

The Florida Bar, Criminal Law Section

CRIMINAL LAW UPDATE 2007

APPELLATE UPDATE

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by

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A. PRESERVATION OF ERRORS FOR APPEAL

1. Overview: Failure to object is the easiest and most frequently cited

basis to affirm a conviction. It forecloses most state and federal postconviction relief. Thus, object contemporaneously, with specificity, and fully (including state and federal constitutional grounds where appropriate). For an excellent list of practical suggestions, see James T. Miller, *Giving Nine Lives to a Busy, Overworked Criminal Defense Attorney*, Florida Defender, Vol. 17, No. 4 at 45-7 (Winter 2005).

2. Object Contemporaneously to error: Unless instructed otherwise by the court, don't delay to avoid interrupting the proceedings or your opponent. At the very least, object and reserve a motion or full argument for later.

Arbelaez v. State, 898 So.2d 25, 47 (Fla. 2005) (failure to raise contemporaneous objection to improper closing argument waives review);

Clark v. State, 363 So.2d 331, 332 (Fla. 1978);

Caldwell v. State, 920 So.2d 727, 730-1 (Fla. 5th DCA 2006) (rationale underlying contemporaneous objection rule); *Wooten v. State*, 904 So.2d 590, 592 (Fla. 3rd DCA 2005) (same); *Crumbley v. State*, 876 So.2d 599, 601 (Fla. 5th DCA 2004);

Woods v. State, 905 So.2d 246 (Fla. 4th DCA 2005) (error preserved where, though counsel inexplicably failed to hear improper testimony, counsel moved for mistrial several hours later as soon as he learned of improper comment, before jury retired);

Cole v. State, 866 So.2d 761 (Fla. 1st DCA 2004) (motion for mistrial timely where objection to improper remarks in closing sustained, but mistrial motion not made until recess preceding jury instructions).

3. Specify Grounds: Err on the side of specificity. Include any and all state or federal constitutional grounds. If you feel compelled, add catch-all after specific grounds.

Section 90.104(1)(a), Fla. Stat. (2003) (error in admission of evidence will only be recognized upon timely objection or motion to strike stating specific ground of objection unless specific ground was apparent from context).

Section 924.051(1)(b), Fla. Stat. (2000) (preserved error for purposes of appeal is one for which objection "was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and grounds therefor").

Harrell v. State, 894 So.2d 935 (Fla. 2005) (motion to withdraw guilty plea as coerced and involuntary fails to preserve error in trial court's failure to formally accept plea);

Hutchinson v. State, 882 So.2d 943, 950 (Fla. 2004);

Harmon v. State, 527 So.2d 182, 185 (Fla. 1988);

Fitzsimmons v. State, 935 So.2d 125, 128 (Fla. 2d DCA 2006) (refusing to consider prosecution argument not raised in trial court);

Corona v. State, 929 So.2d 588, 592-3 (Fla. 5th DCA 2006) (objection on confrontation and hearsay grounds did not preserve *Crawford* argument; rejecting excuse that *Crawford* constituted paradigm shift in law);

Felton v. State, 919 So.2d 557, 30 (Fla. 5th DCA 2005) (failure to raise in trial court non-fundamental error of not swearing to probation violation affidavit waives issue on appeal);

Mencos v. State, 909 So.2d 349, 351 (Fla. 4th DCA 2005) (hearsay objection does not preserve confrontation clause argument);

Gresham v. State, 908 So.2d 1114, 1115 (Fla. 1st DCA 2005) (request for instruction on lewd and lascivious misconduct failed to preserve issue where counsel failed to specify section);

State v. Ayers, 901 So.2d 942, 944 (Fla. 2nd DCA. 2005) (prosecutor's objection "I don't see a legal reason to depart" preserves argument on appeal that facts failed to support downward departure for isolated crime committed in unsophisticated manner);

Cotton v. State, 901 So.2d 241 (Fla. 3rd DCA 2005) (motion to suppress on Miranda grounds did not preserve argument that defendant's initial detention violated fourth amendment);

Baskin v. State, 898 So.2d 266, 267-8 (Fla. 2nd DCA 2005) (counsel need not necessarily cite correct rule if calls attention to legal issue raised on appeal and relief sought; "magic words are not needed to make a proper objection");

Cuzo v. State, 830 So.2d 177 (Fla. 4th DCA), *rev. denied*, 842 So.2d 843 (Fla. 2002);

Jackson v. State, 738 So.2d 382, 386 (Fla. 4th DCA 1999) (objection based on "lack of foundation" does not preserve arguments regarding all facets of the foundation that may have been missing);

But see Neeley v. State, 883 So.2d 861 (Fla. 1st DCA 2004) (hearsay objection requires

court to consider all possible hearsay violations, exceptions, and exclusions);

Richardson v. State, 875 So.2d 673, 676 (Fla. 1st DCA 2004) (general hearsay objection sufficient to preserve for appellate review the failure of the proponent to lay a proper predicate);

Reyes v State, 580 So.2d 309, 310 n.4 (Fla. 3rd DCA 1991) (general objection to opinion testimony about character for truthfulness sufficient to preserve error for appeal).

