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

REPLY BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF THE STATE OF FLORIDA

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

ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

Respondent argues that the Fifth District Court of Appeal was correct in concluding that there is no longer any sort of fundamental error in a sentencing context. In support of this respondent relies virtually exclusively on the language of Rule 9.140 The Florida Rules of Appellate Procedure which provides that a defendant may appeal from a guilty or nolo contendere plea a sentencing error, if preserved. Unfortunately, this

rule is in direct conflict with the legislative dictate of 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 having specifically recognized the continuing viability of fundamental error in the context of sentencing. This Court by judicial rule cannot eliminate the concept.

In its initial brief, petitioner argued that such arguably unpreserved errors could still be addressed on direct appeal under the guise of ineffective assistance of counsel. Since the filing of the initial brief, the Third District Court of Appeal has indeed adopted this approach in ***Mizell v. State***, 23 Fla.L. Weekly D1978 (Fla. 3rd DCA August 26, 1998). The court acknowledged the Fifth District's opinion in the case of **sub judice** but found that not to be an impediment to granting relief:

> It is apparent that, even if arguendo *Maddox* is correct that defense counsel's failure to present the point precludes reversal, that very holding requires the concomitant conclusion that Mizell received ineffective assistance of his counsel in failing to

> preserve a right which would have otherwise inevitably resulted in a correction of a sentence. Applying the limited, but controlling, exception to the rule that ineffectiveness claims may not be reached on direct appeal which applies when, as here, "the facts giving rise to such a claim are apparent on the face of the record," [citations omitted], we simply order the amendment of the sentence after remand.
>
> While this resolution of the case may not satisfy some of the more rabid of the judicial Thomists among us, we think it is easily more consistent with our duty to avoid the legal churning, ***see***, ***State v. Rucker***, 613 So.2d 460 (Fla. 1993), which would be required if we may the parties and the lower court do the long way what we ourselves should do the short. Thus, we agree with *Maddox,* 708 So.2d at 621, that the lack of preservation in the sentencing area necessarily involves ineffective assistance of counsel, but strongly disagree that anything is accomplished by not dealing with the matter at once.

Thus, the Third District has adopted a common sense approach to dealing with these arguably unpreserved yet clearly improper sentencing issues.

Most recently, the First District Court of Appeal in an en banc decision decided that even after the enactment of the Criminal Appeals Reform Act, an illegal sentence constitutes fundamental error which may be addressed for the first time on appeal. ***Nelson v. State***, 23 Fla.L. Weekly D2241 (Fla. 1st DCA October 1, 1998). In dealing with the issue of preservation and the concept of fundamental error in sentencing, the District Court of Appeal noted that the holding in ***Maddox*** cannot be reconciled with this

Court's opinion in ***Amendments to the Florida Rules of Appellate Procedure***, 685 So.2d 773 (Fla. 1996). In that case, this Court indicated that the amendments to the Rules of Criminal Procedure and Rules of Appellate Procedure were adopted in recognition of the legislature's prerogative to "reasonably condition the right to appeal upon the preservation of a prejudicial error ***or the assertion of a fundamental error***." Id. at 775. Because of this, the First District Court of Appeal stated its belief that the court's holding in ***Maddox*** would frustrate rather than recognize the legislative intent of the Criminal Appeal Reform Act.

Petitioner would further note that apparently even the Fifth District Court of Appeal itself does not follow its decision ***sub judice***. In ***Lebron v. State***, 23 Fla. L. Weekly D1731 (Fla. 5th DCA July 24, 1998) the court affirmed a conviction for aggravated assault with a firearm rejecting the only issue raised on appeal. However, in a footnote the court stated:

> Although Lebron did not raise the issue on appeal, the State points out an error in the written sentence showing a sentence of 45.75 *years* instead of the orally announced 45.75 *months*. We direct that this scrivener's error be corrected.

The Fifth District Court of Appeal took this action despite the total lack of any objection below or the filing of a motion to correct the sentence. Perhaps the Fifth District finds

an exception to the preservation issue when it is the state, and not the defense that raises the issue.

A final observation must be made as to the workability of the Criminal Appeal Reform Act. In the ***McGreevey v. State***, 23 Fla.L. Weekly D2213 (Fla. 5th DCA September 25, 1998) the defendant appealed a sentencing issue concerning the scoring of victim injury points. At sentencing, defense counsel and the state agreed that the scoresheet was incorrect in that the victim injury points had been scored for moderate injury as opposed to slight injury. The trial court refused to rule on the objection on the grounds that defense counsel had not filed the objection in writing. Thereafter, and at express direction of the trial court, defense counsel filed a motion to correct the sentence. The trial court inexplicably denied the motion without a hearing. On appeal, the Fifth District Court of Appeal remanded for a hearing on the defendant's objection to the scoresheet. What the ***McGreevey*** illustrates is that the Criminal Appeal Reform Act, however laudable its purpose may be, is still no guarantee that justice will be done. In ***McGreevey***, defense counsel did everything he was supposed to do. He objected to the score sheet at sentencing. The state agreed with the objection at sentencing. When the trial court overruled the objection and proceeded with sentencing, defense counsel filed the motion to correct the sentence. The trial court still denied relief. Petitioner contends

that at least in the ***McGreevey*** case the Criminal Appeal Reform Act offered no efficiency and indeed no justice.

Finally, although the Fifth District below offered its opinion and assurances that an aggrieved defendant could still get relief by filing a motion to correct the sentence should errors have occurred, this holding ignores reality. Once a defendant is sentenced, in many instances he or she is placed in an institution in some remote area of the state, far away from the county in which the conviction and sentence were obtained. To require an untrained defendant to proceed pro se in correcting errors that could just as easily be corrected by an appellate court places an undue burden on the accused. If, as was apparent in ***McGreevey***, an attorney attempting to comply with the requirements of the Criminal Appeal Reform Act cannot succeed in having a trial court comply, how can a pro se litigant untrained in the law expect any greater success?

CONCLUSION

Based on the reasons and authorities cited herein as well as in petitioner's Initial Brief, petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal below.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, in his basket at the Fifth District Court of Appeal, and mailed to Mr. David L. Maddox, 130 Washington St., St. Augustine, FL 32084, this 14th day of October, 1998.

_____

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14pt.

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MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER