IN THE SUPREME COURT OF FLORIDA

CURTIS HARVEY,

Petitioner,

v. **CASE NO. 1D99-4629**

STATE OF FLORIDA,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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INITIAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Curtis Harvey was the defendant in the trial court, and the appellant before the District Court of Appeal, First District of Florida. He will be referred to in this brief as "petitioner," "defendant," or by his proper name.

Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses.

Filed with this brief is an appendix containing copies of the district court's original opinion of February 20, 2001, and opinion or rehearing dated May, 2000, as well as other pleadings pertinent to the case. Reference to the appendix will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

By information, it was alleged that the petitioner, on October 29, 1995, with premeditation, attempted to murder Serena Simmons Harvey by shooting her, and during the offense carried a firearm, a pistol, contrary to Sections 775.087, 777.04, and 782.04, Florida Statutes (1995)(I-5).

On November 12, 1996, the petitioner tendered and the court accepted a negotiated plea of guilty to the lesser offense of aggravated battery. The agreement provided the petitioner would be adjudged guilty and placed on community control for two years, followed by probation for eight years. Several special conditions were imposed, including one that the petitioner have no contact with the victim, who was then his wife. This disposition was under the sentencing guidelines. The victim, Ms. Harvey, was present during the plea proceedings and expressly agreed to the plea. It was mentioned she and the petitioner were then in the process of divorce. As a factual basis, the prosecutor recited that if the case went to trial the state would prove the petitioner caused the great bodily injury, or permanent disability or disfigurement to the victim. To avoid the three-year mandatory minimum sentence, the prosecutor deleted the reference to Chapter 775, Florida Statutes, in the information (I-7-15, II-46-65).

On September 2, 1999, the petitioner’s probation

supervisor filed an affidavit alleging the petitioner had breached the conditions of his probation in two respects: (1) changing his address without obtaining consent from his probation officer; and, (2) violating the “no contact” condition in that on August 20, 1999, the petitioner was at his ex-wife’s home (I-16-17). A warrant for the petitioner’s arrest was executed September 3, 1999 (I-18-19).

A violation of probation hearing was conducted October 19, 1999. At the conclusion of the hearing, the trial court found the petitioner did not violate the condition that he obtain the consent of his probation officer prior to changing residence. The Court did find the petitioner had violated the “no contact” condition (II-182-183).

A sentencing hearing was conducted November 5, 1999 (II-189). The trial court revoked the petitioner’s probation and sentenced him to nine years in state prison (I-22-34, II-189-227). The sentencing guidelines score sheet used at sentencing contained a total sentencing points of 120, which corresponded to a recommended range of sentence of 69 months to 115 months in prison (I-28-29).

Notice of appeal was timely filed December 3, 1999 (I-38), the petitioner was adjudged insolvent(I-37), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal.

On February 10, 2000, counsel for the petitioner filed

an *Initial Brief Of Appellant* pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 495 (1967). Seven days later, on February 10, 2000, the Court issued its decision in ***Heggs v. State***, 759 So.2d 620 (Fla. 2000), holding that Chapter 95-184, Laws Of Florida, which enacted changes to the 1995 sentencing guidelines under which the petitioner was sentenced, violated the single subject revision of Article III, Section 6, Constitution of the State of Florida.

In light of ***Heggs***, petitioner withdrew the "***Anders***" brief and on March 8, 2000, filed an *Amended Initial Brief Of Appellant* arguing the petitioner was entitled to be resentenced pursuant to ***Heggs***. The state filed its *Answer Brief Of Appellee* dated April 14, 2000, conceding error under ***Heggs***.

On May 11, 2000, the Court issued its decision in ***Maddox v. State***, 760 So.2d 89 (Fla. 2000).

On February 20, 2001, the District Court of Appeal, First District of Florida, issued its opinion in petitioner's case, ***Harvey v. State***, 26 F.L.W. D554 (Fla. 1st DCA Feb. 20, 2001)("***Harvey I***"). In essence, the district court relied upon ***Maddox*** and held petitioner had failed to preserve his single-subject argument under ***Heggs*** because neither trial nor appellate counsel sought relief in the trial court pursuant to Florida Rule Of Criminal Procedure

3.800(b)(A-1-9).

