IN THE SUPREME COURT OF FLORIDA

PAUL O'NEIL STOVALL,

Petitioner,

v. Case No. 95,059

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State generally accepts Petitioner's version of the case and facts but restates and emphasizes the following evidence elicited at trial:

Daytona Beach Police Officer Janet Hawkins testified that after Petitioner returned to his bed from the bathroom and as she was handcuffing him to the bed, he threw something in her eyes. (Vol. III, T. 169, 170). Hawkins testified that she struggled to hold Petitioner, but he freed himself, and punched her. (Vol. III, T. 170). The two fel to the floor, and Petitioner landed on top of her with his hand over her face. (Vol. III, T. 170-171). She bit down on his hand, and then he punched her hard in the mouth, causing her to let go of her gun. Petitioner took the gun, pointed it at her, and started to back up out of the room. (Vol. III, T. 171, 175). She asked him not to shoot her, and he responded that he would not. (Vol. III, T. 175). Hawkins testified that she attempted to make communication for back up, and Petitioner returned to the room, and pointed the gun at her head. (Vol. III, T. 175-176). Petitioner attempted to take her walkie talkie, and then fled the room with Hawkins in pursuit. (Vol. III, T. 177-178). As she pursued him down the hallway, Petitioner turned around and pointed the gun at her again. (Vol. III, T. 178-179).

Hawkins later testified that at the time of her struggle with Petitioner, her fear was secondary to her concern for the people in that area of the hospital. (Vol. IV, T. 204). Moreover, she testified that she was dazed immediately following the confrontation with Petitioner, and that she required therapy after the ordeal. (Vol. III, T. 181-182, Vol. IV, T. 205).

Daytona Beach Police Officer Thomas Harrison testified that Petitioner drew his gun forward, and pointed it at his head and the head of Officer Dallarosa as they attempted to enter the hospital break room. (Vol. IV, T. 273, 276, 279). Harrison explained that their immediate reactions were to avoid being shot as he turned and spun around out of the door and Officer Dallarosa fell backward from the door out of the line of fire. (Vol. IV, T. 273, 276-277, 278-279).

Gregory Kennedy testified that he was locked in the break room with John Duffy and Mark David, and Petitioner held a gun the entire time. Kennedy indicated that he was scared, and feared for his life as he was confined with a patient with a gun, not knowing what could happen. (Vol. IV, T. 223-227, 235, 237).

John Duffy added that Petitioner kept them in the locked break room, with the gun in his hand, waving it back and forth as he paced in the room. Duffy testified that Petitioner positioned each

of them in the room, with David sitting with his back to the door, Kennedy on the floor, while he sat in a chair. He testified that he feared for his life, not knowing how the situation would end. (Vol. IV, T. 247-250).

Mark David testified that when he saw Petitioner in the break room and asked Petitioner if he needed any help, he noticed that Petitioner had a gun. At that point, he told Kennedy and Duffy that they were "in trouble, so to speak." (Vol. IV, T. 257-258). Petitioner locked them in the room, and had David sit with his back to the locked door. (Vol. IV, T. 259). David testified that while he remained confined in the room, he was scared and prayed for his life. (Vol. IV, T. 263-264).

SUMMARY OF ARGUMENT

POINT I: The district court properly affirmed the denial of the motions for judgment of acquittal on charges of aggravated assault and armed kidnapping. Despite the fact that most of Petitioner's claim were waived because they were not raised below, there was more than sufficient evidence presented of each of these crimes against the various victims to warrant denial of the motions.

POINT II: The trial judge did not abuse his discretion by denying the request to read Officer Hawkins's testimony back to the jury. The testimony was lengthy and it was not possible to narrow the jury's request as to a specific portion of testimony. Finally, the testimony was not crucial as Petitioner essentially admitted to his aggravated assault on her person. As to the unrelated jury instruction issue, the trial judge did not commit fundamental error by the manner in which he gave the voluntary intoxication instruction.

