IN THE SUPREME COURT OF FLORIDA

BRYAN PERRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC97-119
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Petitioner filed a Notice to Invoke the discretionary jurisdiction of this Court, and a brief on jurisdiction, and on February 21, 2000, this Court issued an Order Accepting Jurisdiction and Dispensing with Oral Argument. See, Appendix to this brief, (hereinafter "A"), at Pg. 5. The instant brief on the merits follows.

STATEMENT OF THE FACTS

In 1987, pursuant to a negotiated plea agreement, the defendant was convicted of second degree murder. The plea agreement stipulated a maximum of 27 years imprisonment. (A 1) In accordance with that plea agreement, he was sentenced as follows: Life imprisonment, with all but 27 years suspended, on the condition that the defendant successfully complete lifetime probation. (A 1- 4) The Petitioner was released from the aforesaid term of imprisonment in 1997, and thus began serving his lifetime term of probation. (A 4) In 1998, the petitioner was found guilty of

violating probation, and was sentenced to life imprisonment. (A 4)

On direct appeal, the defendant challenged the life sentence, arguing that he originally agreed to a two cell upward departure sentence, so that upon violation of probation, the trial court was limited to a one cell "bump" up from the original departure sentence. In this case, Petitioner argued, that would mean the Petitioner faced a maximum 40 year prison term after the violation of probation; and , in turn, that the life sentence imposed by the trial court constituted an unlawful departure absent written reasons. (A 4) The State argued that the issue had not been preserved for review, and the district court agreed, citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1999); and Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1999). Both Maddox and Seccia are presently pending for review in this Court.

SUMMARY OF THE ARGUMENT

The Criminal Appeal Reform Act, as interpreted by the Fifth District Court in its' Maddox decision, would deprive Florida's appellate courts of jurisdiction to address ***any*** issue which has not been preserved in the trial court. Petitioner submits that the Fifth District Court's interpretation of the Act would erode judicial efficiency, and would unduly prejudice a great many defendants. Defendants such as the Petitioner, who seek review of unlawful sentences, should not have to forego representation by appellate counsel when the record supports their claim, simply because trial counsel failed to utter some "magic words". Indeed, as this Court has recently acknowledged, many sentencing errors continue to escape the recognition of trial counsel, or the trial judge.

It is not an efficient use of judicial resources to allow appellate courts to decline review of an issue for lack of preservation, even when the record would allow a decision on the merits, and to return issues to the trial with the expectation that the same issue will ultimately return to the court of appeals for resolution. The Criminal Appeals Reform Act should not be interpreted so as to waste judicial resources in the appellate process. Petitioner submits that Maddox, and Seccia should be rejected, in favor of a more reasonable interpretation of the Act .

ARGUMENT

THE MADDOX AND SECCIA OPINIONS INCORRECTLY INTERPRET THE CRIMINAL APPEAL REFORM ACT, THUS ALLOWING SUBSTANTIAL SENTENCING ERRORS TO REMAIN UNDETECTED, AND/OR UNREMEDIED.

In the district court, the Petitioner argued that absent a plea agreement or written reasons for departure, the sentence imposed after his violation of probation was an unlawful upward departure according to the sentencing guidelines relevant to this case. State v. Norris, 724 So. 2d 630 (Fla. 5th DCA 1998); Holmes v. State, 728 So. 2d 1214 (Fla. 4th DCA 1999); Fla. R. Crim. Pro. 3.701(d)(11) (1987). The district court did not refute the aforesaid authorities, and stated only that their decision in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), and the decision of the First District Court in Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1999), meant that the Petitioner's claim of error could not, and would not be addressed, because his trial counsel had offered no specific objection to the upward departure sentence after violation of probation. There was no indication that the record in this case was so deficient as to preclude a ruling on the issue; and the Petitioner had presented authority which, if applied, would dictate a reduction of his sentence from a life term to a term of 40 years. The district court simply refused to entertain review, in adherence to their ruling that some claims, no matter how legitimate, will not be

addressed, because trial counsel and/or the trial court did not recognize them. The district court expressed its willingness to ignore errors apparent from the record, saying that Petitioner's claim could not be made cognizable under the "guise" of ineffective assistance of trial counsel.(A 4) While the First and Fifth District Courts may willing to deny remedy for valid claims, favoring a procedural punctilio over substantive law, Petitioner submits that in a society founded upon the principle of equal justice for all, it must be unacceptable for the meritorious plenary appeals of criminal defendants to be ignored in this way. This Court recently expressed a similar premise, in reaching the decision to amend the rules of appellate procedure. Amendment to Fla. Rules. Crim. Pro. 3.111(e), 3.800 and Fla. Rules App. Pro. 9.010(h), 9.140, and 9.600, 24 Fla. L. Weekly S530, at 531 (Fla. 11-12-99).

