Unpreserved Issues in Criminal Appeals

by Richard J. Sanders

This article addresses the problem of unpreserved issues in appeals brought by criminal defendants. This problem differs from the analogous problem in other types of appeals. Criminal defendants have constitutional rights other litigants do not, most notably the right to effective assistance of counsel. The opposing party (the state) has ethical obligations beyond those of ordinary litigants; such obligations restrict the state's ability to "push the edge of the envelope," or take advantage of weak opposing counsel, in its trial tactics. Criminal appeals are virtually automatic and, for the most part, publicly financed. Collateral relief is more readily available and more often used; again, the costs are borne almost entirely by the public. Thus, society has significant interests in criminal defense appeals that it does not have in other appeals. Finally, the consequences of losing in the trial court are qualitatively different for criminal defendants.

The general rules of preservation may not be applied to criminal defense appeals without regard to these differences. The following hypothetical opinion provides perspective:

> Appellant challenges his conviction for first degree murder. The record shows prejudicial error occurred at trial. However, since the issue was not preserved, we affirm, without prejudice to appellant's right to seek relief under rule 3.850.

The author is aware of no opinions like this in Florida law. Indeed, one cannot imagine such an opinion. Although there is no way to prove it, it seems likely that, if an appellate court is convinced from the record that prejudicial error occurred, that court will find a way to reverse, either by loosening the preservation rule[1] or by fitting the case within one of its exceptions.

> Florida courts recognize three exceptions [to the general rules of preservation]: fundamental error; ineffective assistance of trial counsel; and cumulative error.

Florida courts recognize three such exceptions: fundamental error, ineffective assistance of trial counsel, and cumulative error. Although these three developed separately, they should be (and, at least implicitly, are being) blended into a single rule: Appellate courts should address the merits of the issue if the record is sufficient to allow the court to do so. The record is sufficient if 1) the issue was preserved or 2) if unpreserved, the record is sufficient to allow the court to determine that a) error did occur and b) there was no legitimate tactical reason for defense counsel's failure to preserve the issue. If conditions a) and b) are met, the court should reverse if the error was prejudicial.

If it is clear from the record that prejudicial error occurred, it is the appellate court's *duty* to reverse, in order to vindicate the defendant's due process right to a fair trial. The label applied to the legal basis for reversal is irrelevant; what is important is the determination that is clear from the record that prejudicial error occurred.

The rule just proposed is not a new rule. Rather, the historical development of the law in this area shows this is the existing rule, although it has not yet been fully articulated.

Fundamental Error

"[Florida] courts have struggled to establish a meaningful definition of 'fundamental error' that would be predictive as opposed to descriptive."[2] Over the years, the Florida Supreme Court has offered several definitions of fundamental error, including: "[error which] goes to the foundation of the case"; "error which reaches down into the validity of the trial itself"; and error as a result of which "the interests of justice present a compelling demand for its application."[3]

This problem was fully exposed when the courts tried to apply the concept of fundamental error to the ever-changing complexities of Florida sentencing laws.[4] This sentencing problem helped prompt the

passage of the 1996 Criminal Appeals Reform Act (CARA). CARA generated a great deal of ferment and conflict in the district courts, on such issues as legislative control over both the district courts' jurisdiction and the rules appellate courts must apply when deciding criminal appeals.[5] These cases also caused courts to reexamine the problem of unpreserved issues, and the role of appellate courts, in criminal appeals.

In two recent cases, the Florida Supreme Court resolved the separation of powers issues by reaffirming judicial authority in these areas and interpreting CARA as merely codifying existing law. With respect to the role of appellate courts, the Supreme Court laid the groundwork for the rule proposed here.

The first CARA case is *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999), which held that CARA "[did not] abrogate [pre-CARA] harmless error analysis" but rather merely codified existing law.[6] *Id.* at 538. This conclusion was reached as follows: With respect to "constitutional errors," U.S. Supreme Court precedent requires a harmless error test that apparently conflicts with CARA; CARA cannot override federal constitutional law, so it must be interpreted in a manner consistent with federal law; there is no meaningful distinction between constitutional error and nonconstitutional error in this context because even nonconstitutional errors "impact[ ] the defendant's right to a fair trial and therefore implicate[ ] a defendant's basic due process rights"; thus, the pre-CARA harmless error rule still applies in *all* cases.[7] The Court also said:

> [E]nsuring that criminal trials are free from harmful error [is] an essential judicial function that serves to protect a defendant's constitutional right to a fair trial . . . free of harmful error
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> [Appellate courts have] the undeniable obligation . . . to safeguard a defendant's right to a fair trial
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> [T]he Legislature cannot relieve the appellate courts of their independent and inherent obligation to assess the effect of the error on the verdict
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> [A]n independent harmless error review . . . is . . . critical to the appellate function . . . .[8]

Goodwin identified the policy concerns of the harmless error rule as

> "(1) promoting public trust and confidence by preserving the State's interest in the finality of verdicts free from harmful error; . . . (2) protecting the citizen's right to a fair trial by ensuring that no conviction will be affirmed unless . . . there is no reasonable possibility that the error affected the verdict; (3) reaffirming appellate courts' obligation not to reverse for technical or harmless error; and (4) providing an incentive on the part of the State . . . to refrain from causing error . . . ."[9]

Finally, the Court also said that "[o]nly when the defendant . . . demonstrat[es] the existence of *preserved* error does the appellate court engage in . . . harmless error analysis. If the error is . . . unpreserved, the conviction can be reversed only if the error is 'fundamental.'"[10]

The Court did not amplify this latter assertion. The inference is that courts should not engage in harmless error analysis if the issue is unpreserved. But harmless error analysis comes into play only after the court determines error occurred. Whether it is clear from the record that error occurred, and whether the error was harmless, are distinct questions. The lack of preservation may make it impossible to tell whether error occurred; but once error is discovered, the lack of preservation should not modify the prejudice inquiry. If defendants have a constitutional right to a fair trial, and appellate courts are obliged to protect that right, why is the same harmless error analysis not applied to unpreserved errors? And what takes its place?

Thus, although *Goodwin* did not directly address the problem of unpreserved issues, some of its language touches on the subject.

The second CARA case is *Maddox v. State*, 760 So. 2d 89 (Fla. 2000), which addressed the issue of fundamental error in sentencing. The district courts reached conflicting conclusions regarding the effect CARA had on the concept of fundamental sentencing error.[11] In *Maddox*, the Fifth District concluded there was no longer any such thing as fundamental sentencing error; all unpreserved sentencing issues must be raised in postconviction proceedings.[12] The Supreme Court in *Maddox* first concluded that, in enacting CARA, "the Legislature intentionally deferred to the judicially created definition of 'fundamental error.'"[13] Although anticipating that new Rule 3.800(b) "should eliminate the problem of unpreserved sentencing errors," the court reaffirmed the recognition of fundamental sentencing error for those defendants in the pre-3.800(b) "window period":

> The reason that courts correct [unpreserved] error as fundamental . . . is not to protect the interests of a particular aggrieved party, but rather *to protect the interests of justice itself*. [Failing to recognize fundamental sentencing error during the pre-rule 3.800(b) "window period"] would neither advance judicial efficiency nor further the interests of justice . . . .
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> [F]ailing to review certain serious sentencing errors would undermine the fairness of the judicial process . . . . [R]igid adherence to the contemporaneous objection rule [does not] always serve the goal of judicial economy . . . .
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> Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal.
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> [S]hifting to . . . postconviction motions [does not] advance[] the goal [of judicial efficiency] . . . .
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> Another potential problem [is] defendants . . . will not necessarily be afforded counsel during collateral proceedings . . . .[14]