4. Secure a Ruling: Even if you aren't going to like it, get the court to state its ruling on the record. This avoids any claim that the judge wasn't apprised of the objection.

Farina v. State, 937 So.2d 612, 629 (Fla. 2006); *Tolbert v. State*, 922 So. 2d 1013, 1017-18 (Fla. 5th DCA) (objection waived if litigant fails to secure a ruling; citing numerous cases), *rev. denied*, 934 So.2d 451 (Fla. 2006); *Flanagan v. State*, 586 So.2d 1085, 1092 (Fla. 1st DCA 1991) (same), *approved*, 625 So. 2d 827 (Fla.1993).

5. Objection by Co-counsel: In multi-defendant cases, place on record at commencement of trial that objection for one is objection for all unless defendant opts out.

Johnson v. State, 726 So.2d 359, 360 (Fla. 1st DCA 1999) (objection by codefendant does not preserve ground for appeal unless defendant specifically requested to join codefendant's objection).

6. Move to Strike/Request a Curative Instruction: If objection is overruled, no motion to strike or request for curative instruction is necessary. Any such motion would be futile. If objection is sustained and testimony or remark was heard by jury, motion to strike or request for curative instruction is generally necessary to preserve error for appeal.

Section 90.104(1)(a), Fla. Stats.;

Wilson v. State, 436 So.2d 908, 910 (Fla. 1983);

Capron v. State, No. 5D05-4154, 2007 WL 485988 (Fla. 5th DCA Feb 16, 2007);

Russ v. State, 832 So.2d 901, 909 (Fla. 1st DCA 2002), *rev. denied*, 845 So.2d 892 (Fla.2003);

Gray v. State, 640 So.2d 186, 194-5 (Fla. 1st DCA 1994).

7. Offer of Proof: Erroneous exclusion of evidence will not be considered on appeal absent offer of proof. Offer may be through testimony or proffer of counsel. Make sure proffer is thorough.

Miller v. State, 870 So.2d 15, 17-18 (Fla. 2nd DCA 2003) (court's erroneous sustaining of state's hearsay objection not preserved because defense failed to proffer testimony that was not hearsay);

cf. Lucherini v. State, 932 So.2d 521, 523-4 (Fla. 4th DCA 2006) (refusal to allow proffer is reversible error.)

8. Move for a Mistrial: If objection is overruled, no motion for mistrial is necessary. If objection is sustained and motion to strike or curative instruction is granted, motion for mistrial is generally necessary to preserve issue for appeal.

Rimmer v. State, 825 So.2d 304, 323 (Fla. 2002);

Wilson v. State, 436 So.2d 908, 910 (Fla. 1983);

Capron v. State, No. 5D05-4154, 2007 WL 485988 (Fla. 5th DCA Feb 16, 2007);

Gray v. State, 640 So.2d 186, 194-5 (Fla. 1st DCA 1994).

9. Specific Errors:

a. Insufficient plea colloquy: Must be raised in trial court within 30 days of plea. Fla. R. App. P. 9.140(b)(2)(A)(ii).

In re Amendments to Florida Rules of Criminal Procedure 3.170 and 3.172, 938 So.2d 978 (Fla.2006) (adopting requirement that court must inquire into existence of DNA evidence that might exonerate defendant);

In Re Amendments to Florida Rule of Criminal Procedure 3.172, 911 So.2d 763 (Fla. 2005) (adopting requirement that defendants be advised of potential Jimmy Ryce Act consequences).

Williams v. State, 873 So.2d 1248 (Fla. 5th DCA 2004);

b. Jury Selection: Claimed error in seating juror must be renewed before jury is sworn. *See, e.g., Joiner v. State*, 618 So.2d 174, 176 (Fla. 1993); *Arnold v. State*, 755 So.2d 696, 698 (Fla. 4th DCA 1999).

Scott v. State, 920 So. 2d 698 (Fla. 3rd DCA 2006) (error in denial of peremptory challenge preserved despite failure to renew where trial court twice assured defense counsel objection was preserved and panel was accepted shortly after court inquired whether there was any *other* business to address).

c. Motion to suppress: In abundance of caution, renew objection at trial upon prosecutor's offer of evidence sought to be suppressed. In Florida state courts, renewal is unnecessary; in federal court objection must be renewed.

Section 90.104 (1)(b), Fla. Stat. (2003), **Rulings on Evidence:** “. . . If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before a trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”

In re: Amendments to The Florida Evidence Code - Section 90.104, 914 So.2d 940 (Fla. 2005) (adopting 2003 amendment to section 90.104(1)(b) recited above).

d. Motion in Limine: In an abundance of caution, renew motion at time evidence is offered at trial. *But see* newly amended section 90.104(1)(b), Fla. Stat. (2003) (renewal of objection or offer of proof unnecessary where trial court made definitive ruling on the record at or before trial).

Rodgers v. State, No. SC04-1425, 2006 WL 3025668 (Fla. Oct. 26, 2006) (applying section 90.104 (1)(b) to hold that pretrial motion to exclude hearsay under *Crawford* from penalty phase preserved by court's definitive ruling);

Tolbert v. State, 922 So.2d 1013, 1017 (Fla. 5th DCA) (explaining reasoning underlying 2003 amendment to section 90.104(1)(b)), *rev. denied*, 934 So.2d 451 (Fla. 2006).

e. Motion for judgment of acquittal: Failure to object to insufficiency of evidence or move for judgment of acquittal waives argument on appeal.

Romero v. State, 901 So.2d 260, 265 (Fla. 2005) (boilerplate motion or one simply alleging “lack of prima facie case” insufficient to preserve insufficiency of evidence as error on appeal);

F.B. v. State, 852 So.2d 226, 230-1 (Fla. 2003) (only exceptions to contemporaneous objection rule in this context are death penalty cases (for which Supreme Court is required to review the sufficiency of the evidence) and cases where the evidence is insufficient as a matter of law to establish the commission of a crime);

Gehring v. State, 937 So. 2d 169 (Fla. 2d DCA 2006) (relying on *F.B.* exception to reverse CCF conviction where evidence established shotgun not found in car until defendant was out);

Sanders v. State, 905 So.2d 271 (Fla. 2nd DCA 2005) (relying on *F.B.* exception to reverse kidnaping conviction where there was no evidence that movement of victim in apartment was more than incidental to sexual battery);

Goad v. State, 887 So.2d 415, 416 (Fla. 2nd DCA 2004) (failure to make a particular argument for acquittal below waives argument on appeal).

f. Jury Instructions: Error concerning giving or failing to give jury instruction waived unless party objects before jury retires “stating distinctly the matter to which the party objects and the grounds of the objection.” Fla. R. Crim. P. 3.390(d).

Coday v. State, 946 So. 2d 988, 995 (Fla. 2006) (claimed error in premeditation instruction not preserved by pretrial motion that was not renewed at charge conference or after instruction given) (pre-amendment to section 90.104 (1)(b));

Hutchinson v. State, 882 So.2d 943, 950 (Fla. 2004) (although defense counsel objected to special instruction at trial, failure to make specific argument urged on appeal waived argument);

Grimsley v. State, 939 So.2d 123, 124-5 (Fla. 2d DCA 2006) (although defendant requested instructions on both justifiable use of deadly and non-deadly force, where court directed defendant to choose one or the other and he requested instruction on non-deadly force, initial request failed to preserve error in failing to instruct on justifiable use of deadly force);

Bryant v. State, 932 So.2d 408, 410 (Fla. 2d DCA 2006) (denial of necessarily included lesser offense instruction preserved where, through defense counsel failed to object to failure to give instruction, counsel clearly requested instruction and trial court clearly denied request);

Bain v. State, 934 So. 2d 490 (Fla. 3rd DCA 2005) (assertion that law should be changed insufficient to preserve claim on appeal that instruction was incorrect statement of law).

g. Double Jeopardy: Error is fundamental; failure to object does not preclude appellate review. Don't bank on this-object, object, object.

State v. Florida, 894 So.2d 941, 944-5 (Fla. 2005);

Capron v. State, No. 5D05-4154, 2007 WL 485988 (Fla. 5th DCA Feb 16, 2007);

Charneco v. State, 917 So.2d 378, 379 (Fla. 2nd DCA 2005);

Romage v. State, 890 So.2d 550 (Fla. 5th DCA 2005);

Scarola v. State, 889 So.2d 108 (Fla. 5th DCA 2004).

h. Sentencing Errors: Error must be preserved in the trial court,

even after the filing of a notice of appeal, pursuant to Rule 3.800(b). *See* Fla.R.App.P. 9.140(e). Except in the case of a facial constitutional challenge to a sentencing statute, failure to preserve sentencing error as prescribed in Rule 3.800(b) precludes the recognition of fundamental sentencing error on appeal. *See Brannon v. State*, 850 So. 2d 452 (Fla. 2003).

B. STANDARDS OF REVIEW: The standard of review must be set forth in the Appellant's initial brief. Fla. App. P. 9.210(b)(5). The outcome of any appeal may well turn on this standard.

1. Compliance with/breach of plea agreement: Whether a party's conduct violates a plea agreement, to the extent it turns on an interpretation of the plea agreement, is reviewed de novo. *State v. Dempsey*, 916 So.2d 856, 859 (Fla. 2d DCA 2005); *Atlanta Jet v. Liberty Aircraft Services, LLC* 866 So.2d 148, 150 (Fla. 4th DCA 2004); *United States v. Hawley*, 93 F.3d 682, 690 (10th Cir. 1996) (“[w]hether government conduct has violated a plea agreement is a question of law which we review de novo”).

2. Motion to Withdraw Plea: before sentencing-abuse of discretion; after sentencing-manifest injustice. *Wallace v. State*, 939 So.2d 1123 (Fla.3d DCA 2006) (abuse of discretion before sentencing; defense must show manifest injustice after sentencing);

Stokes v. State, 938 So.2d 644 (Fla. 2d DCA 2006) (finding manifest injustice compelling post-sentence withdrawal where defendant had mental health issues into which trial court failed to inquire);

Woodly v. State, 937 So.2d 193, 196 (Fla. 4th DCA 2006) (abuse of discretion);

Townsend v. State, 927 So.2d 1064, 1065 (Fla. 4th DCA 2006) (manifest injustice).

3. Motion to Suppress: Historical facts are presumed correct and may not be rejected if supported by competent substantial evidence; legal conclusions of trial court drawn from facts are reviewed *de novo*.

Ornelas v. United States, 517 U.S. 690, 699, 116 S.Ct. 1657 (1996) (deference to trial court on questions of historical fact but constitutional issues reviewed *de novo*);

Connor v. State, 803 So.2d 598, 605-8 (Fla. 2001).

4. Motion for Continuance: abuse of discretion.

Bowland v. State, 946 So.2d 642, 645 (Fla. 4th DCA 2007);

Smith v. State, 578 So.2d 366 (Fla. 3d DCA 1991).

5. Motion to Disqualify Judge: *de novo*.

State v. Ballard, 2D07-407, 2007 WL 547749 at *2 (Fla. 2d DCA Feb 23, 2007).

6. Evidentiary Issues: The admission or exclusion of evidence is generally reviewed for an abuse of discretion. Specific issues sometimes have different or more unique standards of review.

Rivera v. State, 561 So.2d 536, 540 (Fla. 1990);

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) (discretion abused when judicial action is “arbitrary, fanciful, or unreasonable” or “where no reasonable man would take the view adopted by the trial court”);

Triplett v. State, 947 So.2d 702, 704 (Fla. 5th DCA 2007) (same);

Fitzsimmons v. State, 935 So.2d 125, 127-8 (Fla. 2d DCA 2006) (abuse of discretion for Williams rule evidence);

Eliakim v. State, 884 So.2d 57, 60 (Fla. 4th DCA 2004) (restating standard from *Canakaris*);

Eliakim v. State, 884 So.2d 57, 63-8 (Fla. 4th DCA 2004) (Farmer, C.J., dissenting) (lengthy discussion criticizing vagueness and universal employment of abuse of

discretion standard in reviewing evidentiary matters).

7. Rulings on Frye Issues: *de novo*.

Murray v. State, 838 So.2d 1073, 1077 (Fla. 2002);

Ramirez v. State, 810 So.2d 836, 844 (Fla. 2002);

Roeling v. State, 880 So.2d 1234, 1238 (Fla. 1st DCA 2004).

8. Restriction of Cross-Examination: Abuse of discretion standard subject to the rules of evidence.

Perez v. State, No. 2D05-3565, 2007 WL 624072 (Fla.2d DCA March 2, 2007);

Docekal v. State, 929 So.2d 1139, 1142 (Fla. 5th DCA 2006);

Michael v. State, 884 So.2d 83, 84-5 (Fla.2d DCA 2004) (denial of cross-examination may “easily” constitute reversible error);

Tomego v. State, 864 So.2d 525, 530-1 (Fla. 5th DCA 2004) (trial court lacks discretion to exclude questions which touch upon interest, motive, or animus.)

9. Motion for Mistrial: abuse of discretion.

Elisha v. State, 4D05-4060, 2007 WL 397318 (Fla. 4th DCA Feb. 7 2007) (based on prosecutorial misconduct in summation).

10. Motions for Judgment of Acquittal: *de novo*.

Troy v. State, SC04-332, 2006 WL 2987627 at *8 (Fla. Oct. 19, 2006);

Sullivan v. State, 898 So.2d 105, 108 (Fla. 2nd DCA 2005).

11. Double Jeopardy Claims: *de novo*, to the extent they present pure questions of law based on undisputed facts.

State v. Florida, 894 So.2d 941, 945 (Fla. 2005).