Petitioner filed a timely *Motion For Rehearing, Motion For Certification, Motion For Rehearing En Banc* on February 29, 2001 (A-10-19). The state filed a *Motion For Clarification* (A-20-22) dated March 2, 2001 that, while agreeing with the district court's analysis, pointed out that its concession of error was based upon the then "controlling authority" of ***Heggs*** and that the state "...has been following the rule of law announced in Maddox since its announcement [on May 11, 2000]"(A-21).

On May 1, 2001 the district court filed an opinion denying rehearing, rehearing en banc, and the state's request for clarification, but certifying the following two issues to this Court as questions of great public importance:

> WHETHER THE CONCEPT OF FUNDAMENTAL SENTENCING ERROR, AS DISCUSSED IN MADDOX V. STATE, 760 SO. 2D 89 (FLA. 2000), APPLIES TO DEFENDANTS WHO COULD HAVE AVAILED THEMSELVES OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO. 2D 1015 (FLA. 1999)?

and

> WHETHER AN APPELLANT IN THE FIRST DISTRICT COURT OF APPEAL, WHO COULD HAVE AVAILED HIMSELF OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE

> 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO. 2D 1015 (FLA. 1999), HAD AN OBLIGATION TO RAISE HIS SINGLE SUBJECT CHALLENGE TO THE 1995 SENTENCING GUIDELINES IN THE TRIAL COURT, DESPITE THE EXISTENCE OF ADVERSE PRECEDENT IN TRAPP V. STATE, 736 SO. 2D 736 (FLA. 1ST DCA 1999), IN ORDER TO LATER OBTAIN APPELLATE RELIEF BASED ON HEGGS V. STATE, 759 SO. 2D 620 (FLA. 2000).

Harvey v. State, 26 F.L.W. D1151(Fla. 1st DCA May 1, 2001)(on rehearing)("***Harvey II***")(A-23-31).

A *Notice To Invoke Discretionary Jurisdiction* was timely filed May 18, 2001 (A-32-33).

III. SUMMARY OF THE ARGUMENT

Issue I: The first question certified by the court below concerns whether the doctrine of fundamental sentencing error, where such an error can be corrected for the first time on appeal, still applies after Florida Rule Of Criminal Procedure 3.800(b) was modified effective November 11, 1999. Petitioner argues the answer to the question is "yes." ***Maddox*** was expressly limited to cases where the initial briefs were filed prior to November 11, 1999, thus the language pertaining to a "window period" is mere dicta. The appeal reform act specifically recognizes the doctrine of fundamental error and does not distinguish between trial and sentencing error. Thus, properly understood, ***Maddox*** does not support the district court's opinion in ***Harvey I***.

The Court's authority to regulate "practice and procedure" does not allow it to abrogate substantive rights granted by both the constitution and the legislature. Even if it was the intent of the court in ***Maddox*** to totally eliminate the doctrine of fundamental sentencing error, and the Court has authority to do so pursuant to its obligation to regulate "practice and procedure," the concept of fair notice embodied within the Due Process Clause requires that the "window" remain open until the date ***Maddox*** was decided, May 11, 2000.

Issue II: At the time petitioner filed his initial brief in the District Court of Appeal, First District, that Court had held that the 1995 revisions to the sentencing guidelines did not violate the single subject provision of the state constitution. All trial courts within the first district court absolutely bound by that holding. Thus, to require the petitioner in this case to first proceed to the trial court is nothing more than "legal churning" and required him to perform a futile and useless act. The answer to the second question certified in ***Harvey II*** is "no."

IV. ARGUMENT

ISSUE I:

WHETHER THE CONCEPT OF FUNDAMENTAL SENTENCING ERROR, AS DISCUSSED IN MADDOX V. STATE, 760 SO. 2D 89 (FLA. 2000), APPLIES TO DEFENDANT WHO COULD HAVE AVAILED THEMSELVES OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO. 2D 1015 (FLA. 1999)?

Petitioner contends that the answer to above question, the first of two certified by the district court in ***Harvey II***, is "yes". The standard of review is *de novo*.

In ***Maddox***, the Court was construing the effect the Criminal Appeal Reform Act ("Act:), Section 924.051, Florida Statutes(Supp. 1996), had upon various types of unpreserved sentencing errors. The Court ruled in ***Maddox*** that an unpreserved sentencing error can be corrected as fundamental error for the first time on direct appeal where the error is "both patent and serious." 760 So.2d at 99.

In ***Harvey I***, the district court recognized petitioner's sentence of nine years was imposed pursuant to a score sheet prepared under the 1995 guidelines recommending a presumptive sentencing range of 5.75 years to 9.58 years (A-2). That guidelines score sheet assessed 56 points for aggravated battery as the "primary offense" (I-28-29). Under ***Heggs***, however, petitioner is entitled to be resentenced

pursuant to the 1994 guidelines. Under the 1994 guidelines, aggravated battery corresponds to 42 points under "primary offense." This 14 point reduction results in a recommended sentencing range of 58.5 months to 97.5 months in prison. Thus, petitioner's present 9-year sentence (108 months) amounts to a departure sentence without the required written reasons. ***Maddox*** determined this to be a fundamental sentencing error. 760 So.2d at 106-108. Moreover, ***Heggs*** itself deems the error fundamental. *Accord:* ***State v. Johnson***, 616 So.2d 1 (Fla. 1993).

Without question, the sentencing error in petitioner's case is "fundamental" under both ***Heggs***, ***Johnson***, and ***Maddox***. The issue posed by the first certified question is whether even fundamental sentencing errors must be first presented to the trial court pursuant to Florida Rule Of Criminal Procedure in cases where the first appellate brief is filed on or after November 12, 1999, the date the Court issued its decision in ***Amendments To Florida Rules Of Criminal Procedure 3.111(e) And 3.800 And Florida Rules Of Appellate Procedure 9.020(h), 9.140, and 9.600***, 761 So.2d 1015 (Fla. 2000)(***"Amendments II")***. Here, the first appellate brief was filed February 10, 2000 (A-3).

Petitioner asserts the doctrine of fundamental sentencing error as defined in ***Maddox***, permitting such error to be corrected for the first time on appeal, has survived

the establishment of the right to file a motion in the trial court pursuant to Florida Rule Of Criminal Procedure 3.800(b)(2) prior to the filing of the first brief.

First of all, nothing in the ***Amendments II*** opinion itself suggests in the slightest that ***fundamental*** sentencing errors must always be raised via Rule 3.800(b)(2).

Secondly, ***Maddox*** itself recognizes that the doctrine of "fundamental error" has survived the Criminal Appeal Reform Act; indeed, it is expressly referenced in the statutory language:

> Section 924.051(3) specifically gives defendants the right to raise, and appellate courts the authority to correct, "fundamental error." The Act neither defines "fundamental error" nor differentiates between trial and sentencing error. It is certainly reasonable to assume that, rather than attempting to alter the definition of fundamental error as it evolved through case law, the Legislature intentionally deferred to the judicially created definition of "fundamental error."

760 So.2d at 95.

Maddox therefore expressly recognizes that "fundamental error" applies to both trial and sentencing errors and even the Appeal Reform Act allows parties to raise, and the courts to correct, fundamental errors. ***Maddox*** certainly does not ***hold*** that after the date of the ***Amendments II*** decision that a party must first raise fundamental sentencing errors in the trial court.

In point of fact, the Court in ***Maddox*** observed:

> In this opinion we address ***only*** the question of whether unpreserved sentencing errors should be corrected in those noncapital criminal appeals filed in the window period between the effect date of the Ace and the effective date of our recent amendment to rule 3.800(b)....

760 So.2d at 95, note 4 (emphasis supplied).

Thus, with all due respect to the Court, petitioner argues that to the extent certain language in ***Maddox*** appears to concern cases where the initial brief is filed after ***Amendments II*** was decided November 12, 1999, that language is mere dicta.

Appellant contends that ***Maddox***, properly understood, means that, even subsequent to ***Amendments II***, any type of error can be raised for the first time on appeal if fundamental, whether the error be fundamental trial or fundamental sentencing error.

To rule otherwise would effectively amend Section 924.051(3), Florida Statutes (Supp. 1996) as follows:

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

(emphasis supplied). The bracketed, emphasized language

above illustrates how the district court's ***Harvey I*** decision has amended the statute. The judiciary simply does not have constitutional authority to effect such an amendment.

The right of a citizen of Florida to appeal in a criminal case is grounded in the Florida Constitution; a citizen has a constitutional right to appeal in a criminal case. ***Amendments To The Florida Rules Of Criminal Procedure***, 696 So.2d 1103, 1105 (Fla. 1996)(“***Amendments I***”). The legislature is empowered to enact “substantive law,” which is that part of the law which creates, defines, and regulates rights, or that part of law which courts are established to administer, and it includes those rules and principles which fix and declare the primary rights of individuals. ***Haven Federal Savings & Loan Association v. Kirian***, 579 So.2d 730 (Fla. 1991). The Court’s constitutional authority to regulate “practice and procedure” does not allow the Court to abrogate or modify substantive law. ***State v. Garcia***, 229 So.2d 236 (Fla. 1969) and ***Julian v. Lee***, 473 So.2d 736 (Fla. 5th DCA 1985).

Here, the legislature has defined the parameters of the constitutional right to appeal by enacting the substantive law known as the Criminal Appeal Reform Act. As ***Maddox*** itself recognizes, the Act does not eliminate the doctrine of fundamental sentencing error and the courts have the power to correct such errors. With all due respect, the Court’s authority to regulate practice and procedure does not give it the power to unilaterally do away with the doctrine of fundamental sentencing error and declare that

even fundamental sentencing errors must be first raised via the changes to Rule 3.800(b)(2) made in ***Amendments II***.

Thus, to the extent dicta in ***Maddox*** tends to support what the district court has done in ***Harvey I***, such dicta simply cannot be squared with the separation of powers principles of the Florida Constitution.

Petitioner contends further that, even if the dicta in ***Maddox*** was intended to be construed in the manner the first district interpreted it in ***Harvey I***, petitioner argues that the window period should be deemed to remain open until May 11, 2000, the date ***Maddox*** was decided, rather than November 12, 1999, the date ***Amendments II*** was decided. This is required by the "fair notice" aspects of the Due Process Clause of both the state and federal constitutions. ***Rogers v. Tennessee***, ___U.S.___, 121 S.Ct. 1693, ___L.Ed.2d ___ (2001) and ***Buie v. City Of Columbia***, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

In both ***Buie*** and ***Rogers***, it was held that judicial abrogation of a legal doctrine by an appellate court decision violates the "fair warning" principle of the Due Process Clause and may not be given retroactive effect where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.

Here, nothing in either the Act or ***Amendments II*** placed the bench and bar on notice that ***fundamental*** sentencing

errors could not be corrected on direct appeal, but must instead be always raised under Rule 3.800(b)(2), especially since fundamental error was expressly referenced in the Act. At best, this did not occur until ***Maddox*** was decided May 11, 2000, with its language concerning a "window period," which was after petitioner in this case raised a ***Heggs*** issue in the district court.

Indeed, at the time petitioner filed his merit brief in the district court, it appeared to him that ***Heggs*** was directly on point, the error was fundamental, and ***Heggs*** allowed him to raise the issue for the first time on direct appeal. Not only was petitioner of this view, but the state was as well! As noted by the state in its *Motion For Clarification*, at the time the state conceded error, the state felt bound by ***Heggs*** and "has been following the rule of law ***announced*** in Maddox since its ***announcment*** [on May 11, 2000]"(A-21)(emphasis supplied). Both parties in this case were in effect blind-sided by ***Harvey I***, since it relies upon ***Maddox***, a case that did not exist at the time the briefs were filed in the district court in this case.

In Florida, the proposition that appellate courts have authority to correct fundamental sentencing errors that can be corrected for the first time on direct appeal goes back to at ***least*** to the 1959 decision of the Court in ***Stanford v. State***, 110 So.2d 1 (Fla. 1959)(dissenting opinion). In 1965,

the Court in ***Dallas v. Wainwright***, 175 So.2d 785 (Fla. 1965), held that where the defendant received a 30-year sentence where the statutory maximum was 20 years, it would be corrected via habeas corpus due to "fundamental error appearing on the face of the sentence which renders it void." ***Id***.