POINT III: The trial judge did not abuse his discretion by denying the motion for a mistrial as Petitioner's comment that he really did not want to go back to jail was properly admitted to show intent, negated the voluntary intoxication defense and was not of such a nature to vitiate the trial. Moreover, any claim

regarding the Richardson violation as it related to Petitioner's conviction for possession of a firearm by a convicted felon is moot as that conviction was reversed by the district court.

POINT IV: Changes to criminal appeals which eliminate review of fundamental sentencing errors are not unconstitutional. For a sentencing error to be preserved, all that is required is that they initially be presented to the trial court for review prior to being raised on appeal. The requirement of preservation is not unconstitutional. As to sentences which are illegal, the rules of criminal procedure provide a remedy for such errors. Such a restriction on the appeal of sentencing errors is both efficient and constitutional.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY AFFIRMED THE DENIAL OF STOVALL'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON CHARGES OF AGGRAVATED ASSAULT AND ARMED KIDNAPPING.

Petitioner first contends that the district court erred in affirming the denial of his motions for judgment of acquittal on charges of aggravated assault and armed kidnapping.

It is well-established that a motion for judgment of acquittal should only be granted when "the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." Marshall v. State, 604 So. 2d 799, 805 (Fla. 1992), cert. denied, 508 U.S. 915.

Petitioner claimed that he was entitled to judgments of acquittal for charges of aggravated assault upon law enforcement officers, Janet Hawkins and Wendell R. Dallarosa, and hospital employee victims, Gregory Kennedy, John Duffy, and Mark David. However, the record contains more than sufficient evidence that Petitioner committed aggravated assault on each victim, warranting denial of his motions.

An assault is an intentional, unlawful threat by word or act to do violence to another, coupled with an apparent ability to do

so, and doing some act which creates a well-founded fear that such violence is imminent. Section 784.011, Fla. Stat. (1997). Aggravated assault is an assault with a deadly weapon without intent to kill or with an intent to commit a felony. Section 784.021, Fla. Stat. (1997). Thus, Florida law specifies that an essential element of any assault, including aggravated assault on a law enforcement officer, is an act creating a well founded fear in the victim that violence is imminent. State v. Von Deck, 607 So. 2d 1388, 1389 (Fla. 1992).

First, with regard to victim Officer Hawkins, Respondent initially notes that Petitioner never moved for judgment on acquittal on the ground that Officer Hawkins lacked a well-founded fear of violence. Instead, at the close of the State's case, trial counsel moved for an acquittal on Count V on the grounds that it was subsumed under Count II (battery on Officer Hawkins) and exposed Petitioner to double jeopardy. (Vol. IV, T. 326). In his direct appeal, Petitioner argued for the first time that the State failed to show that Officer Hawkins had a well-founded fear that violence was imminent. His failure to present this argument before the trial judge precludes its assertion on appeal. See Archer v. State, 613 So.2d 446, 448 (Fla. 1993))("For an issue to be preserved for appeal, however, 'it must be presented to the lower

court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.'"); Fla.R.Crim.P. 3.380(b);

Even assuming the issue had been preserved for appellate review, there was sufficient evidence for the jury to determine that Officer Hawkins had a well-founded fear that violence was imminent. Von Deck, 607 So. 2d at 1389; Mason v. State, 665 So. 2d 328, 329 (Fla. 5th DCA 1995); Martinez v. State, 561 So. 2d 1279 (Fla. 2d DCA 1990).

Officer Hawkins testified regarding the physical altercation in Petitioner's attempt to escape, the struggle for her gun, and Petitioner pointing the gun at her. She further testified to her statement "Don't shoot me," his response, "I'm not" as he left, his subsequent return to the room, again pointing the gun at her head, and finally, his pointing the gun at her as she chased him. (Vols. III-IV, T. 169-182, 201-203, 205). Why else would Officer Hawkins say "Don't shoot me" except for the undeniable fact that she feared or was concerned that Petitioner would shoot her. See Mason. The fact that Petitioner responded "I won't" does not eliminate the fact that she had a well-founded fear of imminent violence by the Defendant with the gun.

Petitioner's reference to a specific portion of Officer

Hawkins' testimony that she was "not afraid" is taken out of context, and does not negate her testimony adducing a well-founded fear that violence was imminent. As she explained:

> A It wasn't that I was afraid for myself. At that time I didn't give a concern for myself. I thought about the people that are in the hospital and thought about him getting out armed with a gun. That was my main concern. For myself, no, I did not. That came secondary.

(Vol. IV, T. 204). Thus, Officer Hawkins had a well-founded concern/fear that she would be shot, but this concern was secondary to her concern to protect others.

One important factor missing from the record is the demeanor of the witness during her testimony. Evidence of her demeanor and the impact of the situation may be found in her testimony that later she walked around shocked, in a daze and received therapy for a while as a result of the incident. (Vol. III, T. 181-182, Vol. IV, T. 205). Moreover, evidence of her well-founded fear was expressly conceded by trial counsel during sentencing. (Vol. II, R. 196).[1]

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[1]In seeking leniency for his client, trial counsel admitted:

> People were -- granted, people were horribly intimidated by the display of the weapon. People were horribly psychologically injured because of Paul's actions, and he stands before the Court saying he is willing to take

With regard to Officer Dallarosa, Petitioner argued at trial that he was entitled to judgment of acquittal on this count because Officer Dallarosa did not testify at trial and there was no evidence that he was "personally impaired." (Vol. IV, T. 327). The prosecutor responded that Officer Harrison's testimony as to Officer Dallarosa's actions was sufficient to allow this count to go to the jury. The trial judge agreed.

On appeal, Petitioner argues that the evidence of Officer DallaRosa's action did not evince a "reasonable expectation of imminent violence being directed by [Defendant] toward him." Petitioner's Merits Br. at 22. Because Petitioner did not made this argument below, this argument also has been waived. Archer, 613 So. 2d at 448.

However, even if the issue were preserved, Officer Harrison's testimony was sufficient for the jury to conclude that Officer DallaRosa's actions evinced a well-founded fear that violence was imminent. Officer Harrison testified that Petitioner drew the gun forward, pointing it at both his and Officer DallaRosa's heads. (Vol. IV, T. 273, 276, 279). Officer Harrison testified that their

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responsibility for those actions.

(Vol. II, R. 196).

immediate reactions were to avoid being shot at as he turned and spun around out of the door, and Officer DallaRosa fell backward from the door out of the line of fire to the floor. (Vol. IV, T. 273, 276-277, 278-279). Taking all inferences in favor of the State, there was sufficient evidence that Officer DallaRosa had a well-founded fear that Petitioner was about to shoot him, warranting denial of the motion for judgment of acquittal.

Petitioner further argues that the district court erred in rejecting his claims that he was entitled to judgment of acquittal for the charges of aggravated assault against victims, hospital employees, Gregory Kennedy, John Duffy, and Mark David. Yet, defense counsel never moved for judgment of acquittal on these charges nor did he argue that the state failed to prove that these victims were in fear as he argues now. Accordingly, these claims have been waived as well. Archer, 613 So. 2d at 448.

Nevertheless, even if preserved, Kennedy, Duffy, and David each testified that they feared for their lives when they were held hostage by Petitioner in the hospital break room. Petitioner attempts to single out certain portions of their testimony to argue that the state failed to prove their fear when each of their testimonies read in toto demonstrates their fear.