12. Statutory Construction/Interpretation/Constitutionality: *de novo*.

State v. J.P., 907 So.2d 1101, 1107 (Fla. 2004);

State v. Hanna, 901 So.2d 201, 204 (Fla. 5th DCA 2005).

13. Brady Claims: Mixed standard of review deferring to factual findings

made by trial court and supported by competent, substantial evidence but reviewing *de novo* the application of those facts to the law.

Ponticelli v. State, 941 So.2d 1073, 1084-5 (Fla. 2006);

Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005).

14. Ineffective Assistance of Counsel: mixed question of law and fact; deference to factual findings but *de novo* review of legal/constitutional conclusions.

Sochor v. State, 883 So.2d 766, 771-2 (Fla. 2004);

Mathis v. State, 1D06-1066, 2006 WL 3017251 at *3 (Fla. 1st DCA Oct. 25, 2006).

C. FUNDAMENTAL/PLAIN ERROR

Trial court error that was not the subject of a timely, specific objection may only be recognized on appeal if it was “fundamental.” *See* sections 90.104(3), 924.051(3), Fla. Stat. (2003). Fundamental error is error that “goes to the foundation of the case or goes to the merits of the cause of action, . . .” *Jacques v. State*, 883 So.2d 902, 906 (Fla. 4th DCA 2004), or one “[which] reach[es] 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.” *Davis v. State*, 937 So.2d 273, 276 (Fla. 4th DCA 2006) (citations omitted); *accord Caldwell v. State*, 920 So. 2d 727 (Fla. 5th DCA 2006). To be deemed “fundamental,” a defendant necessarily bears the burden of demonstrating that the error is harmful. *See Sampson v. State*, 903 So.2d 1055, 1058 (Fla. 2nd DCA 2005) (Altenbend, C.J., concurring).

The United States Supreme Court has defined “plain error” as requiring (1) error; (2) that is “clear” or “obvious;” (3) that affects the defendant’s substantial rights; and (4) and that seriously effects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732-5, 113 S.Ct. 1770 (1993). *See also* Fed. R. Crim. P. 52(b). The burden for demonstrating “plain error” is on the defendant.

1. Generally:

Farina v. State, 937 So.2d 612, 629 (Fla. 2006);

Pena v. State, 901 So.2d 781, 786 (Fla. 2005) (“In order to constitute fundamental error, the error must affect the validity of the trial to the extent that the verdict would not have been the same if the error had not occurred”);

Martinez v. State, 933 So.2d 1155, 1158-9 (Fla. 3d DCA 2006);

2. **Evidentiary Errors:** The erroneous admission of evidence will seldom, if ever, be found fundamental error.

Wooten v. State, 904 So.2d 590, 592 (Fla. 3rd DCA 2005) (court unaware of any reported Florida case where fundamental error has been invoked to cure unpreserved evidentiary error).

3. Closing Argument:

Farina v. State, 937 So.2d 612, 629 (Fla. 2006);

Cherry v. Moore, 829 So.2d 873, 882 (Fla. 2002) (improper comments in closing argument may constitute fundamental error if relatively egregious);

Capron v. State, No. 5D05-4154, 2007 WL 485988 (Fla. 5th DCA Feb 16, 2007); (improper remarks in closing argument constitutes fundamental error “when the prejudicial conduct, in its collective import, is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury”);

Davis v. State, 937 So.2d 273, 276-7 (Fla. 4th DCA 2006) (improper remarks in summation vouching for police witnesses, coupled with improper impeachment of defendant with criminal record, constituted fundamental error);

4. Jury Instructions:

State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) (failure to instruct on excusable and justifiable homicide as part of manslaughter is fundamental error not subject to harmless error analysis where defendant convicted of offense no more than one step removed, *i.e.*, second degree murder); *see also Franco v. State*, 901 So.2d 901 (Fla. 4th DCA), *rev.*

denied, 917 So.2d 193 (Fla. 2005);

Garzon v. State, 939 So. 2d 278, 287-8 (Fla. 4th DCA 2006) (“Fundamental error occurs where a criminal statute contains two or more distinct methods of committing an offense, consisting of different elements, and a defendant is charged with one of the means, but the jury is instructed in a manner that permits conviction for another, uncharged mode of guilt”);

Martinez v. State, 933 So.2d 1155, 1158-9 (Fla.3d DCA 2006) (extensive discussion of when instructional errors are fundamental);

Grier v. State, 928 So. 2d 368, 370 (Fla. 3rd DCA 2006) (“[f]undamental error exists where an inaccurate and misleading instruction negates the defendant’s only defense”), *rev. denied*, 2007 WL 708918 (Fla. Feb. 12, 2007);

Caldwell v. State, 920 So. 2d 727, 731 (Fla. 5th DCA 2006) (error regarding jury instruction is fundamental when “error in the instruction relate[s] to an element of the crime that is a contested issue”); *accord* ***Reed v. State***, 837 So.2d 366 (Fla. 2002);

York v. State, 932 So.2d 413 (Fla. 2d DCA 2006) (fundamental error to give forcible felony exception to self-defense when there is only one forcible felony charged); ***Flynn v. State***, 2D05-5, 2007 WL 188660 (Fla. 2d DCA Jan. 26, 2007) (same); ***Martinez v. State***, 933 So.2d 1155 (Fla. 3d DCA 2006) (error not fundamental if it did not negate defendant’s sole defense); ***Sutton v. State***, 929 So.2d 1105, 1106-7 (Fla. 4th DCA) (error not fundamental if defendant not entitled to self-defense instruction), *receded from on other grounds*, ***Yisrael v. State***, 938 So.2d 546 (Fla. 4th DCA 2006).

Garzon v. State, 939 So.2d 278, 282-7 (Fla. 4th DCA 2006) (error in placing “and/or” between defendant’s and co-defendant’s names in pertinent portions of jury instruction not fundamental where principal instruction placed matter in proper context; citing numerous cases); ***Tolbert v. State***, 922 So.2d 1013 (Fla. 5th DCA 2006) (and/or error not fundamental where codefendant is acquitted); ***Davis v. State***, 922 So.2d 279 (Fla. 1st DCA 2006) (and/or error fundamental where jury instruction could have materially misled jury); ***Dorsett v. McRay***, 901 So.2d 225, 226-7 (Fla. 3rd DCA 2005) (same);

Boland v. State, 893 So.2d 683, 686 (Fla. 2nd DCA 2005) (failure to give instruction on necessarily lesser included offense only one step removed from charged offense is fundamental error not subject to harmless error analysis);

Davis v. State, 804 So.2d 400, 404 (Fla. 4th DCA 2001) (fundamental error to (1) “fail to give a complete or accurate instruction in a criminal case if it relates to an element of the

charged offense” or (2) “give an inaccurate and misleading instruction where the effect of that instruction is to negate a defendant’s only defense”); accord *State v. Lucas*, 645 So.2d 425 (Fla. 1994)

5. Miscellaneous

Orta v. State, 919 So.2d 602, 604 (Fla. 3rd DCA 2006) (fundamental error to deny defendant right to be present at critical stage of proceedings);

Lawrence v. State, 918 So.2d 368, 369 (Fla. 3rd DCA 2005) (application of facially unconstitutional statute fundamental error that can be raised at any time);

Davis v. State, 891 So.2d 1186, 1187-8 (Fla. 4th DCA 2005) (revocation of probation may not be based on violation not alleged in charging document; “deprivation of the right to due process is a fundamental error”);

D. HARMLESS ERROR:

The state carries the burden of demonstrating beyond all reasonable doubt that any trial error did not affect the verdict. See *Goodwin v. State*, 751 So.2d 537, 541-2 (Fla. 1999); *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986). Alternatively stated, the appellate court must be satisfied that “[t]here [was] no reasonable possibility that the error[s] contributed to the conviction.” *Id.* As the court explained in *DiGuilio*: “The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.” *Id.* at 1139. “[Even] overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution’s case may have played a substantial part in the jury’s deliberation and thus contributed to the actual verdict reached . . .” *Goodwin* at 542. “[T]he reviewing court must resist the temptation to makes its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence.” *Id.* Instead, “[t]he focus is on the effect of the error on the trier of fact.” *Id.*

Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824 (1967) (for constitutional error, court must be convinced beyond reasonable doubt that error did not contribute to the verdict);

Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239 (1946) (for non-constitutional error, court need only determine with “fair assurance” that judgment was not “substantially swayed by the error”);

Brooks v. State, 918 So.2d 181, 202 (Fla. 2005) (where court finds multiple errors but deems them individually harmless, court must determine whether cumulative effect of errors was harmless), *cert. denied*, 126 S. Ct. 2294 (2006).

E. POST-TRIAL RELEASE

Post-trial release is governed by Florida Rule of Criminal Procedure 3.691, Florida Rule of Appellate Procedure 9.140(h), and Florida Statutes sections 903.132 and 903.133. Courts generally must apply the principles enunciated in *Younghans v. State*, 90 So.2d 308 (Fla. 1956), which include consideration of risk of flight and danger to the public. See *McGlade v. State*, 941 So.2d 1185, 1188 (Fla. 2d DCA 2006). Additionally, a defendant must demonstrate that the appeal is taken in good faith, on grounds fairly debatable, and not frivolous. Fla. R. Crim. P. 3.691(a); section 903.132(1), Fla. Stats. “Good faith does not mean there is probable cause to believe the judgment will be reversed, but simply that the appeal is not vexatious and the defendant has assigned errors that are open to debate and about which reasonable questions exist.” *Baker v. State*, 213 So.2d 285, 287 (Fla. 4th DCA 1968). A trial court’s order denying release cannot be arbitrary, capricious, or unreasonable. *McGlade* at 1189.

Post-trial release is prohibited for persons (1) who have been convicted of a felony prior to the commission of the offense pending on appeal for which the defendant’s civil rights have not been restored; (2) who have felony charges pending for which probable cause has already been found; or (3) who have been adjudged guilty of the first degree felonies enumerated in section 903.133 including second degree murder or second degree felony murder, or a first degree, life, or capital sexual battery. The fact that a defendant is subject to a minimum mandatory prison sentence, *Cooley v. State*, 720 So.2d 598 (Fla. 2nd DCA 1998), or is a citizen of a different country and may be subject to deportation, see *Dumas v. State*, 889 So.2d 139 (Fla. 4th DCA 2004), does not preclude appellate bond.

If the trial court denies an appeal bond, it must explain its reasons in writing. *McGlade v. State*, 941 So.2d at 1189; *Lingane v. Arnold*, 875 So.2d 1280 (Fla. 5th DCA 2004); Fla. R. Crim. P. 3.691(b). Review of an order denying appeal bond is by motion in the court of appeal and should be expedited on the court’s docket. Fla. R. Crim. P. 3.691(c); Fla. R. App. P. 9.140(h)(4).

F. EXTRAORDINARY WRITS

1. **Mandamus:** Compel court to do non-discretionary act; “to enforce a right already clearly and certainly established in law.” *Walters v. State*, 905 So.2d 974, 976 (Fla. 1st DCA 2005). It is not appropriate where another legal remedy is available. See *Leichty v. Clerk of Court, Lake County*, 948 So.2d 47 (Fla. 5th DCA 2007).

a. Compel Court to Accept Jurisdiction

State v. Clark, 810 So.2d 882 (Fla. 2002) (directing lower appellate court to reinstate appeal from speedy trial discharge);

Franklin v. Kearney, 814 So.2d 462 (Fla. 2001) (directing circuit court that adjudged defendant incompetent and involuntarily committed him to exercise jurisdiction over habeas petition).

b. Compel Court to Rule

Weldon v. State, 800 So. 2d 705 (Fla. 5th DCA 2001) (directing circuit court to rule on timely motion for new trial not resolved after sentencing);

Stout v. State, 795 So.2d 227 (Fla. 4th DCA 2001) (directing circuit court to accept waiver of defendant's appearance at pretrial status conference).

c. Seek Review of Various Acts of DOC or Parole Commission

Griffith v. Crosby, 898 So.2d 212 (Fla. 2nd DCA 2005) (venue to review DOC disciplinary action is proper in county in which prisoner is incarcerated or where DOC's headquarters is located);

Roth v. Crosby, 884 So.2d 407 (Fla. 2nd DCA 2004) (proper vehicle for challenging Parole Commission's determination of presumptive release date is mandamus against Parole Commission);

Section 947.173, Fla. Stat. (administrative remedies that must be exhausted).

d. Compel Court to Allow Appearance of Counsel

Hardy v. State, 776 So.2d 962 (Fla. 3rd DCA 2000) (county court compelled to provide indigent defendant in misdemeanor case counsel though no jail certified where defendant remains incarcerated).

e. Compel Execution of Particular Aspect of Sentence

Sada v. State, 807 So.2d 146 (Fla. 3rd DCA 2002) (circuit court directed to modify sentence to probation following youthful offender's completion of boot camp as required by statute).

f. Review Judicial Disqualification

May Investments, Inc. v. LISA, S.A., 814 So.2d 471 (Fla. 3rd DCA 2002) (affidavit supporting disqualification of judge not legally sufficient).

2. **Prohibition:** Prohibit lower court lacking jurisdiction from proceeding.

a. Review denial of speedy trial rights.

Clark v. State, 873 So.2d 598 (Fla. 3rd DCA 2004);

Hajal v. State, 864 So.2d 1167 (Fla. 5th DCA 2004);

Alvarez v. State, 791 So.2d 57 (Fla. 4th DCA 2001).

Mc Kinney v. Yawn, 625 So.2d 885 (Fla. 1st DCA 1993) (discussing when alleged speedy trial violation is remedied by prohibition as contrasted with direct appeal).

b. Review denial of motion to recuse judge.

Pierce v. State, 873 So.2d 618 (Fla. 2nd DCA 2004) (judge disqualified based on initiation of plea dialogue following denial of suppression motion offering harsher sentence if defendant appealed ruling);

Martin v. State, 804 So.2d 360 (Fla. 4th DCA 2001) (judge disqualified based on announced policy of not sentencing probation violators to time served), *rev. denied*, 819 So.2d 139 (Fla. 2002);

Brimson v. State, 789 So.2d 1125 (Fla. 2nd DCA 2001) (disqualification based on judge's response to disqualification allegations).

c. Review denial of motion to dismiss on double jeopardy grounds.

Morris v. State, 869 So.2d 1264 (Fla. 3rd DCA 2004) (severed charge of possession of a firearm by a convicted felon should have been dismissed based on acquittal of underlying charges);

Quinones v. State, 766 So.2d 1165 (Fla. 3rd DCA 2000) (affirming trial court's finding of

manifest necessity for mistrial based, *inter alia*, on defense counsel's repeated violation of pretrial order in limine).

d. Review denial of SOL claim.

Lucas v. State, 718 So.2d 905 (Fla. 3rd DCA 1998) (SOL barred prosecution where capias issued almost four years after offense and initial arrest).

e. Review of acceptance of jurisdiction.

Goodwin v. State, 826 So.2d 1022 (Fla. 3rd DCA 2001) (circuit court directed to dismiss appeal where state's filing rehearing in response to county court suppression order did not toll due date of notice of appeal);

Atkinson v. State, 791 So.2d 537 (Fla. 2nd DCA 2001) (prohibiting involuntary civil commitment because defendant not in custody on effective date of Jimmy Ryce Act).

3. Certiorari: Violation clearly established principle of law resulting in miscarriage of justice; departure from essential requirements of law. *State v. Storer*, 920 So.2d 754, 758 (Fla. 2nd DCA 2006) (denying state's petition to quash order granting defense motion in limine to introduce victim character evidence). Must be filed within 30 days of rendition of order. See *Burns v. State*, 906 So.2d 351 (Fla. 3rd DCA 2005); Fla. R. App. P. 9.100(c).

a. Review of pretrial discovery issues.

State v. Johnson, 814 So.2d 390 (Fla. 2002) (state could not evade statutory notice requirement by subpoenaing patient's medical records but state can subpoena records prospectively in compliance with statute);

State v. Roberson, 884 So.2d 976 (Fla. 5th DCA 2004) (alleged sexual assault victim's mental health records associated with commitment under Baker Act subject to in camera inspection);

Nussbaumer v. State, 882 So.2d 1067 (Fla. 2nd DCA 2004) (determination of clergy communications privilege);

State v. Famiglietti, 817 So.2d 915 (Fla. 3rd DCA 2001) (defendant failed to make sufficient showing to overcome sexual assault counselor-victim privilege to support issuance of subpoena for records).

Tillinger v. State, 789 So.2d 1146 (Fla. 3rd DCA 2001) (state could not subpoena defendant's blood sample);

b. Review of trial court's refusal to exercise discretion.

State v. Tarrago, 800 So.2d 300 (Fla. 3rd DCA 2001) (lower court directed to exercise discretion re: whether child victim could testify via closed-circuit tv).

c. Review of orders in limine excluding witnesses or evidence or granting discovery.

State v. Snyder, 807 So.2d 117 (Fla. 3rd DCA 2002) (character evidence regarding victim in lewd and lascivious prosecution admissible for limited purpose);

State v. Adderly, 803 So.2d 760 (Fla. 3rd DCA 2001) (reversing denial of state's motion in limine to exclude evidence of sex battery victim's sexual activity), *rev. disp.*, 842 So.2d 781 (Fla. 2003);

State v. Nelson, 785 So.2d 727 (Fla. 3rd DCA 2001) (reversing exclusion of state witnesses for discovery violation);

State v. Miranda, 777 So.2d 1173 (Fla. 3rd DCA 2001) (quashing order granting discovery of docs in federal custody related to confidential informant);

State v. Trujillo, 764 So.2d 852 (Fla. 3rd DCA 2000) (quashing trial court's order excluding witnesses as sanction for state's alleged discovery violation).

d. Review of order disqualifying attorneys.

State v. Nolasco, 803 So.2d 757 (Fla. 3rd DCA 2001) (reversing order disqualifying three assistant state attorneys);

Palmer v. State, 775 So.2d 404 (Fla. 4th DCA 2000) (certiorari proper remedy to seek review circuit order prohibiting trial counsel from entering appearance because conflict with judge would require judicial disqualification).

e. Review of circuit court appellate decisions.

State v. Schreiber, 868 So.2d 564 (Fla. 4th DCA 2004) (circuit court's order granting prohibition on speedy trial grounds reviewable by certiorari to determine whether court departed from essential requirements of law causing miscarriage of justice);

State v. Alvarez, 776 So.2d 1060 (Fla. 3rd DCA 2001) (review of circuit appellate court decision reversing defendant's DUI conviction).