IN THE SUPREME COURT OF FLORIDA

DAVID L. MADDOX,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92,805
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S MERIT BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT OF CASE AND FACTS

The Petitioner pled nolo contendere to one count of burglary of a structure specifically preserving his right to appeal the trial court's order denying his motion to suppress. On appeal the Office of the Public Defender filed a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967) asserting that it could find no meritorious issues to argue on appeal but drew attention to the issue concerning the motion to suppress. The Office of the Attorney General filed a notice of intent not to file a brief unless requested to do so by the court. Thereafter, the court sua sponte ordered counsel for Petitioner to supplement the record with the transcript of the sentencing hearing which had not originally been requested to be included in the original record

on appeal. No brief was filed arguing any issues concerning sentencing.

On March 13, 1998, the court sitting en banc issued its opinion affirming the trial court's ruling concerning the motion to suppress. However, the court then identified certain sentencing errors including improper assessment of costs. The court then determined that pursuant to the Criminal Appeal Reform Act all sentencing issues must be preserved before an appellate court can consider them. The court noted that this includes all unlawful sentencing errors as well as any errors that would render a sentence illegal. In reaching its decision the Fifth District Court of Appeal receded from several earlier opinions wherein they addressed sentencing errors absent objection. The court also noted that by its opinion they disagreed with the contrary results reached by other district courts of appeal insofar as those courts continue to recognize the concept of fundamental error in the sentencing context. The court specifically noted the contrary opinions issued in ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2nd DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3rd DCA l997); ***Johnson v. State***, 701 So.2d 382 (Fla. 1st DCA 1997); ***Cowan v. State***, 701 So.2d 353 (Fla. 1st DCA 1997); ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). The court also noted its disagreement with decisions that have held that errors that render a sentence illegal are fundamental and thus can be raised absent objection. ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1997) and ***Sanders v. State***, 698 So.2d 377 (Fla. 1st DCA

1997); The decision of the Fifth District Court of Appeal is cited as ***Maddox v. State***, 708 So.2d 617 (Fla. 5th DCA 1998). (copy attached as Appendix hereto) By order dated July 7, 1998, this Court accepted jurisdiction and dispensed with the oral argument.

SUMMARY OF ARGUMENT

The Criminal Appeal Reform Act of 1996 as codified in Section 924.051, Florida Statutes (1996) did not abolish the concept of fundamental error in the context of sentencing. Thus, although an appellate court can no longer routinely reverse issues that had heretofore been deemed fundamental, it nevertheless retains the inherent power and duty to reverse illegal sentences which continue to be fundamental. Additionally, if an appellate court already has jurisdiction over a case, it may in its discretion address unpreserved issues to effect the intent of the legislature in enacting the Criminal Appeal Reform Act.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL HEREIN INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.

The Fifth District Court of Appeal in an en banc opinion has determined that the Criminal Appeal Reform Act as codified in Section 924.051, Florida Statutes (1996) has abolished the concept of fundamental error in the sentencing context. To understand the scope and breadth of the fifth district's opinion herein, some procedural background is necessary. Petitioner was charged with burglary of a structure and filed a motion to suppress physical evidence that was seized. Following denial of his motion to suppress, Petitioner entered a plea of no contest specifically preserving for appeal the denial of the motion to suppress. On appeal, counsel for Petitioner filed a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967) asserting that she could not argue any meritorious issues on appeal but drew the court's attention to the issue concerning the denial of the motion to suppress. No other issues were raised or even alluded to in the brief filed by Petitioner's counsel. During the pendency of the appeal, the Fifth District Court of Appeal, **sua sponte**, ordered counsel for Petitioner to supplement the record with the transcript of the sentencing hearing, which had not been designated for inclusion on the record on

appeal by trial counsel. Following supplementation of the record with the sentencing transcript, the court issued no further orders asking counsel for Petitioner to address any issues concerning sentencing. Ultimately, the Fifth District Court of Appeal issued its en banc opinion in the instant case affirming the denial of the motion to suppress and dealing with the purported sentencing issues which the court, on its own, raised. Concluding that the Criminal Appeal Reform Act prevented the court from addressing the sentencing issues (wrongful imposition of costs) the court affirmed. The court further interpreted the Criminal Appeal Reform Act as eliminating the concept of fundamental error at least as it had been previously applied in the sentencing context. From the date of the opinion, the court gave notice that no sentencing issue will be addressed on appeal by the Fifth District Court of Appeal unless properly preserved by a timely objection or a motion to correct the sentence and denial thereof. In reaching this conclusion, the Fifth District Court of Appeal looked to the language of Florida Rule of Appellate Procedure 9.140 which purports to limit the scope of appeal in criminal cases solely to those sentencing issues which have been preserved for appeal. Since no exception in the appellate rules exists for the concept of fundamental error, the Fifth District Court of Appeal concluded that such concept has effectively been abolished with regard to the sentencing issues. In this regard, the Fifth District Court of Appeal expressed its direct disagreement with

all of the remaining district courts of appeal which continue to recognize the concept of fundamental error at least as regards illegal sentences. ***State v. Hewitt***, 702 So.2d 633 (Fla. 1st DCA 1977); ***Chojnowski v. State***, 705 So.2d 915 (Fla. 2nd DCA 1997); ***Pryor v. State***, 704 So.2d 217 (Fla. 3rd DCA 1998) and ***Callins v. State***, 698 So.2d 883 (Fla. 4th DCA 1997). Thus, this Court must resolve this conflict and determine once and for all the scope of the Criminal Appeal Reform Act.

Petitioner asserts that the Fifth District Court of Appeal erred below in its basic premise that the Criminal Appeal Reform Act has eliminated the concept of fundamental error. To support its conclusion, the court below merely referred to the Rules of Appellate Procedure which were promulgated by this Court to implement the Criminal Appeal Reform Act. Petitioner contends that if the Fifth District Court of Appeal's interpretation of the rules of appellate procedure is correct, then the rules themselves are unconstitutional as eliminating a specifically recognized right that the legislature provided. In particular, Petitioner draws this Court's attention to Section 924.051 (3), Florida Statutes (1996) which provides:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, **if not properly preserved, would constitute fundamental 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 error**. (Emphasis added)

Thus, the legislature in enacting the Criminal Appeal Reform Act, specifically recognized the continuing viability of the concept of fundamental error even in the sentencing context. Once the legislature has recognized this concept, an appellate court may not eliminate it as such would constitute judicial legislation and would be improper. ***See***, ***Wyche v. State***, 619 So.2d 231, 236 (Fla. 1993); ***Firestone v. News-Press Publishing Co.***, 538 So.2d 457, 460 (Fla. 1989); ***Brown v. State***, 358 So.2d 1620 (Fla. 1978)

In considering the issue of fundamental error the First District Court of Appeal had little problem concluding that illegal sentences constituted fundamental error for which no objection was necessary prior to granting appellate relief. In ***Sanders v. State***, 698 So.2d 377 (Fla. 1st DCA 1997) the court was faced with an appeal from a defendant's conviction and sentence for the offense of sexual battery. The defendant had been sentenced to twenty years in prison followed by fifteen years probation which exceeded the statutory maximum for the crime of which he had been convicted which was a second degree felony punishable by a term of imprisonment not exceeding fifteen years. Rejecting the state's contention that the issue had not been preserved for appeal by a proper objection, the court nevertheless granted relief. The

court held:

> [S]ection 924.051 does not preclude an appellate challenge to unpreserved sentencing error that constitutes fundamental error. ***Neal v. State***, 688 So.2d 392 (Fla. 1st DCA 1997).
>
> The error asserted by the appellate in the present case must be classified as fundamental. The sentence for sexual battery is in excess of the statutory maximum for the offense and is therefore "illegal." [citations omitted] An illegal sentence is regarded with such disdain by the law that it, unlike other trial court errors, may be challenged *for the first time* by way of collateral proceedings instituted even decades after such a sentence has been imposed....The extraordinary provision made for remedying illegal sentences evidences the utmost importance of correcting such errors even at the expense of legal principles that might preclude relief from trial court errors of less consequence. In light of this, illegal sentences necessarily constitute fundamental error, and may therefore be challenged for the first time on direct appeal.