Kennedy testified that he was locked in the break room with

Duffy and David, and Petitioner held the gun the entire time. Kennedy indicated that he was scared, and feared for his life as he was confined with a patient with a gun, not knowing what could happen. (Vol. IV, T. 223-227, 235, 237). Duffy further testified that Petitioner kept them in the locked break room, with the gun in his hand, waving it back and forth as he paced in the room. Duffy testified that Petitioner positioned each of them in the room. Petitioner had David sit with his back to the locked door, Kennedy on the floor, and Duffy sit in a chair. Duffy expressed his fear for his life, noting he did not know how the situation would end. (Vol. IV, T. 247-250). Finally, David testified that when he saw Petitioner in the break room and asked if he needed any help, he noticed that Petitioner had a gun. At that point, he told Kennedy and Duffy that there "in trouble, so to speak." (Vol. IV, T. 257-258). Petitioner locked them in the room and had David sit with his back to the locked door. (Vol. IV, T. 259). David testified that while he remained confined in the room, he was scared and prayed for his safety. (Vol. IV, T. 263-264).

Based upon this testimony, judgment of acquittal was not warranted as more than sufficient evidence that Petitioner committed aggravated assault against each of these men was presented. The fact that Petitioner may have apologized to them

during some point in the ordeal did not eliminate the fact that each victim testified to his fear.

Finally, Petitioner argues that he was entitled to judgment of acquittal on the charges of armed kidnapping of these three victims, Kennedy, Duffy, and David. He claims the state failed to establish that the men were held as hostages, and thus, the charges should have been reduced to false imprisonment. Petitioner is mistaken.

Section 787.01(1)(a)(1), Fla. Stat. (1997) provides that kidnapping means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against their will and without lawful authority, with the intent to held that person for ransom or reward or as shield or hostage.

The evidence presented here demonstrates that Petitioner kidnapped Kennedy, Duffy, and David under § 787.01(1)(a)1. Petitioner held these three men for ransom (for cigarettes) or as hostages to prevent his recapture for at least two to four hours. (Vol. IV, T. 249, 263, 281-283). He also positioned these three men to set a shield to prevent his recapture. (Vol. IV, T. 247, 259, 267). Accordingly, there was sufficient evidence to show that Petitioner confined the victims against their will with intent to hold them for ransom or use them as shields or hostages. See

Fitzpatrick v. State, 437 So. 2d 1072, 1076 (Fla. 1983).

POINT II

THE DISTRICT COURT PROPERLY REJECTED PETITIONER'S CLAIMS THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE JURY'S REQUEST FOR THE REREADING OF TESTIMONY, AND THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON VOLUNTARY INTOXICATION.

Second, Petitioner contends that the district court erred in rejecting his claim that the trial court abused its discretion in refusing the jury's request for a rereading of Officer Hawkins's testimony.

It is well-established that when questioned by the jury during deliberations, a trial court need only answer questions of law, not of fact, and the trial court has wide discretion in deciding whether to have testimony reread. Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992), cert. denied, 510 U.S. 921; Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990); Kelley v. State, 486 So. 2d 578 (Fla.), cert. denied, 479 U.S. 871 (1986). See also Florida Rule of Criminal Procedure 3.410.

Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable man would take view adopted by trial court; however, if reasonable men could differ as to propriety of action taken by trial court, then it cannot be said that trial court abused its discretion.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

In the instant case, the State noted that the jury sought to have all of Officer Hawkins' testimony read to them and thus, he objected to reading it because it was too lengthy and it was not possible to narrow the jury's request as to a specific portion of the testimony. (Vol. V, T. 450-452). Officer Hawkins's testimony was over 50 pages long. Accordingly, the trial judge did not abuse his discretion in refusing to allow this testimony read to the jury.

Moreover, Officer Hawkins' testimony was not crucial, as the record shows that Petitioner essentially admitted the aggravated assault on her person. (Vol. V, T. 338-340, 350-351). Specifically, Petitioner admitted that he threw the liquid in her face, that he struggled to get the gun and then, the walkie-talkie, that, at best, he did not remember pointing the gun at her, and that he returned to the room that she was in because he was concerned that he had hurt her. Id. Accordingly, there was no abuse of discretion in denying the motion to read her testimony to the jury.

Petitioner also raises the disjointed claim that the trial court improperly instructed the defense of voluntary intoxication, and that the district court erred in rejecting this claim.

However, the record shows that the trial judge gave the standard jury instruction on voluntary intoxication and instead of listing the specific intent for each specific intent crime, delineated the crimes to which the defense applied (because they were specific intent crimes), and which crimes it did not apply. (Vol. V, T. 445). See Fla. Std. Jury Instr. (Crim. Cases) 3.04(g). There was no objection to this procedure at trial (Vol. V, T. 448), but rather the issue has been raised for the first time on appeal.

Jury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred. Archer v. State, 673 So. 2d 17 (Fla. 1996); Fla. R. Crim. P. 3.390(d). Fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id.

Moreover, the trial court has the responsibility to properly and correctly charge the jury in each case, and the court's decision as to the appropriate jury instructions comes to the appellate court clothed with the presumption of correctness. Kearse v. State, 662 So. 2d 677, 681-82 (Fla. 1995).

There was no fundamental error in this case as the trial judge gave the standard jury instructions as to each charge, as well as

the voluntary intoxication charge and informed them to which charges it applied. Not only was there no objection below, but there is no indication that the jury was confused. This is especially so as the jury did submit questions during their deliberation, but no questions indicating a misunderstanding of the jury instructions. The fact that voluntary intoxication was not applicable to the lesser included general intent crime of false imprisonment only inured to Petitioner's potential benefit. There was no fundamental error; thus, the district court properly rejected this claim.

POINT III

THE DISTRICT COURT PROPERLY REJECTED PETITIONER'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR MISTRIAL.

Third, Petitioner contends that the district court erred in rejecting his claim that he was entitled to mistrial based upon Kennedy's isolated statement that Petitioner said he did not want to go back to jail when he was holding Kennedy, Duffy, and David in the break room.

Motions for mistrial are addressed to the discretion of the trial court, and should be granted only when necessary to ensure that a defendant receives a fair trial. Terry v. State, 668 So.2d 954, 962 (Fla. 1996). The record demonstrates no abuse of discretion here.

As pointed out by the prosecutor below, this case involved a 13-count information and one of the counts was possession of a firearm by a convicted felon. The comment by Petitioner to one of the hostages that he did not want to back to jail because he had been in trouble before was properly admitted to show intent, negated the defense of voluntary intoxication, did not become a feature of the trial and was not of such a nature as to inflame the jury so as to taint the verdict or vitiate the trial. See Escobar v. State, 699 So. 2d 988, 998 (Fla. 1997); Smith v. State, 683 So.

2d 577, 578 (Fla. 5th DCA 1996); Collier v. State, 681 So. 2d 856 (Fla. 5th DCA 1996). Any error was harmless, especially in light of the fact that Petitioner admitted at trial that he had a prior record of 4-5 prior felony convictions (Vol. IV, T. 345).

Petitioner then bootstraps this claim to an unrelated argument regarding the ruling of the trial court following a Richardson[2] hearing. Petitioner contends that he was prejudiced by the state's failure to turn over a judgment and sentence to be introduced against him as evidence of his prior felony conviction, the proof necessary to conviction him of possession of a firearm by a convicted felon. The record demonstrates that the trial court properly found that the discovery violation was inadvertent, and Petitioner failed to show prejudice. (Vol. IV, T. 302-306).

Furthermore, a Richardson violation may be considered harmless when there is no reasonable possibility that the discovery violation procedurally prejudiced the defense in their trial preparation or strategy. State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995). Here, Petitioner fails to make any argument as to how his trial preparation or strategy was altered by this violation. Instead, he incorrectly argues that the admission of the certified

[2] See Richardson v. State, 246 So. 2d 771 (Fla. 1971), reh. denied.

judgment and sentence "tainted the entire trial as to all of the charged offenses." Petitioner's Merits Br. at 33. Without any argument as to how he was procedurally prejudiced by this omission, Petitioner's argument fails.

In addition, the district court reversed his conviction for possession of a firearm by a conviction felon, rendering this claim moot. Moreover, any error regarding this witness was further made harmless given the fact that Petitioner testified that he had four to five prior felony convictions. (Vol. IV, T. 345, 356).

POINT IV

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

Fourth and finally, the Fifth District Court of Appeal affirmed Petitioner's consecutive habitual offender sentences pursuant to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, No. 92,805 (Fla. July 7, 1998).

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." Respondents contend 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

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.[3] 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, 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

[3] The Second District Court recently wrote in a case which will be reviewed in more detail later in this brief, "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).

So. 2d 947 (Fla. 1984), receded, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (costs could not be imposed without notice).

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

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

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.[4] As the court noted, only "preserved" errors can be appealed. Sentencing issues become much more like other issues with there now being a specific requirement that they be preserved in order to be presented on appeal. See section 90.104(1)(a), Fla. Stat. (1997) (requiring a specific objection to preserve an evidentiary issue); Fla. R. Crim. P. 3.390(d) (requiring an objection to preserve a jury instruction issue). Further, the situation that was of concern in Rhoden that the subject matter of the objection would not be known to the defendant until the moment

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[4] As additional support for the fact that fundamental errors only apply to trial errors, the Fifth District 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 opined:

> 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.

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 District 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. Here, Petitioner was sentenced as a habitual felony offender following his convictions for armed escape, battery upon a law enforcement officer, depriving an officer of means of protection or communication, three counts of aggravated assault on a law enforcement officer, two counts of aggravated assault, and three counts of armed kidnapping. (Vol. I, R. 123-125). He was sentenced, inter alia, as a habitual offender to life imprisonment on the three counts of armed kidnapping with the terms to run consecutively. (Vol. I, R. 152, 203-204). There was no objection from defense counsel. Citing Maddox, the district court refused to consider this claim that the consecutive life sentences were

improper because the issue was not preserved. Without preservation, the claim was waived.

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 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 District specifically agreed with the Fifth District's majority approach in Maddox; however, it noted disagreement with Maddox when holding that an

illegal sentence exceeding the statutory maximum[5] was "fundamental error" which could be raised at any time. In a footnote, the Fourth District 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 in Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998), reviewed the Reform Act and held that when an appellate court has jurisdiction through the proper appeal of a preserved error it could then address all other errors which it referred to as "serious, patent" errors[6] creating yet another exception for review. Interestingly, the court wrote:

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

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

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

Id. at 1229. The Second District 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. at 1229 n. 12.

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

(emphasis added). The court continued its analysis and held that

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

Also, 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, 728 So. 2d 748 (Fla. 3d DCA 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), in which it was confronted with the issue of whether the imposition of a fourteen year sentence for a misdemeanor could be corrected on appeal absent presenting the issue to the trial court. (seven felony counts were run concurrently; however, on one count the jury had found the defendant guilty of the lesser included misdemeanor and a fourteen 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 as does this case, 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 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.[7] 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 District's interpretation is correct that only preserved sentencing issues can be raised, or if exceptions do exist, they must be extremely limited and well-defined.[8]

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[7] 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 (1993).

[8] 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

To repeat the point well made by the Fifth District regarding 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.

Respondents assert that this is the very reason that this Court amended the appellate rule specifically to address the appeal of sentencing errors as the amendment of Rule 9.140(d) specifically provides:

> (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, Respondents stress that this Court has

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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.

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. In the instant case the issue was abandoned by defense counsel and should be found to be waived and non-fundamental.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests this honorable Court to affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and type of font used in this brief is 12 point Courier New, a font that is not proportionately spaced.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief has been furnished by delivery to Assistant Public Defender Susan Fagan, counsel for appellant, this _____ day of August, 1999.

_____
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