Shortly after *Maddox*, fundamental error was also discussed in *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000), which addressed that issue in closing arguments in civil cases. Noting that the fundamental error doctrine addresses "the overarching concern that a litigant receive a fair trial and that our system operate so as to deserve *public trust and confidence*," *Murphy* stated that fundamental error has occurred if the closing argument "so damaged the fairness of the trial that the public's interest in

our system of justice requires a new trial."[15]

It is not clear whether these new definitions of fundamental error improve on prior definitions. "The interests of justice" and "public trust and confidence" do not provide an objective standard. Surely, the court is not suggesting that fundamental error will be found only if the public is *actually aware* of the case on appeal, and is so troubled by it that failure to reverse will cause a public outcry. Rather, the test must be more like the following: "If the public knew what happened in this case, they would think it unjust if the court did not reverse because of nonpreservation." But are we to assume the "public" has some awareness of legal principles and their policy rationales? Many people would have no qualms if courts refused to address some unpreserved issues. Suppression issues, both Fourth and Fifth Amendment, provide examples. Many people are outraged that courts exclude perfectly good evidence, including confessions, because of "technicalities" in ancient constitutional provisions; these people will not be upset if defendants lose their appeals on such issues as a consequence of procedural default (indeed, one technicality negating another may strike them as justice of its own kind, thereby affirming their belief in the system). Ardent viewers of shows like *L.A. Law* and *Ally McBeal* will see no harm in closing arguments courts find outrageous; indeed, they may find the real thing tame and boring by comparison. What's wrong with calling the defendant a scumbag; he is, isn't he?

And if the "public" is to be presumed to be "legally savvy" (*i.e.*, sophisticated enough to recognize both substantive and procedural injustice, and that appellate courts are often more concerned with the latter), does this mean the fundamental error test now hinges on whether reasonably informed lawyer-like minds would lose confidence in the system if the appellate court did not reverse? How is this different from standard harmless error analysis, in which the appellate court (presumably, a sample of reasonably informed lawyer-like minds) must reverse if it "cannot say beyond a reasonable doubt that the error did not affect the verdict . . . ."?[16] The same basic policy considerations motivate both the harmless error rule and the fundamental error doctrine. Won't public confidence in the system be lost if courts affirm convictions on nonpreservation grounds even though the record shows there is a reasonable doubt about whether the trial was fair?

And why is the public's interest more weighty that the defendant's? Why is that individual's interest insufficient to merit the appellate court's attention? Isn't it in the public's interest to see that *no one* is unfairly convicted, which means the public has the same interest in every case? Yet *Maddox* and *Murphy* indicate that there may be some appeals in which the record is sufficient to establish prejudicial-but-unpreserved error, yet appellate courts need not grant relief because that failure will not cause any loss of public confidence. How one might identify such cases is unclear.

Individually, *Goodwin* and *Maddox* leave serious questions unanswered. However, read together, they support the test proposed above. If the defendant has a constitutional right to a fair trial; and appellate courts must ensure that right is protected; and neither judicial economy nor fairness is served by automatically funneling identifiable unpreserved issues into postconviction proceedings; and public confidence will be diminished if courts fail to correct identifiable prejudicial error at the first opportunity, then courts must address unpreserved issues if they can, *i.e.*, if the record is sufficient to allow them to do so.[17]

Under this view, fundamental error does not refer to a particular subset of substantive issues that appellate courts will address even though unpreserved. Rather, funda-

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mental error is simply the label when appellate courts reverse despite the fact that the harmful error was unpreserved.[18]

Ineffective Assistance of Counsel

Unpreserved ineffective assistance claims generally cannot be raised on direct appeal because they usually involve questions of fact that are unresolved in the record (particularly the question of defense trial strategy). However, such issues may be raised if "the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue."[19]

There are two components to an ineffective assistance claim: "deficient performance" and "prejudice."[20] Ineffectiveness will be apparent on the face of the record only if both of these elements may be determined by the existing record.