Thus, for at least forty years the doctrine of fundamental sentencing error, where the error can be corrected by an appellate court even if not preserved in the trial court, has part and parcel of the business of Florida appellate courts. Not until ***Maddox*** was decided was anyone on notice that even fundamental sentencing errors must now be raised via Rule 3.800(2)(b). To rule that the "window period" mentioned in ***Maddox*** closed November 12, 1999, is a violation of the Due Process Clause as constructed in ***Buie*** and ***Rogers***. In order to comply with the fair notice requirement, the window must remain open until May 11, 2000, the date of ***Maddox***, rather than November 12, 1999, the date of ***Amendments II.***

ISSUE II:

> WHETHER AN APPELLANT IN THE FIRST DISTRICT COURT OF APPEAL, WHO COULD HAVE AVAILED HIMSELF OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO. 2D 1015 (FLA. 1999), HAD AN OBLIGATION TO RAISE HIS SINGLE SUBJECT CHALLENGE TO THE 1995 SENTENCING GUIDELINES IN THE TRIAL COURT, DESPITE THE EXISTENCE OF ADVERSE PRECEDENT IN TRAPP V. STATE, 736 SO. 2D 736 (FLA. 1ST DCA 1999), IN ORDER TO LATER OBTAIN APPELLATE RELIEF BASED ON HEGGS V. STATE, 759 SO. 2D 620 (FLA. 2000).

Petitioner contends that the answer to the above question, the second issue certified in ***Harvey II***, is "no." The standard of review is *de novo*.

The district court in ***Harvey I*** has declined to correct petitioner's sentence, even though the state conceded error, and even though it is patently erroneous pursuant to ***Heggs v. State***, 759 So.2d 620 (Fla. 2000), because:

> Not only did appellant's trial counsel not file a postsentencing 3.800(b) motion raising his single subject claim in the trial court before he filed his notice of appeal, but appellate counsel also did not file a motion in the trial court, after the notice of appeal had been filed but before the initial Anders brief had been filed, raising appellant's Heggs claim. Thus, both appellant's trial counsel and his appellate counsel failed to follow the procedures of Florida Rule of Criminal Procedure 3.800(b) which the supreme court had envisioned from the

> beginning as providing to defendants a mechanism to correct sentencing error in the trial court at the earliest opportunity.

(A-7).

In so ruling, petitioner contends the court in ***Harvey I*** has failed to consider several matters.

First of all, the court's suggested remedy, a Rule 8.800(2)(b) filed in the trial court either by trial or appellate counsel, is wholly illusory. This is true because of the practical effect of the decision in ***Trapp v. State***, 736 So.2d 736 (Fla. 1st DCA 1999), *quashed*, ***Trapp v. State***, 760 So.2d 924 (Fla. 2000), had on petitioner's case, in light of the ***Harvey I***.

On June 17, 1999, the district court in ***Trapp*** held that Chapter 95-184, Laws Of Florida, did ***not*** violate the single-subject rule of the state constitution. ***Trapp*** controlled the law in the first district until ***Heggs*** was decided on February 17, 2000. All circuit judges in the first district were bound by ***Trapp*** until February 17, 2000. *See* ***Pardo v. State***, 596 So.2d 665 (Fla. 1992).

Therefore, at the time petitioner was sentenced in this case, it would have been entirely useless and futile for his counsel to file a Rule 3.800(b) motion in the trial court, because the trial court was bound by ***Trapp***. Likewise, from the time the notice of appeal was filed until the time the undersigned filed petitioner's initial brief on February 10,

2001, it would have been entirely useless and futile for the undersigned to seek relief in the trial court for exactly the same reason, namely, the trial court would have had no other choice but to follow ***Trapp***. Yet the district court has affirmed in petitioner's case because trial counsel and/or the undersigned failed to file a motion in the trial court that the sentencing judge would have ***no*** choice but to deny.

It is well-established that a court should not require the performance of a useless act. *See* ***Howard v. State***, 616 So.2d 483 (Fla. 1st DCA 1993)(the law does not require a futile or useless act) and ***Beckwith v. State***, 386 So.2d 836 (Fla. 1st DCA 1980)(the law does abhor a useless act). ***Harvey I*** is in conflict with this principle.

Contrary to the district court's view, to have proceeded first in the trial court in petitioner's case would not have resulted in the correction of the sentencing error at the earliest opportunity. The "earliest opportunity" to have the error corrected in this case could not, given ***Trapp***, arise until ***Heggs*** was decided February 17, 2000; petitioner's amended brief based upon ***Heggs*** was filed March 8, 2000.

