IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,630

THE STATE OF FLORIDA,

Petitioner,

-vs-

JAMES ANTHONY JEFFERSON,

Respondent.

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

REPLY BRIEF OF PETITIONER

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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.

STATEMENT OF THE CASE AND FACTS

The State relies upon the Statement of Case and Facts contained in its initial brief, except to add that after the State's initial brief on the merits to this Honorable Court, the parties fully briefed and presented oral argument regarding the substantive issues in the case *sub judice* in the Third District Court of Appeal.

QUESTION PRESENTED

WHETHER AN APPEAL SHOULD BE SUMMARILY DISMISSED WHERE, AFTER THE OPPOSING PARTY BY MOTION OR THE APPELLATE COURT SUA SPONTE DEMANDS APPELLANT TO SHOW THAT A COGNIZABLE ISSUE EXISTS WHICH REQUIRES THE ATTENTION OF THE OPPOSING PARTY AND COURT, THE APPELLANT FAILS TO IDENTIFY A PRESERVED OR OTHERWISE COGNIZABLE ISSUE IN THE INITIAL BRIEF?

SUMMARY OF ARGUMENT

The enactment of the Criminal Appeal Reform Act of 1996 and the recent amendments to the Florida Rules of Appellate and Criminal Procedure by this Court show 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 rather than require a full scale briefing and conduct a full appellate review.

When an appellant fails to identify a preserved or otherwise cognizable issue in an initial brief, it is appropriate for the appellate court itself, and the opposing party by motion, to demand a showing that there is in fact a cognizable issue requiring the attention of the court and opposing party. Appeals which do not present a preserved and/or cognizable issue should be summarily dismissed.

ARGUMENT

I.

AN APPEAL SHOULD BE SUMMARILY DISMISSED WHERE, AFTER THE OPPOSING PARTY BY MOTION OR THE APPELLATE COURT SUA SPONTE DEMANDS APPELLANT TO SHOW THAT A COGNIZABLE ISSUE EXISTS WHICH REQUIRES THE ATTENTION OF THE OPPOSING PARTY AND COURT, THE APPELLANT FAILS TO IDENTIFY A PRESERVED OR OTHERWISE COGNIZABLE ISSUE IN THE INITIAL BRIEF.

The District Court below and the Respondent attribute great significance to the question of whether appeals such as this should be disposed of by dismissal for lack of jurisdiction or by affirmance after full appellate review. The State suggests that those concerns, and the concerns of the legislative and executive branches, can be reconciled as follows.

In *Kalway v. Singletary*, 708 So. 2d 267, 269 (Fla. 1998), this Court explained the spirit and the attitude with which separation of powers issues should be approached by the separate branches of government. Significantly, for our purposes here, this Court used the Criminal Appeal Reform Act of 1996 and this Court's decision in *Amendments to Florida Rules of Appellate Procedure*, 685 So. 2d 773 (Fla. 1996)("*Amendments*") as exemplifying the correct approach in addressing such issues.

> Separation of powers is a potent doctrine that is central to our constitutional form of state government. *See* Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of

> the other branches unless expressly provided herein."). This does not mean, however, that two branches of state government in Florida cannot work hand-in-hand in promoting the public good or implementing the public will, as evidenced by our recent decision in *Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d 773 (Fla.1996), wherein we deferred to the legislature in limited matters relating to the constitutional right to appeal:

Kalway, 708 So. 2d at 269. This Court then quoted from its opinion in *Amendments*, 685 So. 2d at 774-775:

> '[W]e 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.'

Id.

The State's Reply Brief on behalf of the legislative and executive branches is written in that spirit.

First, the Criminal Appeal Reform Act was constitutionally enacted by the legislature in reliance on decisions from this Court and the United States Supreme Court that the right to appeal was purely statutory and not grounded in the constitutions. *See, e.g. 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."); *Abney v. United States*, 431 U.S. 651, 656 (1977)("[I]t is well settled that there is no

constitutional right to an appeal."); *Ross v. Moffitt*, 417 U.S. 600, 611 (1974)("[I]t is clear that the State need not provide any appeal at all."); *McKane v. Durston*, 153 U.S. 684, 687-688 (1894)("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal." "... the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." "... whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself."); *State v. Creighton*, 469 So. 2d 735, 739 (Fla. 1985)("Cases decided after the 1972 revisions of article V [of the Florida Constitution] still recognize the right of appeal as a matter of substantive law controllable by statute not only in criminal cases but in civil cases as well.").

Under this heretofore well-settled doctrine, the legislative branch was constitutionally responsible for creating the right to appeal, **if any were to exist**, and for setting such terms and conditions as were appropriate for the exercise of such substantive statutory right. The historical record of the Florida Legislature discharging that authority and responsibility is clear in the statutes themselves since at least 1939. *See* §§§ 924.02, 924.04, and 924.05, Fla. Stat. (1997)(creating a right to appeal and specifying who may appeal in criminal cases).