The prejudice component of the ineffectiveness claim should not be troublesome on direct appeal. Appellate courts routinely decide whether errors were harmless.

A question may arise regarding whether the prejudice component is the same in both an ineffectiveness claim and standard harmless error analysis. The harmless error cases use the expression "a reasonable possibility that the error affected the verdict."[21] The ineffectiveness cases invoke "a reasonable probability that . . . the result . . . would have been different."[22] It is not clear whether this subtle shift in language is a substantive shift.[23]

The prejudice analysis should be the same. If we phrase the ineffectiveness claim as "failure to preserve the issue," then the prejudice inquiry would require a determination whether the outcome would have been different had counsel preserved the issue. To determine this, we must assume the issue was preserved and apply standard harmless error analysis; this is the only way we can see what was lost by the failure to preserve. Thus, the prejudice inquiry in ineffective assistance claims should be the same as in standard harmless error analysis.

This underscores the point made earlier: With respect to the prejudice component, there is (or should be) no meaningful distinction between "preserved and harmful error" and "fundamental error." The lack of preservation does not change the harmless error analysis. Rather, it only imposes a threshold requirement bearing on that analysis: Is the existing record sufficiently complete to allow the appellate court to address the merits?

The deficient performance element is the difficult one here. Ineffectiveness claims can be raised on direct appeal only if the record is sufficient to determine there was no legitimate tactical reason to explain the alleged deficiency. Given the wide latitude for trial strategy for defense counsel, these would be rare cases.[24]

Although unpreserved claims rarely succeed in Florida, the district courts are becoming more receptive to such claims.[25]

There is no meaningful distinction between fundamental error and ineffective assistance in this context. Inherent in any finding of fundamental error is a finding that there was no legitimate tactical reason for failing to raise the issue. This does not necessarily mean counsel was deficient; deficient performance also requires a showing that a reasonably competent lawyer would have raised the issue. But it is hard to imagine a set of facts in which a court would find an issue to be fundamental error but also conclude that trial counsel was not deficient for failing to raise it.[26]

Goodwin and *Maddox* both stressed the importance of the appellate role in protecting the defendant's constitutional right to a fair trial. That right includes effective assistance of counsel. If it is clear from the existing record that right was prejudiced because trial counsel was ineffective, the appellate court should reverse. Whether the basis for that reversal is called "ineffective assistance" or "fundamental error" is insignificant.[27]

Cumulative Error

Under "cumulative error," unpreserved errors are attached to preserved errors and the cumulative effect of all the errors is considered when addressing the issue of harmlessness. Reversal is warranted if, as a result of the cumulative effect of the errors, "the integrity of the judicial process [was] compromised and the resulting convictions . . . irreparably tainted"[28] or "[the defendant] was denied the fundamental right to due process and the right to a fair trial."[29] Note the similarity in language to *Goodwin's* discussion of harmless error and *Maddox's* discussion of fundamental error.

Recent cases relying on this theory usually involve trials riddled with prosecution misconduct, generally in closing argument.[30] However, reversal is granted, not as punishment for the prosecutor, but because the trial was fundamentally unfair.[31] Further, prosecutorial misconduct is not a sine qua non; cumulative error may be found as to other combinations of issues as well.[32]

These cases also recognize that prosecutors have ethical obligations beyond those of other trial attorneys; obligations that are, in effect, part of a defendant's constitutional right to a fair trial. That same constitutional right imposes greater responsibilities on trial courts to step in on their own, even without defense objections. These cases recognize that there are at least three lawyers involved in criminal prosecutions, and all have some duties to ensure that the trial is fair.[33]

Since the preserved error need not be harmful in itself, this basis for raising unpreserved issues blends into the other two bases just discussed. Indeed, if the preserved issue need not be harmful itself, presumably unpreserved issues could be attached to *any* preserved issue, regardless of its lack of independent weight. These cases could easily be decided as "straight" fundamental error or on ineffectiveness grounds; the state misconduct noted in the cases is so obvious that defense

counsel's failure to object should be facially apparent deficient performance.[34]

In sum, these three lines of cases all address the same problem from different perspectives. The Constitution imposes certain procedural requirements in criminal cases, and trial judges, prosecutors, and defense counsel all bear some responsibility in ensuring that those requirements are met. Appellate courts' duty is to ensure the trial participants fulfilled their duties. If it is clear from the record that one or more of the trial participants failed, and the defendant was prejudiced thereby, the appellate court must reverse.

