WOOA 097

IN THE SUPREME COURT OF FLORIDA

DARYL W. JERVIS,

Petitioner,

v.

CASE NO. 94,933
DCA Case No.: 97-2684

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The Petitioner in this case submits that the Fifth District Court of Appeal incorrectly eliminated from appellate review unpreserved sentencing errors. It is the position of the State that all the Fifth has done is correctly interpret the changes to the appellate process to require that all sentencing errors need to be initially presented to the trial court prior to being raised on appeal. If such is not done, then the alleged error is waived. Such a restriction on the appeal of sentencing errors is both efficient and constitutional. It is the position of the State that the changes to the appellate process have placed such a requirement upon the appeal of sentencing errors eliminating the various exceptions to preservation including that of "fundamental" error.

ARGUMENT

POINT I

WHETHER SENTENCING ERRORS HAVE TO BE INITIALLY PRESENTED TO THE TRIAL COURT IN ORDER TO BE PRESERVED.

The Fifth District Court of Appeal affirmed the judgment and sentence in this case citing to its opinion of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, No. 92,805 (Fla. July 7, 1998).[1] In Maddox, the appellate court ruled *en banc* that only sentencing errors which have been preserved can be raised on direct appeal. This includes any sentencing errors which previously may have been labeled "fundamental." It is the position of the State that this is a correct interpretation of the recent changes to the appellate process. To understand how the Fifth District reached its conclusion, some background review of the previous law in this area is necessary.

First, a examination of case law prior to the Criminal Reform Act shows an inconsistent approach to whether an objection was needed to preserve a sentencing error. In the case Walcott v. State, 460 So. 2d 915, 917-921 (Fla. 5th DCA 1984), approved, 472 So. 2d 741 (Fla. 1985), Judge Cowart wrote a detailed analysis of the application of the contemporaneous objection rule to sentencing errors in his concurring opinion which pointed out many of the

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[1] This Court has sua sponte consolidated the cases of Maddox v. State, case no.: 92,805; Edwards v. State, case no: 93,000; Speights v. State, case no.: 93,207; and Hyden v. State, case no.: 93,966. These cases have been set for oral argument on May 11, 1999.

inconsistencies in the sentencing error cases. Adding to the inconsistencies of the necessity of a contemporaneous objection was the expansive definition of fundamental error when used in the sentencing context.[2] Case law held that an illegal sentencing error was fundamental error since it could cause a defendant to serve a sentence longer than is permitted by law; however, cases called sentencing errors fundamental which ranged from sentences in excess of the statutory maximum to jail credit to improper costs to improper conditions of probation. See, Larson v. State, 572 So. 2d 1368 (Fla. 1991) (illegal conditions of probation can be raised without preservation), Wood v. State, 544 So. 2d 1004 (Fla. 1989), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (failure to provide defendant notice and opportunity to be heard as to costs imposed constitutes fundamental error), Vause v. State, 502 So. 2d 511 (Fla. 1st DCA 1987) (improper imposition of mandatory minimum sentence constituted fundamental error); Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984) (error in jail credit fundamental since defendant may serve in excess of sentence), Jenkins v. State, 444 So. 2d 947 (Fla. 1984), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (costs could not be imposed without notice).

Eventually it seems, case law evolved which provided that sentencing errors apparent from the record could be reviewed by the

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

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

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

Id. at 1016, (emphasis added).

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

> Those who legislate substantive rights and who promulgate procedural rules should consider if the time has not arrived to take action to improve the present rules and statutes. The first step might be to eliminate these vexatious questions, perhaps by eliminating the right of direct appeal of sentencing errors with the injustice that necessarily attends application of the concept of implied waiver to the failure of counsel to timely, knowingly, and intelligently present appealable sentencing errors for direct appellate review. **Perhaps it would be**

> **better to have one simple procedure,** permitting and requiring, any legal error in sentencing that can result in any disadvantage to a defendant, to be presented once, specifically, explicitly, but at any time to the sentencing court for correction with the right to appeal from an adverse ruling.

460 So. 2d at 920, (emphasis added). More than a decade later, the better, simpler approach urged by Judge Cowart was attempted with an extensive overhaul of the appellate system in regards to criminal appeals. Included in this process was the Criminal Reform Act (Reform Act) which was codified in section 924.051, Fla. Stat. (Supp. 1996) as well as changes to the Rules of Criminal and Appellate Procedure.

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

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

See, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). However, this Court also noted that

article V, section 4(b) of the Florida Constitution was a constitutional protection of the right to appeal. Id. This Court wrote

> . . . we believe that the legislature may implement this constitutional right and place **reasonable conditions** upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, **this Court continues to have jurisdiction over the practice and procedure relating to appeals.**

Id. (emphasis added)(footnote omitted).

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

> (2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower tribunal's lack of subject matter jurisdiction;
>
> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if

preserved by a motion to withdraw plea;

(iv) **a sentencing error, if preserved;** or

(v) as otherwise provided by law.

(emphasis added). The Rule was also further changed in order to specifically refer to sentencing errors:

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

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

It is these specific changes that led the Fifth District Court to find in Maddox that the concept of fundamental sentencing errors no longer exists.[3] As the court noted, only "preserved" errors can be appealed. Sentencing issues become much more like other issues

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

> The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived.

Id.

with there now being a specific requirement that they be preserved in order to be presented on appeal. See, section 90.104(1)(a), Fla. Stat. (1997) (requiring a specific objection to preserve an evidentiary issue); Fla. R. Crim. P. 3.390(d) (requiring an objection to preserve a jury instruction issue). Further, the situation that was of concern in Rhoden that the subject matter of the objection would not be known to the defendant until the moment of sentencing is solved by the fact that there is still a thirty (30) day window in which to present any sentencing issues to the trial court for remedy and for preservation.

As the Fifth noted

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

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

This leads to a review of the facts of the instant case. The Petitioner submits that the scoresheet under which he was sentenced was incorrectly calculated. He argued that the calculation was 113.8 points and should have been 103.8 points. This argument was not preserved for appeal and, even if it had been, any error was harmless.

First, this issue was not preserved. There was no objection either at sentencing or in a motion to correct. Moreover, even if

this issue had been preserved, any error was harmless. § 924.051(7), Fla. Stat. (1997); Jackson v. State, 707 So. 2d 412, 414-415 (Fla. 5th DCA 1998)(requiring defendant to demonstrate prejudicial error). If the scoresheet were recalculated as Appellant urges, the guidelines range would be 56.85 to 94.75 months. The sentence of 85.8 months in prison is still within that range.

Additionally, the record shows that the defense had the scoresheet in advance and had moved to correct a victim injury calculation. Obviously, the defense should have also calculated a total amount based upon its requested correction. Instead, the defense appeared to acquiesce in the court's scoresheet calculation:

> THE COURT: . . . I'll find slight injury from this, and drop that from 18 to 4.
> Which will make page one 113.8 and that will carry through. I think that's 85.8 midpoint. 64.3 low end. 107.2 high end.
> With those changes made, I'll sign the score sheet.
> MR. BALGO [defense counsel]: I apologize, Judge, what was the high end?
> THE COURT: What I have was 85 -- 113.8 minus 28 was 85.8. Low end 64.3. High end 107.2.
> MR. BALGO: Thank you.
> THE COURT: Okay. Okay. Any legal cause then not to proceed to sentencing at this time, Mr. Balgo?
> MR. BALGO: No, sir.

(S.155-156).

Any error is therefore harmless. See, Poe v. State, 689 So. 2d 333 (Fla. 5th DCA 1997)(use of erroneous scoresheet was harmless, where sentence imposed was within the guidelines range of

a corrected scoresheet, was within the range contemplated by the plea bargain, and defendant agreed to trial court's use of scoresheet at sentencing); but see, Lawrence v. State, 590 So. 2d 1068 (Fla. 5th DCA 1991)(remanding for new sentence where scoresheet error changed the recommended range, even though sentence fell within permitted range of corrected scoresheet).

It is the State's position that this is the situation that the Reform Act intended to be presented to the trial courts prior to it being reviewed by the appellate courts. No such preservation was done in this case, and the Fifth ruled correctly that the issue could not be raised on direct appeal.

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

> Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), rev. denied, 698 So. 2d 543 (Fla. 1997):
>
> -- improper departure issue was not preserved for appeal and is barred from review
>
> -- however, imposition of attorney fees is fundamental sentencing error which can be raised for first time on direct appeal
>
> Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997):
>
> -- imposition of a twenty year sentence for a second degree felony

is an illegal sentence which must be classified a fundamental error and can be raised with no objection

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

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

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

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

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

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

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

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

-- issue was certified.

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

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

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

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

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

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

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

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

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

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

Additionally, several of the other district courts have reviewed the Reform Act in *en banc* panel decisions. Much like in the Maddox, the Fourth District Court reviewed an appeal from a plea which had led the appellate attorney to file an Anders brief. See, Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998). The State had filed a motion to dismiss which the court had initially denied but which it ultimately granted. The Fourth specifically agreed with the majority of the Fifth's approach in Maddox; however, it noted disagreement with Maddox when holding that an

illegal sentence exceeding the statutory maximum[4] was "fundamental error" which could be raised at any time. In a footnote, the Fourth also agreed with Maddox that costs type issues could not be raised without being preserved; however, it viewed such sentences as being unlawfully imposed - not illegal.

Next, the Second District Court of Appeal in the case Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998)[5], reviewed the Reform Act and held that when an appellate court has jurisdiction through the proper appeal of a preserved error it could then address all other errors which it referred to as "serious, patent" errors[6] creating yet another exception for review.[7] Interestingly, the court wrote

. . . there is little question that

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

[5]The Second District recently in an en banc decision broadened its analysis in Denson and certified several questions to this Court for resolution. Bain v. State, 24 Fla. L. Weekly D314 (Fla. 2d DCA Jan. 29, 1999).

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

[7]The Petitioner submits to this Court that for the Reform Act to be "constitutional and just" appellate courts should have the discretion to review fundamental or obvious sentencing errors. The Respondents would first argue that simply requiring preservation of an error should not render an Act unconstitutional. Secondly, Denson only found that an appellate court had jurisdiction to review "serious, patent" errors if the court "already has jurisdiction over a criminal appeal because of a properly preserved issue...." There was no preserved issue appealed in this case. Therefore, even under Denson - which the Petitioner expressly asks this Court to follow - the issue would not be reviewed on appeal.

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

Id. at 1229. The Second also stated that it did not accept Harriel's position that an illegal sentence is fundamental error giving jurisdiction to the appellate court for its review. Id., n. 12.

The Fourth, then, again issued an *en banc* opinion again addressing the Reform Act in the case in the case of Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), rev. granted, case no.: 93,966. Perhaps finally seeing the wisdom of the changes and the need for preservation, the court issued an aggressive decision in which it attempted to stress the fact the new changes existed and that they would be utilized. For example, the court used some of the following language:

> In this district, **we will no longer** entertain on appeal the correction of sentencing errors not properly preserved.
>
> Although in the past we have corrected such deviations from oral pronouncement of sentences, **we will**

> **do so no more.** (as to the imposition of a condition of probation without that condition being oral pronounced).
>
> It is for the benefit of the criminal system as a whole, as well as the individual defendants, that this expeditious remedy of sentence correction has been made available. Our strict enforcement of Rule 9.140(d) should have the effect of alerting the criminal bar of the absolute necessity for reviewing the sentencing orders when received to determine whether correction is necessary. **If they do not, relief will not be afforded on appeal.**

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

Also, the Third District wrote that a sentence in excess of the statutory maximum was a fundamental error which it could review even if not preserved; evidently, the court equates the definition of an illegal sentence with that of a fundamental sentencing error. See, Jordan v. State, case no.: 97-2002 (Fla. 3d DCA September 16, 1998). Still yet, another twist was added by the Third District in the case Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998)[8], in which it was confronted with the issue of whether the imposition of a fourteen year sentence for a misdemeanor could be corrected on

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[8] The defense's brief seems to point toward the application of the cases from the Second District of Denson and Bain; however, recognizing that no issue on appeal was preserved below, the brief shifts to a request to apply Mizell.

appeal absent presenting the issue to the trial court. (seven felony counts were run concurrently; however, on one count the jury had found the defendant guilty of the lesser included misdemeanor and a fourteen sentence had been improperly imposed). The defendant argued that the sentencing error was fundamental and reviewable; whereas, the State submitted that Maddox was controlling. The Third District noted some of the above cited conflicting decisions such as Harriel and Denson, and wrote that "Because we are able to reach what we think is the correct result without doing so, we respectfully decline, at least in this case, to involve ourselves in this fratricidal warfare." The court, then, sua sponte found ineffective assistance of counsel on the face of the appellate record and ordered correction upon remand. The court continued and stated that while it agreed with Maddox that lack of preservation is an ineffective assistance of counsel issue it "strongly disagree(d) that anything is accomplished by not dealing with the matter at once."

There are several problems with this approach. First, assuming Maddox is correct, the changes to the process require all sentencing issues to be preserved by having been presented to the trial court before appellate review. As to cases involving pleas, this requirement might even be jurisdictional. There is no exception in the rules for errors apparent on the face of the record. Additionally, to allow the appellate courts to circumvent the preservation requirement by use of ineffective assistance on its face could completely destroy the Reform Act. This exact point

was recognized recently by the First District Court of Appeal when it refused to follow Mizell and wrote "[W]e decline appellant's invitation to address the issue as one involving ineffective assistance of counsel because to do so would effectively nullify the preservation requirement contained in section 924.051 (1997). See, Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1998). Further, under Mizell, even if the error is found not to be fundamental and not to be illegal (assuming these to be different for sake of argument), an appellate court could sua sponte find these errors to be the product of ineffective assistance.[9] Again, such an approach would basically destroy the entire Reform Act.

What these cases show is that in just the space of a few months, we have the attempt to get sentencing issues preserved by presentation to the trial court being eroded by exceptions. We have the "patently serious error" exception, the "illegal sentence error" exception, the "fundamental sentencing error" exception, and now even the "apparent on the face of the record thus ineffective assistance" exception. Additionally, none of these is defined. Basically, the exceptions will consume the reforms unless the Fifth's interpretation is correct that only preserved sentencing

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[9] Such an approach also is a concern given the fact the State is omitted from the process and is deprived of the opportunity to respond in any manner . As the United States Supreme Court noted, the analysis for prejudice involves the question of whether the proceeding was fundamentally unfair and is not merely outcome determinative. See, Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

That point is highlighted by the facts of this case since the sentence was within the range of a corrected scoresheet.

issues can be raised, or if exceptions do exist, they must be extremely limited and well-defined.[10]

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

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

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

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

(emphasis added).

Based upon this, it is the State's position that this Court

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

has clearly limited appeals of sentencing errors to only those which are preserved by presentation to the trial court; thus, eliminating the potentially expansive exception of fundamental error.

POINT II

WHETHER THE OFFENSE OF ATTEMPTED SECOND DEGREE MURDER IS A VIOLATION OF DUE PROCESS.

The second issue presented to this Court is that the conviction for attempted second degree murder violated the Petitioner's due process rights. The State respectfully disagrees.

This issue was raised on appeal in Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998), and like in Watkins, it was not preserved for appellate review because it was not argued in the court below. See, §§ 924.051(3) & 924.051(1)(b), Fla. Stat. (1997). Although Jervis characterizes the alleged error as a violation of due process and therefore fundamental error, he cites no authority for that proposition.

Even if this Court reaches the merits, it should still affirm. The support offered by the Petitioner for its position is the dissent written in the Watkins case. In Watkins, the Fifth District Court reaffirmed the continuing validity of the offense of attempted second degree murder. Judge Griffin wrote:

> Moreover, the law appears well settled that attempted second-degree murder is a crime in Florida and that it is a necessarily lesser included offense of attempted first-degree murder. Gentry v. State, 437 So. 2d 1097 (Fla. 1983); Holland v. State, 634 So. 2d 813, 816 (Fla. 1st DCA 1994); Dicicco v. State, 496 So. 2d 864, 865 (Fla. 2d DCA 1986); Williams v. State, 462 So. 2d 577 (Fla. 4th DCA), review denied, 472 So. 2d 1182 (Fla. 1985); Morgan v. State, 417 So. 2d 1027 (Fla. 3d DCA 1982), review denied, 426 So. 2d 27 (Fla. 1983); Littles v. State, 384 So. 2d 744

> (Fla. 1st DCA 1980). See Florida Std. Jury Instr. (Crim.), Schedule of Lesser Included Offenses. The difficulties that inhere in attempted second-degree murder are undeniable, if not novel. They were recognized prior to Gentry[11] and the stated purpose of Gentry was to put them to rest.

Watkins, 705 So. 2d at 939.

In rejecting the contention that the abolition of attempted felony murder[12] necessarily required the abolition of attempted second degree murder, the Watkins opinion noted that the two offenses are different and that courts have not encountered the same difficulties in applying the latter offense that they encountered in applying the former. Id. Since Watkins was decided, the other four district courts have joined in affirming the continuing validity of the offense of attempted second degree murder. See, Gilyard v. State, 718 So. 2d 888 (Fla. 1st DCA 1998); Quesenberry v. State, 711 So. 2d 1359 (Fla. 2d DCA 1998); Pitts v. State, 710 So. 2d 62 (Fla. 3d DCA 1998); Manka v. State, 720 So. 2d 1109 (Fla. 4th DCA 1998).

The policy underlying Gentry was eloquently stated by Justice Shaw and echoed in Watkins, 705 So. 2d at 939 n.2:

> Had a homicide occurred, there can be no doubt that the appellant could have been successfully prosecuted for second-degree murder without the state adducing proof of a

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[11] In Gentry v. State, 437 So. 2d 1097 (Fla. 1983), the Supreme Court implicitly recognized the validity of the offense of attempted second degree murder.

[12] See State v. Gray, 654 So. 2d 552 (Fla. 1995).

> specific intent to kill. The fact that the father survived was not the result of any design on the part of the appellant not to effect death but was simply fortuitous. We can think of no good reason to reward the appellant for such fortuity by imposing upon the state the added burden of showing a specific intent to kill in order to successfully prosecute the attempted offense.

Gentry, 437 So. 2d at 1099. This reasoning remains just as forceful today as it was when Gentry was handed down. Jervis's conviction should be affirmed.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the holding of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by hand delivery to the Public Defender's mail box at the Fifth District Court of Appeal, to Anne Moorman Reeves, 112 Orange Ave. Ste A., Daytona Beach, 32114, this 7th day of June 1999.

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