and the enhancement of the sexual battery convictions to first degree

felonies – are not even sentencing errors, and are therefore outside the scope of the certified question. The Petitioner's novel attempt to characterize these errors as "sentencing/judgment" issues, *see* Amended Initial Brief of Petitioner on the Merits, p. 24 n. 7, is baseless. Each of these claims is in the nature of an appeal from the judgment of conviction, not from the sentence. Moreover, these errors are fundamental. The trial court effectively overruled the jurors' decision to acquit the Respondent of using a weapon. The failure of the written judgment and sentence to conform to oral pronouncements is fundamental error. *see Johnson v. State*, 701 So. 2d 382 (Fla. 1st DCA 1997) (failure of written judgment and sentence to conform to oral pronouncement fundamental).

The Respondent has also raised fundamental sentencing errors. *See Swinson v. State*, 588 So. 2d 296 (Fla. 5th DCA 1991) (ex post facto violation in sentencing fundamental); *Carnegie v. State*, 564 So. 2d 233 (Fla. 1st DCA 1990) (same); *see also Johnson*, 701 So. 2d 382. The remaining errors raised in the Respondent's brief may not rise to the level of fundamental error. But once the district court has acquired jurisdiction over this appeal through the fundamental errors in the judgment and sentence, it may then consider these as "serious, patent" errors apparent on the record, pursuant to the reasoning of *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), and *Bain v. State*, No. 97-02007, 1999 WL 34708 (Fla. 2d DCA January 29,1999). Alternatively, the district court

may treat the errors as ineffective assistance of counsel apparent on the face of the record pursuant to *Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998).

## CONCLUSION

Based upon the foregoing, the defendant requests that this Court answer the certified question in the negative and conclude that the failure to preserve for appeal an alleged sentencing error that is not fundamental is not a jurisdictional bar to review that should result in dismissal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Appellate Division, 110 S.E. 6th Street, 9th Floor, Fort Lauderdale, Florida 33301, this 23rd day of February, 1999.

______________________________
Andrew Stanton
Assistant Public Defender

## CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

________________________________
Andrew Stanton
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