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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ROBERT ALTON BECKER,

Petitioner,

v.

CASE NO. 79,392

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

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## ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION  
BECAUSE THE CERTIFIED QUESTIONS GIVE THIS  
COURT JURISDICTION AND SENTENCING ERRORS  
DETERMINABLE FROM THE FOUR CORNERS OF THE  
RECORD MAY BE RAISED FOR THE FIRST TIME  
ON APPEAL.

The state has argued that this Court should not accept jurisdiction in this **case** because the issues were not raised in the trial court and therefore have not been preserved.

First, the state has incorrectly couched its preservation argument in terms of jurisdiction. **The** certified questions give this Court jurisdiction. Art. V, §. 3(b)(4), Fla. Const. Preservation of the claims made in these proceedings is a separate question.

Second, ironically, the state's claim of lack of preservation is itself not preserved. To preserve an issue for review in a higher court, it first must be presented below. **Tillman v. State**, 471 So.2d 32 (Fla. 1985). **As** the state **has** acknowledged, it made no claim **in** the district court of appeal that the statutory construction and constitutional arguments were not preserved in the trial court. Respondent's Brief on the **Merits** at 5.

Third, the state's claim is meritless. The state's discourse on the contemporaneous objection rule in the context of constitutional error ignores the distinction between trial and sentencing error. As this Court explained in **State v. Rhoden**, 448 So.2d 1013, 1016 (Fla. 1984), the contemporaneous objection rule **was** fashioned primarily for use in trial

proceedings, and the purpose for the rule does not apply to sentencing proceedings:

The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected **as** a defense tactic and as a hedge to provide **a** defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by **a** simple remand to the sentencing judge. If the state's argument is followed to its logical **end**, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.

Accordingly, sentencing errors may be reviewed on appeal even in the absence of a contemporaneous objection, if the errors are apparent from the four corners of the record, Dailey v. State, 488 So.2d 532, 533-34 (Fla. 1986), approving 471 So.2d 1349 (Fla. 1st DCA 1985). Errors that require an evidentiary determination, on the other hand, may not initially be raised on appeal. Id.

Thus, the state's reliance on Davis v. State, 383 So.2d 620 (Fla. 1980), is misplaced. Davis pled nolo without reserving any issues for appellate review, then on appeal attacked the trespass statute under which he was prosecuted. Petitioner, on the other hand, contends his sentence was

unauthorized by statute and the statute is unconstitutional. This Court can plainly see the distinction between the unpreserved constitutional challenge to a substantive criminal statute in Davis and the sentencing challenge here: the former is sandbagging; the latter is not.


Moreover, an error in sentencing that causes a defendant to be incarcerated for a greater length of time than the law permits is fundamental and can be corrected on appeal or by the trial court in collateral proceedings. Lentz v. State, 567 So.2d 997 (Fla. 1st DCA 1990); see Rhoden, 448 So.2d at 1016 (sentence longer than legislature mandates is illegal). If this Court finds that petitioner's sentence was unauthorized by statute or that the statute is unconstitutional, he will face longer incarceration than the law permits, error he may raise at any time.

CONCLUSION

Based upon the arguments in this and in the initial brief, petitioner respectfully requests that this Honorable Court vacate his sentence and remand for resentencing without resort to **the** habitual violent felon provisions of **section 775.084**.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has **been** served upon Sara D. Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399; and a **copy has** been mailed to petitioner on this 24th day of **April, 1992**.

  
\_\_\_\_\_  
NADA M. CAREY