Recently, the Fourth District Court of Appeal had an opportunity to consider the ramifications of the Criminal Appeal Reform Act. In ***Harriel v. State***, 710 So.2d 102 (Fla. 1998) the defendant pled guilty and appealed and the state moved to dismiss the appeal. The court initially denied the motion to dismiss and Harriel's appointed counsel filed a brief in compliance with ***Anders v. California***, 386 U.S. 738 (Fla. 1996) asserting that he could point to no meritorious issues on appeal. The court reconsidered the state's motion to dismiss and granted the motion and wrote to establish the procedure for reviewing motions to dismiss appeals where no issues have been reserved. Noting that the Criminal Appeal Reform Act attempted to limit the

issues which could be raised on appeal to those which have been preserved for appeal, the Fourth District Court of Appeal noted that this Court attempted to harmonize the new rules with its previous ruling in ***Robinson v. State***, 373 So.2d 898 (Fla. 1979). ***Robinson*** held that in an appeal from a guilty plea or nolo plea without reserving any particular issue for appeal the scope of appeal was limited to four distinct areas: (1)subject matter jurisdiction, (2) illegality of the sentence, (3)failure of the government to abide by a plea agreement, and (4) the voluntary intelligent character of the plea. In an attempt to harmonize the Criminal Appeal Reform Act with the previous ruling in ***Robinson*** the court noted that the violation of the plea agreement and the intelligent voluntary character of the plea are issues which could continue to be raised on appeal if properly preserved by a motion to withdraw the plea. Additionally, a sentencing error could still be appealed if preserved or as otherwise provided by law. Fla. R. App. P. 9.140 (b)(2)(B). Thus, the Fourth District Court of Appeal concluded that subsequent to the enactment of the Criminal Appeal Reform Act, a criminal defendant could still appeal,even from a guilty plea or nolo plea where no issue is specifically preserved, on two grounds--the subject matter jurisdiction of the lower court and the illegality of the sentence. The court certified conflict with the Fifth District Court of Appeal on this issue.

More recently, the Second District Court of Appeal considered the scope of

review under the Criminal Appeal Reform Act in ***Denson v. State***, 23 Fla. L Weekly D1216 (Fla. 2nd DCA May 13, 1998) ***Denson*** faced sentencing on four discrete cases. Certain issues were preserved for appeal while other issues were not. In particular, trial counsel preserved the issue of whether on several of the cases the defendant had a qualifying offense for purposes of the habitual offender statute. On this preserved issue, the district court of appeal ruled against Mr. Denson. The court then noted that appellate counsel had raised two serious issues that were not preserved--the defendant had been sentenced as an habitual offender for the offenses of possession of cocaine for which the law did not provide habitualization and that the written sentence purported to increase sentence that had orally been pronounced. Noting that these issues had traditionally been allowed to be raised on appeal and addressed by appellate courts, the second district had to determine the effect of the Criminal Appeal Reform Act on its ability to consider these arguably unpreserved errors. Noting that the intent and the goals of the Criminal Appeal Reform Act had been to minimize frivolous appeals, to maximize the efficiency of the appellate system, and to place the task of correcting most sentencing errors in the lap of the circuit court, the court nevertheless held that the legislature could not constitutionally restrict the scope or standards of review of an appellate court when due process and the orderly administration of justice require that the appellate court review certain

issues. Without resorting to deciding whether there is any fundamental error in the sentencing context, the Second District Court of Appeal adopted a common sense approach to the Criminal Appeal Reform Act. The court held that so long as the appellate court has jurisdiction to hear an appeal, i.e., it has before it consideration of an issue that is properly preserved, the appellate court has discretion to consider all issues whether preserved for appeal or not but which are apparent from the record. If, on the other hand, there is no preserved issue so as to give the appellate court jurisdiction over the case, then the appellate court cannot reach any unpreserved issues. Thus, in ***Denson***, noting that it had jurisdiction over the case by way of the preserved issue concerning the qualifying offenses for habitualization, the court chose to grant relief on the two obvious though arguably unpreserved sentencing errors. From both a practical standpoint as well as a sense of fairness and due process, this approach offers a reasonable interpretation of the Criminal Appeal Reform Act. As the court noted:

> If a goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we had jurisdiction over other issues. 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 post conviction motions to correct errors that can be safely identified on direct appeal. Both Mr. Denson and the Department of Corrections need

> legal written sentences that accurately reflect the trial court's oral ruling. We conclude that our scope and standard of review in a criminal case authorizes us to order correction of such a patent error.
>
> Efficiency aside, appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights. When reviewing an appeal with a preserved issue, if we discover that a person has been subjected to a patently illegal sentence to which no objection was lodged in the trial court, neither the constitution nor our own consciences will allow us to remain silent and hope that the prisoner, untrained in the law, will somehow discover the error and request its correction. If three appellate judges, like a statue of the "see no evil, hear no evil, speak no evil" monkeys, decline to consider such serious, patent errors, we would jeopardize the public's trust and confidence in the institution of courts of law. Under separation of powers, we conclude that the legislature is not authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.

D1217-1218. Petitioner contends that this common sense approach adopted by the Second District Court of Appeal is the proper way to interpret the Criminal Appeal Reform Act.

Although the Fifth District in its opinion below observed that the court was accustomed to simply correcting errors on appeal because it seemed "both right and efficient to do so", it concluded that the legislature has in effect prevented them from doing this. The court observed that in its opinion there was little risk that a defendant

would suffer an injustice because of this new procedure because if any of the sentencing was fundamentally erroneous and counsel failed to object or file a motion to correct the sentence the remedy of ineffective assistance of counsel would still be available. The court then noted:

> It is hard to imagine that the failure to preserve a sentencing error that would formally have been characterized as "fundamental" would not support an "ineffective assistance" claim.

Maddox, 708 So.2d at 621. Petitioner certainly agrees that failure of trial counsel to properly preserve a sentencing error which prior to the Criminal Appeal Reform Act would have resulted in a grant of relief by the appellate court, is per se ineffective assistance of counsel. However, the solution to this is not for the appellate court to deny relief and require the untrained defendant to proceed against his counsel on an ineffective assistance counsel claim, but to recognize the issue that is apparent on the face of the record and grant relief as if it were a claim of ineffective assistance of counsel. This Court has ruled in ***Combs v. State***, 403 So.2d 418 (Fla. 1981) that if appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner

by remand to the trial court and avoid unnecessary and duplicitous proceedings. This admonition has renewed meaning in light of the Criminal Appeal Reform Act. Certainly, if the objective of the act was to promote efficiency in the appellate process, and indeed in the criminal justice system, then the approach to these errors even though unpreserved, must not be to permit the appellate court to merely hide their heads in the sand and ignore them but to grant the relief necessary to insure the integrity of the criminal justice system.

From a legal standpoint as well as from a policy standpoint, the decision of the fifth district below is incorrect. While the Criminal Appeal Reform Act requires most sentencing errors to be preserved before an appellate court may grant relief, the concept of fundamental error particularly as it concerns an illegal sentence continues to be a viable issue on appeal notwithstanding the lack of objection. Additionally, if an appellate court has jurisdiction over a case and is confronted with a patent sentencing error it must have the discretion to grant relief whether by simply remanding for correction or by considering the issue in the context of ineffective assistance of trial counsel for failing to preserve the issue. In either case, the appellate court has the discretion to grant relief. The Criminal Appeal Reform Act if it is to be held constitutional, must be interpreted as permitting this discretion. This Court should reverse the decision of the Fifth District below, and remand with instructions

to grant relief as to the costs issues or in the alternative to merely quash the decision of the court below.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the fifth district below and remand with instructions to grant relief on the costs issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Mr. David L. Maddox, 130 Washington St., St. Augustine, FL 32084, this 3rd day of August, 1998.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

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Appendix

Maddox v. State
708 So.2d 617 (Fla. 5th DCA 1998)