The appellate bench is not entirely untroubled by the arbitrary denial of facially valid requests for relief. For example, Judges Griffin and Harris joined in the dissent in Woodbury v. State, 730 So. 2d 354,359 (Fla. 5th DCA 1999). There, Judge Griffin wrote:

> Woodbury is serving a sentence based on a wrongful conviction while we argue the style points of his attorney. We, like Nero who fiddled while Rome burned, seem insensitive to the truly important happening going on around us: the trampling of the Fourth Amendment. When the trial judge himself asked the very question now raised on appeal, was he not

"fairly apprised" of the issue?

More recently, in Hugh v. State, 25 Fla. L. Weekly D453 (Fla. 5th DCA 2-18-00), Judge Harris wrote a lengthy special concurrence, again expressing concern that errors apparent from the record are being ignored.

Just as in Maddox, the district court here determined that an issue not preserved at trial, cannot be heard on appeal. The Petitioner's sentence is not illegal in the narrow sense of one that exceeds the statutory limit, Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995). However, it may be "unlawful", in the broader sense that it fails to comport with statutory or constitutional limitations, State v. Mancino, 714 So. 2d 429 (Fla. 1998). That is, departures without written reasons were, at the time of the petitioner's original sentence, procedurally barred. In any event, it is clear from the record in this case that there is no factual dispute. Therefore, the sentence was reviewable, because the error was apparent, and was raised along with an issue which had been preserved; i.e., the sufficiency of the evidence of a violation of probation. (A 3, 4). See, Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998), (Court may review unpreserved error when the court has jurisdiction through some other, preserved or fundamental, error.); and See, Bain v. State, 730 So. 2d 296,304 (Fla. 2d DCA 1999), (Appellate jurisdiction under Criminal Appeal Reform Act includes review of

unpreserved error in conjunction with review of preserved error.) The district court thus had jurisdiction to hear Petitioner's appeal of the departure sentence, according to Denson and Bain.

While the district could does not believe patent ineffective assistance equals to preservation, the district court here would presumably agree that the ineffective assistance of trial counsel is evident. That is, their conclusion that the ineffective assistance claim was a "guise", implies that the claim is supported by the record, and may have some merit. Therefore, the error ought to be corrected whether or not the appellate court has jurisdiction through other means, as Denson would require. Petitioner submits that with respect to the jurisdiction of the district courts, there should be no distinction between fundamental error, and error that is patent and serious. The Third District Court followed that course in Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), as a reasonable method of giving effect to the purpose of the Criminal Appeal Reform Act: to improve the efficiency of the appellate process, while maintaining fairness to the appellant.

In sum, it is not helpful to leave to the untrained appellant, the responsibility to detect and argue for the correction of serious sentencing errors, either through a claim of ineffective representation, or through a motion to correct his sentence. If a sentencing error passes unnoticed through the lower court, it should not, as a

consequence, be turned away from the appellate court and routed instead back to the *pro se* defendant. The interpretation of the Criminal Appeal Reform Act voiced in Maddox; i.e., the limitation of appellate jurisdiction, should be rejected. This court should reverse the decision of the Fifth District below, and remand with instructions that sentence be imposed under the guidelines.

CONCLUSION

Based on the foregoing argument, and the authorities cited therein, the Petitioner respectfully requests the decision of the Fifth District Court of Appeal be reversed, and this case remanded to the trial court for resentencing under the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Bryan Perry, DC# 109552, Liberty Correctional Institution, H.C.R. 2, Box 144, Bristol, Florida 32321-9711, on this ____ day of March, 2000.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
NOEL A. PELELLA
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