Purposes of the Preservation Rule and Defense Criminal Appeals

The proposed rule is consistent with the purposes of the preservation rule. The basic purposes of the preservation rule are: 1) promoting judicial economy by encouraging the correction of errors at the earliest opportunity, thus eliminating the need for appeals and retrials, and 2) giving opposing parties a chance to cure evidence deficiencies in their case, thus promoting the public policy of having cases fully litigated and resolved on their merits, rather than on counsel's negligent failure to produce available relevant evidence.[35] The rule is a functional rule designed to achieve certain practical results; it creates no substantive rights, and it is not to be blindly followed without regard to its purposes.[36]

As noted above, criminal defense appeals are qualitatively different from other appeals. The purposes of the preservation rule must be assessed in light of those differences. The judicial economy purpose must be considered in light of the facts that 1) criminal defense appeals are virtually automatic and essentially cost-free to defendants; 2) as long as appellate courts recognize *some* method of raising unpreserved issues, appellate counsel will try to raise them; and 3) if unaddressed on appeal, unpreserved issues may resurface as ineffective assistance claims in postconviction proceedings (which are also virtually automatic and cost-free to defendants). Given these factors, appellate courts' failure to "correct errors that can safely be identified on direct appeal" will "neither advance judicial efficiency nor further the interests of justice."[37] The availability of postconviction relief is hardly a satisfactory alternative; aside from its untimeliness, it is available only if defendants are aware of the issue and are capable of raising it themselves.

The "cure the evidentiary defect" purpose of the preservation rule is also fully protected by the proposed rule. Unpreserved errors may be addressed only if it is clear that error occurred. If there was no objection to the evidentiary defect identified on appeal, then the record will generally be insufficient to determine the merits of the issue; since there was no objection, we do not know whether the state had evidence available to cure the defect.

Conclusion

To determine if it should address the merits of an unpreserved issue in a criminal defense appeal, the appellate court should ask two questions: Can we determine from the record both that 1) error occurred and 2) there was no legitimate tactical reason for trial counsel's failure to preserve the issue? The proposed rule is not a new rule; it is the existing rule. Express adoption of this rule would cause no great rush of new unpreserved issues. Criminal appeals are almost invariably handled by experienced public defenders, who know (or quickly learn) what types of issues may succeed. Given that there are three existing bases for raising unpreserved issues, it is intuitively clear that unpreserved issues of arguable merit are already being raised under one or more of those three headings. Express adoption of the pro-

posed rule would simply put the existing problem in better perspective, by focusing on the crucial factors courts must consider before addressing unpreserved issues. ❑

[1] *Compare, e.g., Woods v. State*, 733 So. 2d 980, 984 (Fla. 1999), *with R.S. v. State*, 639 So. 2d 130, 131 (Fla. 2d D.C.A. 1994).

[2] *Denson v. State*, 711 So. 2d 1225, 1229 (Fla. 2d D.C.A. 1998).

[3] *Maddox v. State*, 760 So. 2d 89, 95–96 (Fla. 2000) (citations omitted).

[4] *See id.* at 99–113 (discussing cases).

[5] *See id.* at 94, 101–10 (collecting cases).

[6] *Goodwin v. State*, 751 So. 2d 537, 538 (Fla. 1999).

[7] *Id.* at 543.

[8] *Id.* at 538–43.

[9] *Id.* at 546.

[10] *Id.* at 544 (emphasis added).

[11] *See Maddox*, 760 So. 2d at 93–94 (collecting cases).

[12] *Id.* at 89.

[13] *Id.* at 95.

[14] *Id.* at 94, 98 (emphasis added) (citations omitted).

[15] *Murphy*, 766 So. 2d at 1026, 1030 (emphasis added).

[16] *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986).

[17] *See Ward v. State*, 765 So. 2d 299, 302–03 (Fla. 5th D.C.A. 2000) (Harris, J., concurring specially); *Hugh v. State*, 751 So. 2d 718, 719–22 (Fla. 5th D.C.A. 2000) (Harris, J., concurring and concurring specially).

[18] Some district courts say "[t]he harmless error doctrine can be applied to certain cases of fundamental error." *Brower v. State*, 684 So. 2d 1378, 1380 (Fla. 4th D.C.A. 1996), *quashed on other grounds*, *State v. Brower*, 713 So. 2d 1005 (Fla. 1998). Such statements are erroneous, however. As authority, *Brower* cites *State v. Clark*, 614 So. 2d 453 (Fla. 1992). Yet, *Clark* does not support this proposition. These district court cases appear to be confusing the distinct concepts of "fundamental error" and "fundamental right." A fundamental right may be waived; denial of a fundamental right is not necessarily fundamental error. *Clark* does not say that errors may be both fundamental and harmless; harm is part of the definition of fundamental error. *See id.* at 454 (Shaw, J., dissenting). Harmless errors do not "so damage[] the fairness of the trial that the public's interest in our system of justice requires a new trial." *Murphy*, 766 So. 2d at 1030. Neither "the interests of justice" nor "the fairness of the judicial process" would be "undermine[d]," *Maddox*, 760 So. 2d at 98, if appellate courts fail to address unpreserved harmless errors.

A similar error occurred in *Anderson v. State*, 780 So. 2d 1012 (Fla. 4th D.C.A. 2001), which held that fundamental error "is subject to the harmless error rule. *See Brown v. State*, 501 So. 2d 1343 (Fla. 3d D.C.A. 1987), *opinion partially approved on this ground and partially quashed on other grounds*, *Brown v. State*, 521 So. 2d 110 (Fla. 1988)." *Id.* at 1014–15. However, while it is accurate to cite the *Brown* district court opinion for this point, 501 So. 2d at 1344, it is not accurate to say the Florida Supreme Court "approved on this ground." *See* 521 So. 2d at 111–12.

[19] *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

[20] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[21] *DiGuilio*, 491 So. 2d at 1139.

[22] *Strickland*, 466 U.S. at 693.

[23] *But see Brown v. State*, 755 So. 2d 616, 623 (Fla. 2000) (indicating analysis may be different).

[24] *See Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d D.C.A. 2002); *Eure v. State*, 764 So. 2d 798, 801 (Fla. 2d D.C.A. 2000); *Rios v. State*, 730 So. 2d 831, 832 n.2 (Fla. 3d D.C.A. 1999); *Reaves v. State*, 669 So. 2d 352, 352 n.1 (Fla. 4th D.C.A. 1996).

[25] The only Florida Supreme Court finding of ineffectiveness on direct appeal is in a death penalty case in which trial counsel had a conflict of interest because he represented both the defendant and a codefendant who entered a plea and testified for the state. *Foster v. State*, 387 So. 2d 344 (Fla. 1980). The district courts have found ineffectiveness on direct appeal in the following circumstances: failing to file a meritorious motion to suppress evidence in a violation of probation proceeding, *Lambert v. State*, 27 Fla. L. Weekly D640 (Fla. 2d D.C.A. March 20, 2002); failing to file a meritorious motion to dismiss in a drug trafficking case, *Johnson v. State*, 796 So. 2d 1227 (Fla. 4th D.C.A. 2001); failing to request proper jury instructions on the crucial issue at trial and presenting the case to the jury in a manner which essentially conceded guilt, *Forget v. State*, 782 So. 2d 410 (Fla. 2d D.C.A. 2001); erroneously requesting jury instructions on a "lesser included offense" which was not a lesser offense but rather carried the same penalty as the charged offense, when defendant is convicted of that "lesser" offense, *Lee v. State*, 779 So. 2d 607 (Fla. 2d D.C.A. 2001); failing to object to improper comments in the state's closing argument, *Eure v. State*, 764 So. 2d 798 (Fla. 2d D.C.A. 2000); *Ross v. State*, 726 So. 2d 317 (Fla. 2d D.C.A. 1998); failing to object to improper cross-examination of the defendant regarding his prior criminal record, *Rodriguez v. State*, 761 So. 2d 381 (Fla. 2d D.C.A. 2000); failing to object to an illegal sentence, *Williams v. State*, 731 So. 2d 99 (Fla. 3d D.C.A. 1999), *quashed on other grounds*, 759 So. 2d 680 (Fla. 2000); *Mizell v. State*, 716 So. 2d 829 (Fla. 3d D.C.A. 1998); erroneously stipulating to the jury that the defendant qualified as a violent career criminal, *Rios v. State*, 730 So. 2d 831 (Fla. 3d D.C.A. 1999); and a series of deficiencies, including: untimely filing a witness list, which deprived the defendant of the witnesses; failing to accept the trial court's offer to strike for cause an admittedly biased juror; and "104 instances [of] fail[ing] to object to improper questions or improper comments by the prosecutor." *Gordon v. State*, 469 So. 2d 795, 797 (Fla. 4th D.C.A. 1985).

[26] *See Corzo*, 806 So. 2d at 645 n.2 (noting the "high correlation between errors that may be corrected as fundamental error . . . and errors that may be corrected as ineffective assistance of counsel on direct appeal").

[27] *See Ross*, 726 So. 2d at 319; *Williams v. State*, 507 So. 2d 1122, 1125 n.8 (Fla. 5th D.C.A. 1987); *Jenkins v. State*, 747 So. 2d 997, 999–1000 (Fla. 5th D.C.A. 1999) (Harris, J., dissenting); *compare State v. Bodden*, 756 So. 2d 1111 (Fla. 3d D.C.A. 2000), *with Robinson v. State*, 462 So. 2d 471 (Fla. 1st D.C.A. 1984).

[28] *Ruiz v. State*, 743 So. 2d 1, 8 (Fla. 1999).

[29] *State v. Townsend*, 635 So. 2d 949, 959–60 (Fla. 1994).

[30] *E.g., Martinez v. State*, 761 So. 2d 1074 (Fla. 2000); *Ruiz*, 743 So. 2d at 8.

[31] *E.g., Henry v. State*, 743 So. 2d 52, 54–55 (Fla. 5th D.C.A. 1999) (Harris, J., concurring specially).

[32] *E.g., Townsend*, 635 So. 2d at 959–60.

[33] *E.g., D'Ambrosio v. State*, 736 So. 2d 44, 46–47 (Fla. 5th D.C.A. 1999) (collecting cases); *Hugh*, 751 So. 2d at 719–22 (Harris, J., concurring specially); *Henry*, 743 So. 2d at 54 (Harris, J., concurring specially).

[34] *See Bell v. State*, 723 So. 2d 896, 897 (Fla. 2d D.C.A. 1998); *see also In Re Amendments to Fla. R. Crim. P. – Rule 3.112*, 759 So. 2d 610, 616 (Fla. 1999) (Lewis, J., concurring specially).

[35] *Murphy*, 766 So. 2d at 1016-17; *State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984); *Pinder v. State*, 396 So. 2d 272, 273 (Fla. 3d D.C.A. 1981).

[36] *See Rhoden*, 448 So. 2d at 1016; *Williams*, 516 So. 2d at 976.

[37] *Maddox*, 760 So. 2d at 94, 98.

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