The Legislature could not have known when it enacted the Criminal Appeal Reform Act that this Court would **sua sponte** overrule its decision in *Creighton* and construe the language of article V, section 4(b) of the Florida Constitution as establishing a constitutional right to appeal.[1] *See Amendments*, 685 So. 2d at 774. Accordingly, although legislative intent is critical, it must be determined in light of this Court's subsequent pronouncement in *Amendments*.

Second, this Court recognized the authority of the legislature to implement the right to appeal and place reasonable conditions upon that right. More specifically, this Court held that the legislature "could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error." *Amendments*, 685 So. 2d at 775. More specifically still, and recognizing the prevalence of unpreserved sentencing errors under then extant case law, this Court pointed out that it had earlier become concerned with this problem, along with the closely related problem of appeals from guilty pleas. *Amendments*, 685 So. 2d at 773-775. Accordingly, this Court had previously initiated rule changes, some of which were promulgated

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[1]Article V sets forth the constitutional authority of the judicial branch. Ordinarily, given its importance and assuming it existed, a right to appeal would appropriately be found in Article I, Declaration of Rights, along with other such rights, e.g., the right to a jury trial, the right to counsel, the right to remain silent.

in *Amendments* and its companion, *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253 (Fla. 1996), for the purpose of ensuring that claims of sentencing error were properly preserved in the trial court and **thus cognizable under the Criminal Appeal Reform Act.** *See*, Florida Rules of Criminal Procedure 3.800(b) and 3.170(l) and Florida Rules of Appellate Procedure 9.020(h), 9.140(b)(2) and 9.140(d). In connection with these rule changes, this Court declared its agreement with the legislative objective of resolving issues at the trial court level. *Amendments*, 685 So. 2d at 773-775. The rule changes are consistent with the Criminal Appeal Reform Act's requirement that an appeal may not be taken unless a prejudicial error is alleged and properly preserved or would constitute fundamental error. *See* § 924.051(3) & (4), Fla. Stat. (Supp. 1996).

Based on the above, the State maintains that the intent of both the legislature and this Court are the same: to require that claims of non-fundamental error, particularly sentencing error, be first raised in the trial court in order to be cognizable on appeal. Jurisdiction over subject matter, such as appeals from final judgments of conviction, refers to a court's power to hear and determine a controversy. *Calhoun v. New Hampshire Ins. Co.*, 354 So. 2d 882, 883 (Fla. 1978). It is uncontroverted that a court always has jurisdiction to determine whether it has jurisdiction. Similarly, the court has jurisdiction to determine whether there is

a cognizable issue. Thus, the State does not controvert that an appellate court has jurisdiction to determine its jurisdiction or to determine whether a cognizable issue exists. The District Court below could appropriately examine the appeal to see if there was jurisdiction **over the specific appeal** as there unquestionably was over the subject matter of the appeal, i.e., an appeal from a final judgment of conviction and sentence.

In the spirit of *Kalway*, the State does not wish to engage in an "angels on the head of a pin" controversy over whether there is jurisdiction to hear an appeal when no cognizable issues are preserved or, instead, whether there is jurisdiction to hear the appeal but not to address the unpreserved issue(s). The notion that a court has jurisdiction to hear a claim but not to resolve it is, the State suggests, extremely unrealistic. The State is pragmatically concerned with the common sense proposition that when a court notes, or when it is brought to a court's attention, that no cognizable issues exist, that the court should cease its labor and the labor of the parties and dismiss the errant appeal.[2]

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[2]As a practical matter, and logically, there is no difference between this situation and the situation when a court lacks jurisdiction. The holding in *Bohlinger v. Higginbotham*, 70 So. 2d 911 at 914-915 (Fla. 1954)(citation omitted), that courts `are bound to take notice of the limits of their authority, and if want of jurisdiction appears at any stage of the proceedings' to cease their labors and enter an order of dismissal, is just as applicable to a lack of authority to decide an issue as it is to a lack of jurisdiction. Regardless of how the issue is characterized, both mean that the court lacks authority to decide the cause or claim.

There is no common sense reason why an appellate court should not immediately address the threshold question of whether there is in fact a cognizable issue for appeal. There is never a good reason for a court to perform useless acts. *See State v. Strasser*, 445 So. 2d 322, (Fla. 1983)('We are not required to do a useless act nor are we required to act if it is impossible for us to grant effectual relief')(citation omitted). An appellate court should not require the parties or itself to continue with full scale briefing when no cognizable issues exist. Fla.R.App.P. 9.140(b)(1)(D) & (b)(2)(no right to appeal sentences that are not illegal or unlawful and no right to appeal from guilty pleas unless specified issues are properly preserved).

The State submits that when an appellant files an initial brief which does not identify a preserved issue, or assert that there is fundamental error which is cognizable on appeal, then the appellate court and the appellee, before continuing their labors, are entitled to demand a showing or good faith assertion by the appellant that a cognizable issue exists. The appellate court could appropriately issue a ***sua sponte*** order to the appellant to identify the cognizable issue which the appellant wishes to bring to the attention of the court. It is not the responsibility of an appellate court to search out the record or the initial brief for some basis for hearing the appeal. The burden always falls on the appellant to submit an initial brief which makes reversible error

clearly appear. *Lynn v. City of Fort Lauderdale*, 81 So. 2d 511 (Fla. 1955).

Similarly, it is appropriate for the appellee to immediately bring to the attention of the appellate court the threshold absence of any cognizable issue. Whether that motion to dismiss is characterized as a Motion to Dismiss for Lack of Jurisdiction or as a Motion to Dismiss for Lack of a Cognizable Issue, or both, is irrelevant. What the judicial system and the parties need, including the appellant, is a speedy resolution of any threshold issue which will dispose of the appeal. This is entirely consistent with the proposition stated in *Calhoun* that a court has jurisdiction to hear and dispose of a controversy. There is nothing to be gained, and a great deal to be lost, in routinely requiring parties to submit briefs on the merits of non-cognizable issues and then requiring the appellate court to review those irrelevant briefs.[3] The State suggests that the institutionalization of the useless act of conducting full appellate review on cases where there is no authority to resolve

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[3]The controlling principle that the State urges is already embodied in the case law holding that a court should determine at the threshold its jurisdiction to hear a cause and in Florida Rule of Appellate Procedure 9.315, SUMMARY DISPOSITION. The latter rule clearly requires an appellate court to examine an initial brief to determine if there should be summary affirmance without further briefing. Admittedly, few if any appellate courts carry out their responsibilities under this rule but their failure to do so does not rebut the principle that courts and parties should not perform useless acts. A review of an appeal where there are no cognizable issues is a useless act under any definition that may be given to useless.

the claims is not required by any constitutional or statutory provision and should be avoided by all means.

Accordingly, for the above reasons, the State urges this Court to recast the certified question to pragmatically address the actual issue posed by the instant case and to hold that when an appellant fails to identify a preserved or otherwise cognizable issue in an initial brief, it is appropriate for the appellate court itself, and the opposing party by motion, to demand a showing that there is in fact a cognizable issue requiring the attention of the court and opposing party. Appeals which do not present a cognizable issue should be summarily dismissed.[4]

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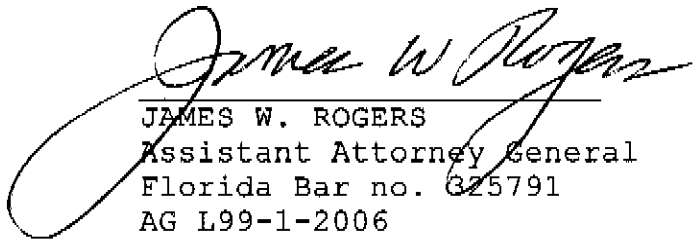
[4]Dismissal more accurately reflects the actual disposition of the case than does affirmance. Dismissal places the responsibility for not preserving the issue squarely on appellant's trial counsel whereas affirmance suggests that the issue has been disposed of on the merits. This distinction is of significance to both parties in state and federal postconviction proceedings.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and cited authorities, the State respectfully requests that this Court recast the certified question and hold that when an appellant fails to identify a preserved or otherwise cognizable issue on appeal, it is appropriate for the appellate court to summarily dismiss the appeal upon its own or the opposing party's motion.

Respectfully Submitted,

ROBERT A. BUTTER WORTH
Attorney General



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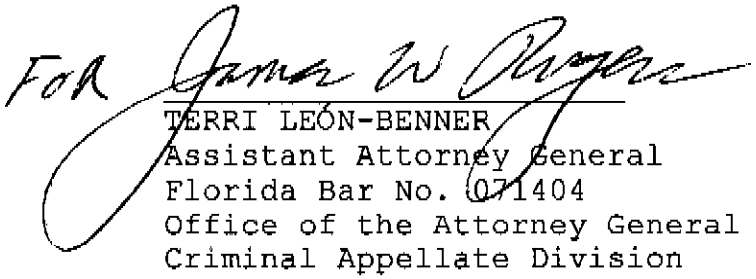

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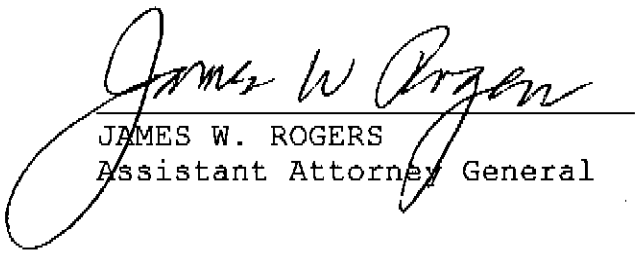
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was mailed this 10th day of March 1999, to Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125.



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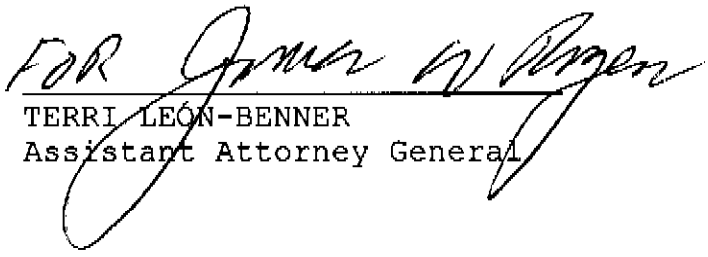

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