Secondly, the district court in ***Harvey I*** has misapprehended or failed to consider the nature and depth of the error complained of. This is not a mere sentencing error or guidelines score sheet error. Here, the error stems from

the fact that Chapter 95-184, Laws Of Florida, in unconstitutional in its entirely; the provision is invalid on its face. This Court has repeatedly held that the facial validity of a statute can be raised for the first time on appeal if the error is fundamental. ***State v. Johnson***, 616 So.2d 1 (Fla. 1973) and ***Trushin v. State***, 425 So.2d 1126 (Fla. 1982). *See also* ***Harris v. State***, 655 So.2d 1179 (Fla. 1st DCA 1995). The error in petitioner's case was deemed fundamental in ***Heggs***.

Petitioner argues that nothing in ***Maddox v. State***, overrules either ***Trushin*** or ***Johnson***. Because the error is fundamental and involves the facial invalidity of Chapter 95-184, Laws Of Florida, it was proper for petitioner to raise it for the first time on appeal.

That the error involves the facial invalidity of a chapter law gives rise to yet another reason why the requirement to first proceed in the trial court would have been futile, useless, and illusory. A trial court decision on the constitutionality of a statute is reviewed *de novo* because it presents a pure issue of law; the appellate court is not required to defer to the judgment of the trial court. ***State Department Of Insurance v. Keys Title & Abstract Company***, 741 So.2d 599, 601 (Fla. 1st DCA 1999), *review denied*, 770 So.2d 158 (Fla. 2000). Petitioner would have gained nothing by proceeding in the trial court because the

trial court was required to deny the motion because of ***Trapp***, and the district court would have reviewed the issue *de novo* on appeal.

In ***Harvey II***, the district court pointed out the procedural history of ***Heggs*** and ***Trapp***. Because the issue was pending in the Court at the time his initial brief was filed, the court in ***Harvey II*** concluded that it would not have been futile to have proceeded first via Rule 3.800(b)(2) (A-24-27).

In response, petitioner contends it matters not what was going on in either this Court or in other districts because the bottom line is that, under ***Pardo***, in light of ***Trapp*** any circuit judge within the first district was ***required*** to deny the motion. Under the circumstances the requirement that petitioner file a motion that was required to be denied is a classic example of "legal churning." ***See Eure v. State***, 764 So.2d 798 (Fla. 2d DCA 2000) and ***Mizell v. State***, 716 So.2d 829 (Fla. 3d DCA 1998)(court granted relief to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves do the short).

The district court's reliance upon ***Espinosa v. State***, 626 So.2d 165 (Fla. 1993) and ***Beltran-Lopez v. State***, 626 So.2d 163 (Fla. 1993)(A-27), is misplaced. Both of those cases are capital cases directly appealable to this Court. As such, they do not involve the rule of ***Pardo*** that trial judges are bound by the direct court decision in their respective jurisdictions.

Secondly, both ***Espinosa*** and ***Beltran-Lopez*** are cases dealing with a jury instruction on an aggravating factor in the death penalty statute. Both cases held that the jury instruction issues were not properly preserved and, even if they had been, the errors were harmless. In other words, despite the ruling that the issue was not preserved, the Court nevertheless reached the merits.

Here, by contrast, petitioner's case presents issues concerning the constitutional validity of a statute which the Court in ***Heggs*** has deemed to be fundamental error. ***Espinosa*** and ***Beltran-Lopez*** do not concern either fundamental error or the constitutional validity of a statute. The answer to the second certified question is "no."

V. CONCLUSION

Based upon the foregoing analysis, arguments, and authorities, petitioner urges the Court to answer the first certified question "yes," and the second certified question "no." Petitioner requests the Court to quash ***Harvey I*** and ***Harvey II***, vacate his sentence, and remand the cause to the trial court with directions to resentence petitioner under the 1994 guidelines as required by ***Heggs***.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, FL 32301, and a copy has been mailed to Curtis Harvey, DOC# J03161, Baker Corr. Inst., P. O. Box 500, Sanderson, FL 32087, on this ____ day of May, 2001.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font require- ments of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
ASSISTANT PUBLIC DEFENDER
FLA. BAR #230502
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER