IN THE SUPREME COURT OF FLORIDA

ALFONZO EDWARDS,

Petitioner,

versus

CASE NO. 93,000

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Fifth Judicial Circuit, in and for Sumter County, Florida. In the Brief the Respondent will be referred to as "the State" and the Petitioner will be referred to as he appears before this Honorable Court of Appeal. In the brief the following symbols will be used:

"R" - Record on appeal (Volume I)

"T" - Transcript of trial proceedings of January 7, 1997 (Volume II)

"VD" - Transcript of voir dire proceedings of January 6, 1997 (Volume II)

"S" - Sentencing proceedings of January 27 and February 3, 1997 (Volume III)

"SR" = Supplemental record on appeal

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Sumter County, Florida, with sale or delivery of cocaine within 1000 feet of a school and possession of cocaine with the intent to sell or deliver. (R 1) He was tried by a jury on January 6 and 7, 1997, and found guilty as charged. (T 138, 139; R 69, 70) On January 27, 1997, he was sentenced as an habitual offender to spend his life in prison for sale of cocaine and on February 3, 1997, he was sentenced to a concurrent term of 15 years in prison for possession of cocaine with the intent to sell or deliver. (S 26, 33; R 82-85)

Petitioner appealed and his convictions and sentences were affirmed by the Fifth District Court of Appeal on April 9, 1998. Edwards v. State, 23 Fla. L. Weekly D940 (Fla. 5th DCA April 9, 1998). (APPENDIX 1). His notice of seeking this Honorable Court's review was filed on May 8, 1998.

STATEMENT OF THE FACTS

About 8:30 in the evening of August 15, 1996, Troy Tinkham, a temporary employee with Corrections Corporation of America, and Corrections Officer Jennifer Swing were in the area of Northwest 4th Street in Webster to make drug buys under video and audio surveillance. (T 28, 29, 31, 32, 34, 44-46, 52, 58-60) They testified that Petitioner approached the driver's side of their truck and Mr. Tinkham asked if he "had a twenty," in response to which, they said, Petitioner told them to "do a block." (T 46-48, 52, 53, 60) When they drove back to the area, they said, Petitioner came to the passenger's side of the truck and gave a rock of cocaine to Officer Swing in exchange for a twenty-dollar bill. (T 48, 54, 60) The video camera inside the truck was pointed toward the driver's side. (T 50, 60) Sumter County Sheriff's Deputy James Ferguson and Webster Police Officer Tony Stravino identified the man whom the video depicted as approaching the driver's side initially as Petitioner. (T 35, 36, 40, 63)

Deputy Ferguson measured with a "traffic wheel" from the east edge of the pavement of Northwest 4th Street one thousand feet to a mark "four or five feet into the grass area of the school property." (T 37, 38, 40, 41) The principal of South Sumter Middle School was permitted to testify that he "understood" that

the property boundary of the school was the fence line, the point to which the school proprietors maintained the grounds. (T 64-68, 71) The trial court overruled defense counsel's objection to allowing the State to re-call Deputy Ferguson to display and explain the "traffic wheel" to the jurors[1]. (T 83-84)

Prior to trial, Petitioner was offered in exchange for a guilty plea concurrent sentences for all of his pending cases, of eight or ten and a half years in prison, and the State would not seek habitual offender enhancement. (VD 4, 6, 17) Petitioner desired instead to have a jury trial but he wanted to be represented by counsel who was retained after the jury had been selected and who requested a continuance of one or two days to prepare for trial. (VD 4-8, 10, 12, 15-18, 20) The motion for a continuance was denied and Petitioner was represented at trial by court-appointed counsel. (VD 18-20) After the guilty verdicts, the State announced its intention to seek habitual offender sentencing and Petitioner was later sentenced to life in prison as an habitual offender. (T 142; S 26, 33; R 82-85)

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[1] THE COURT: Because when they do those speeding tickets that they always say that if the court would allow them to measure it with a certified tape I've never heard that used in any other term but I'll allow the State to recall him. (T 84)

SUMMARY OF ARGUMENT

ISSUE I: The Criminal Appeal Reform Act of 1996 did not abolish appellate courts' ability to review fundamental, serious sentencing errors that are obvious from and supported by the record. If an appellate court has jurisdiction over a case, it has the discretion to address unpreserved issues in order to effect that portion of the Criminal Appeal Reform Act which permits appeals from fundamental errors whether preserved or not.

ISSUE II: Life in prison as an habitual offender constitutes cruel or unusual punishment for selling one piece of crack cocaine where Petitioner technically qualified for enhanced sentencing by having been released from incarceration from his most recent offense barely within five years' time; he had never received treatment for his drug addiction; and the trial court before trial had engaged in negotiations for a sentence of eight or ten and a half years in prison in exchange for a plea of guilty.

ISSUE III: Petitioner's sentence of 15 years as an habitual offender for possession of cocaine with the intent to sell or deliver must be reversed for resentencing within the sentencing guidelines because drug possession offenses are not subject to "habitualization."

ARGUMENT

ISSUE I

THE CRIMINAL APPEAL REFORM ACT OF 1996 DID NOT ABOLISH THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO SENTENCING ISSUES.

Petitioner appealed his convictions and sentences in the Sumter County Circuit Court to the Fifth District Court of Appeal arguing, among other issues, that his sentence of life in prison as an habitual offender for selling cocaine within 1000 feet of a school constituted cruel or unusual punishment and that his sentence as an habitual offender for possession of cocaine with the intent to sell was unauthorized. See Issues II and III, infra. The Fifth District Court of Appeal, per curiam, affirmed his convictions and sentences on April 9, 1998, citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92,805. (APPENDIX 2)

In Maddox, the Fifth District Court of Appeal interpreted the Criminal Appeal Reform Act of 1996 and the 1996 amendments to the appellate and criminal rules as eliminating the concept of fundamental error as it had been previously recognized and applied in the context of sentencing. §924.051, Fla. Stat. (1996); Rule 9.140(d), Fla. R. App. P.; Amendments to Florida Rule of Appellate

Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So. 2d 1374 (Fla. 1996). The Maddox decision "served notice" that unless properly preserved by a timely objection or a denied motion to correct a sentence, no issue would be addressed on appeal by the Fifth District. The en banc Maddox Court expressly disagreed with the contrary rulings in their respective districts of the courts in State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997); Chojnowski v. State, 705 So. 2d 915 (Fla. 2d DCA 1997); Pryor v. State, 704 So. 2d 217 (Fla. 3d DCA 1998); Johnson v. State, 701 So. 2d 382 (Fla. 1st DCA 1997); Cowan v. State, 701 So. 2d 353 (Fla. 1st DCA 1997); Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997); and Callins v. State, 698 So. 2d 883 (Fla. 4th DCA 1997).

Petitioner asserts that the Criminal Appeal Reform Act did not eliminate the concept of fundamental error. Section 924.051(3) 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.

§924.051(3), Fla. Stat. (1996). (Emphasis supplied.) The

Legislature thus specifically recognizes the continued viability of the concept of fundamental error, including sentencing errors. Although the Maddox Court concludes that the 1996 appellate- and criminal-rule amendments eliminated appellate review of fundamental sentencing errors, giving such effect would render them improper as "judicial legislation," rewriting a specific legislative enactment. See, e. g., Wyche v. State, 619 So. 2d 231, 236 (Fla. 1993) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments").

Petitioner urges this Honorable Court to follow the reasoning and conclusion of Denson v. State, 23 Fla. L. Weekly D1216 (Fla. 2d DCA May 13, 1998), that chose to address two serious sentencing issues that were addressed on appeal but not preserved in the trial court, i. e., that the defendant had been sentenced, as was Petitioner, as an habitual offender for possession of cocaine and that the written sentence increased the sentence that had been orally pronounced. The Denson Court wrote that in some respects the Criminal Appeal Reform Act codified the appellate courts' own restrictions on their standard of review; but the Denson Judges recognized that:

> . . . When this court already has jurisdiction over a criminal appeal because of a properly preserved issue, we do not avoid a frivolous appeal

or achieve efficiency by ignoring serious, patent sentencing errors. Limiting our scope or standard of review in these circumstances is not only inefficient and dilatory, but also risks the possibility that a defendant will be punished in clear violation of the law.

* * *

If the 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 have 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 postconviction 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 the 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, declined 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.

Id., 23 Fla. L. Weekly at 1217-1218.

By contrast, the Fifth District Court of Appeal finds "little risk" of injustice in the new procedures as interpreted by Maddox: if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the Court wrote, the remedy of ineffective assistance of counsel will be available. Id., 708 So.2d at 621. That is, the Maddox Court finds acceptable an appellate system which requires judges to ignore obvious, demonstrable errors and then leave it to a "prisoner, untrained in the law, [to] somehow discover the error and request its correction." See Denson, supra.

For the Criminal Appeal Reform Act to be constitutional and just, it must be, and Petitioner asks that it be, declared to preserve appellate courts' discretion to grant relief in cases presenting fundamental or obvious sentencing errors supported by the record. The decisions of the Fifth District Court of Appeal in Maddox, supra, and in the instant case should be reversed and this

cause remanded with instructions to consider and grant relief on the grounds presented in Issues II and III in this appeal.

ISSUE II

PETITIONER'S SENTENCE OF LIFE IN PRISON AS AN HABITUAL OFFENDER CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT UNDER ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION AND WAS THE PRODUCT OF VINDICTIVENESS FOLLOWING PETITIONER'S REFUSAL TO PLEAD GUILTY.

Prior to his trial, Petitioner was offered the opportunity to plead guilty to the charges in this case and in other pending cases, and be sentenced to concurrent terms totalling eight years in prison. (VD 4, 6) When the lawyer whom he wished to retain to represent him at trial appeared in the courtroom, Judge Stancil told him "as a courtesy" that the State had offered an eight-year sentence but would be "pushing for life" if Petitioner was convicted at trial. (T 16) The prosecutor questioned whether the offer was for an eight- or a ten-and-a-half-year sentence but was "not going to object to whatever the Court does." (T 17) Judge Stancil stated, "Well I understand your situation and I would probably concur at this point." (T 17)

After the jury's verdicts of guilty, the prosecutor announced that the State would seek enhanced sentencing of Petitioner as an habitual offender. (T 142) At the sentencing hearing three weeks later, the State was able to show that Petitioner had been convicted of several felonies in the past and that he had been

released from incarceration for his most recent conviction four years and 350 days prior to the date of the offenses for which he was sentenced in this case, or approximately two weeks within the threshold for qualifying for habitual offender sentencing. s. 775.084(1)(a)2.(b), Fla. Stat. (1995). (S 7-16, 19) Defense counsel argued that Petitioner only marginally met the criteria for habitual offender sentencing and that Petitioner's main problem was his own addiction to drugs, for which he had never received any treatment. (S 22-25, 32, 33) The maximum sentence recommended by the sentencing guidelines was 131.5 months, or almost eleven years, in prison. (R 86-88) Judge Stancil declared that Petitioner met the criteria for habitual offender sentencing and sentenced him to life in prison for selling cocaine near a school. (S 26; R 82-85)

In Hale v. State, 630 So. 2d 521 (Fla. 1993), and Williams v. State, 630 So. 2d 534 (Fla. 1993), this Honorable Court clearly stated that the Florida Constitution requires proportionality review by an appellate court of a non-capital sentence in the appropriate case. This Court declined in both of those cases to conduct such a review, not because it is not required but because, in Hale's case, the concurrent terms totalling 25 years in prison for sale and possession of cocaine did not "rise to the level of cruel or unusual" and, in Williams' case, the issue was rendered

moot by the District Court's reversal and remand of his sentence for resentencing. Specifically, Hale held that it was not necessary to delineate the "precise contours" of the Florida guarantee against cruel or unusual punishment because Hale's sentence is "clearly not disproportionate to his crime." Id.., 630 So. 2d 526. Thus, this Court has declared that Florida's constitution requires that sentences must be reviewed for their proportionality both to sentences imposed in like cases and to the crimes committed.

In Coe v. State, 633 So. 2d 38 (Fla. 5th DCA 1994), the Fifth District Court of Appeal wrote that:

> [I]f an appellant seeks "'proportionality review' of criminal penalties," as this appellant does, then a record to support such a review must come from below (the trial court) and some direction on how to make such a review (from the supreme court) would be helpful. See Williams v. State, [630 So. 2d 534 (Fla. 1993)].

This Honorable Court has clearly stated that the Florida Constitution requires proportionality review by the appellate court of a non-capital sentence in the appropriate case. Petitioner's is the appropriate case. His sentence is disproportionate to his crime and is particularly disproportionate to the sentence he could

have received had he not exercised his right to a trial.

An accused may not be subjected to more severe punishment for exercising his constitutional right to stand trial. Mitchell v. State, 521 So. 2d 185 (Fla. 4th DCA 1988). When an accused voluntarily chooses to reject or withdraw from a plea bargain, he retains no right to the rejected sentence and by rejecting the offer of a lesser sentence he assumes the risk of receiving a harsher sentence. Id.; Frazier v. State, 467 So. 2d 447 (Fla. 3d DCA 1985). The Mitchell Court noted, however, that "when the trial judge is involved with the plea bargaining, and a harsher sentence follows the breakdown in negotiations, the record must show that no improper weight was given to the failure to plead guilty." Id., 521 So. 2d at 188.

There is nothing in the record of this cause to explain the immense disparity between the ten-and-a-half-year maximum sentence offered to Petitioner before trial and the life-without-parole term that was imposed following his exercise of the right to a trial. The very possibility of judicial vindictiveness, moreover, compels that Petitioner's sentence be reviewed for constitutional proportionality pursuant to Hale v. State, supra. As his lawyer and he pointed out, Petitioner's primary problem is his dependence on or addiction to drugs. (S 22-25) In Robinson v. California,

370 U. S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), the Supreme Court held that although a state has broad power to regulate drug traffic within its borders and may make possession of narcotics a crime, a statute which makes it a crime to **be addicted** to narcotics inflicts a cruel and unusual punishment. The Supreme Court did not consider the brevity of the authorized sentence--of **ninety days**--in Robinson to dilute the argument against it, because "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Id., 370 U.S. at 667.

Were it not for the fact that Petitioner officially qualified for classification as an habitual offender, Judge Stancil would have been precluded from increasing the ten-and-a-half-year sentencing guidelines term on the basis of Appellant's being a drug addict. See, e. g., Vance v. State, 475 So.2d 1362 at 1363 (Fla. 5th DCA 1985), wherein the Court wrote:

> . . . Drug dependency, like a mental health problem, is a treatable medical and psychological condition. Prison is no "cure" for either. . . .

Id., 475 So.2d at 1363.

Petitioner's sentence of life in prison with no opportunity to earn gain-time or parole constitutes cruel or unusual punishment.

Petitioner asks this Honorable Court to conduct a review of his sentence for proportionality or to remand this cause to the Fifth District Court of Appeal with directions to conduct such a review in conformity with Hale v. State, supra, and the Florida Constitution. Art. I §17, Fla. Const.

ISSUE III

PETITIONER WAS IMPROPERLY SENTENCED AS AN HABITUAL OFFENDER FOR POSSESSION OF COCAINE WITH THE INTENT TO SELL.

Under Count Two of the information filed herein, Petitioner was convicted of possession of cocaine with the intent to sell or deliver. (R 1, 70; T 139) A week after he was sentenced as an habitual offender to spend his life in prison for selling cocaine within 1000 feet of a school, Petitioner was brought back to court for imposition of sentence for possession of cocaine and he was sentenced to a concurrent term of 15 years in prison. (S 31) The sentencing order reflects that he was sentenced as an habitual offender on both counts. (R 84) Section 775.084(1)(a)3 does not permit habitualization where the felony for which a defendant is being sentenced is a violation of Section 893.13 relating to the purchase or possession of a controlled substance. See Jackson v. State, 651 So. 2d 242 (Fla. 5th DCA 1995). The 15-year sentence for possession of cocaine, and the Fifth District Court of Appeal's refusal to address the error in imposing the sentence, must be reversed and this cause remanded to the trial court for correction of the sentencing order to strike the habitual offender classification for Count Two and for resentencing within the sentencing guidelines.

CONCLUSION

For the reasons expressed in Issue I herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending, Florida Supreme Court Case Number 92,805; and, for the reasons expressed in Issue II herein, direct the Fifth District Court of Appeal to review his sentence for proportionality and for the possibility that its imposition was vindictive; and, for the reasons expressed in Issue III herein, vacate his sentence for possession of cocaine with the intent to sell or deliver, order that his adjudication as an habitual offender therefor be stricken, and remand this cause for resentencing on Count Two within the sentencing guidelines.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Alfonzo Edwards, 35 Apalachee Drive, Sneads, Florida 32460, this 7th day of August, 1998.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

ALFONZO EDWARDS,

Petitioner,

versus CASE NO. 93,000

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

A P P E N D I X 1

*969 707 So.2d 969

23 Fla. L. Weekly D940

Alfonso EDWARDS, Appellant,
v.
STATE of Florida, Appellee.

No. 97-0478.

District Court of Appeal of Florida,

Fifth District.

April 9, 1998.

Appeal from the Circuit Court for Sumter County; Hale R. Stancil, Judge.

James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See Maddox v. State*, No. 96-3590, --- So.2d ---- (Fla. 5th DCA March 13, 1998).

GRIFFIN, C.J., and GOSHORN and ANTOON, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

ALFONZO EDWARDS,

Petitioner,

versus CASE NO. 93,000

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

A P P E N D I X 2

David Lavern MADDOX, Appellant,
v.
STATE of Florida, Appellee.

No. 96-3590.

District Court of Appeal of Florida,

Fifth District.

March 13, 1998.

Appeal from the Circuit Court for St. Johns County, Peggy E. Ready, Acting Circuit Judge.

James B. Gibson, Public Defender, and Andrea J. Surette, Assistant Public Defender, Daytona Beach, for Appellant.

No Appearance for Appellee.

EN BANC

GRIFFIN, Chief Judge.

**1 We have elected to hear this *Anders* (FN1) case en banc to clarify the scope of section 924.051, Florida Statutes (1996), which was enacted as part of the Criminal Appeal Reform Act. *See* Ch. 96-248, Laws of Florida. At issue is whether, in a direct appeal, this court may strike costs imposed without statutory authority where the cost issues have never been presented to the trial court. For the reasons which follow, we find the cost issues have not been preserved for review, and we affirm Maddox's sentence.

Maddox entered a plea of nolo contendere to burglary of a structure, (FN2) preserving his right to appeal the trial court's order denying his motion to suppress. He preserved no other issues for appeal. (FN3) He was sentenced on December 3, 1996 to five years' probation, with the special condition that he serve 364 days in the county jail. He was also assessed a number of costs, including $1.00 for the police academy and $205 in court costs. Maddox did not contest the assessment of costs at the time he entered his plea, and he did not file a motion to correct his sentence under rule 3.800(b), although the latter two charges are improper. The $1.00 assessment for the police academy is no longer authorized by statute. *See Laughlin v. State*, 664 So.2d 61 (Fla. 5th DCA 1995); *see generally Miller v. City of Indian Harbour Beach*, 453 So.2d 107 (Fla. 5th DCA 1984) (explaining the history of the assessment). Additionally, section 27.3455, Florida Statutes (Supp.1996) limits to $200 the "additional court costs" which can be imposed by the trial court.

In *Bisson v. State*, 696 So.2d 504 (Fla. 5th DCA 1997), this court addressed an analogous cost issue, despite the failure to file a rule 3.800(b) motion or otherwise preserve the issue for review, on the basis that the cost assessment was illegal and the error therefore "fundamental." We now conclude, however, that these issues are not reviewable on appeal unless the error is preserved.

In a direct appeal from a conviction or sentence in a nonplea case, the Criminal Appeal Reform Act permits review of only those errors which are (1) fundamental or (2) have been *preserved* for review. § 924.051(3), Fla. Stat. The word "preserved," as used in the statute, means that the issue has been presented to, and ruled on by the trial court. § 924.051(1)(a), Fla. Stat. Where a plea of guilty or nolo contendere has been entered, the right of appeal is limited to legally dispositive issues which have been *reserved* for appeal. § 924.051(4), Fla. Stat. As to this latter category, the Florida Supreme Court quickly held that, in order for this statute to be constitutional, it must be construed "to permit a defendant who pleads guilty or nolo contendere without *reserving* a legally dispositive issue to nevertheless appeal a sentencing error, providing it has been timely *preserved* by motion to correct the sentence." *See Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773, 775 (Fla.1996) . The reference to "sentencing errors" appears to include those that are unlawful, as well as those that are illegal, despite the Supreme Court's reference in its opinion to *Robinson v. State*, 373 So.2d 898 (Fla.1979). (FN4)

**2 Recognizing that, in the sentencing arena, the new legislation would preclude the appeal of many sentencing errors which formerly were routinely corrected on direct appeal (such as nonfundamental sentencing errors apparent on the face of the record), (FN5) the supreme court set about creating

a method for a criminal defendant to obtain relief from sentencing errors not preserved at the time of sentencing. In essence, the court created a sort of post-hoc device for preserving such sentencing errors for appeal. Fla. R.Crim. P. 3.800(b). Any error not complained of at the time of sentence could be complained of in the trial court after sentencing, if done in accordance with the new rule. Thus, at approximately the same time section 924.051 became effective, the Florida Supreme Court, by emergency amendment to Florida Rule of Criminal Procedure 3.800, permitted the filing of a motion to correct a sentence entered by the trial court, provided the motion was filed within ten days (now thirty) of the date of rendition of the sentence. *See Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800,* 675 So.2d 1374 (Fla.1996). Only then, if not corrected by the trial court, could it be raised on appeal because it had been "preserved." Although rule 3.800 by its terms traditionally had been limited to illegal sentences, subsection (b) of the rule, as amended, more broadly applies to any sentencing error. 675 So.2d at 1375. (FN6) The Rule 3.800(a) procedure remains available to correct an illegal sentence at any time.

The court also clarified in the amendments to the Florida Rules of Appellate Procedure that direct appellate review of any sentencing error in a nonplea case is prohibited if the issue has not first been presented to the trial court. 685 So.2d at 801. The amendments, which became effective January 1, 1997, provide:

> (d) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:
>
> (1) at the time of sentencing; or
>
> (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

Fla. R.App. P. 9.140(d). The amended appellate rules applicable to pleas of guilty or no contest similarly now limit the right of appeal to those sentencing errors which have been preserved for review. 685 So.2d at 799-800.

> (2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower tribunal's lack of subject matter jurisdiction;
>
> ****3** (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> (iv) a sentencing error, if preserved; or
>
> (v) as otherwise provided by law.

Fla. R.App. P. 9.140(b)(2).

The net effect of the statute and the amended rules is that *no* sentencing error can be considered in a direct appeal unless the error has been "preserved" for review, *i.e.* the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record. And it applies across the board to defendants who plead and to those who go to trial. As for the "fundamental error" exception, it now appears clear, given the recent rule amendments, that "fundamental error" no longer exists in the sentencing context. The supreme court has recently distinguished sentencing error from trial error, and has found fundamental error only in the latter context. *Summers v. State,* 684 So.2d 729, 729 (Fla.1996) ("The trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived."); *Archer v. State,* 673 So.2d 17, 20 (Fla.) ("Fundamental error is 'error which reaches 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.' "), *cert. denied,* --- U.S. ----, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996). It appears that the supreme court has concluded that the notion of "fundamental error" should be limited to trial errors, not sentencing errors. The high court could have

adopted a rule that paralleled the Criminal Appeal Reform Act, which would allow for review of fundamental errors in nonplea cases, but the court did not do so and made clear in its recent amendment to rule 9.140 that unpreserved sentencing errors cannot be raised on appeal.

The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be "fundamental" error where the courts have created a "failsafe" procedural device to correct any sentencing error or omission at the trial court level? Elimination of the concept of "fundamental error" in sentencing will avoid the inconsistency and illogic that plagues the caselaw and will provide a much-needed measure of clarity, certainty and finality. Even those who remain committed to the concept of "fundamental error" in the sentencing context would be hard pressed to identify errors at sentencing that are serious enough to require correction in the absence of objection at the trial level. The supreme court has concluded that the only type of sentencing error that is even "illegal" is a sentence that exceeds the statutory maximum. *Davis v. State,* 661 So.2d 1193, 1196. Yet, under the current statutory sentencing scheme, a sentence can exceed the maximum if warranted by the guidelines score. § 921.0014(1)(a), Fla. Stat. (1996). Here we are dealing with a $1 assessment and a $5 overcharge. If an improper $1 cost assessment is "fundamental error," then any sentencing error, no matter how minor, would be fundamental.

**4 We recognize that the scope of our opinion will be affected by the definition given to the term "sentencing errors." Some errors which occur at sentencing might be categorized as due process violations, *see Richardson v. State,* 694 So.2d 147 (Fla. 1st DCA 1997), a violation of the plea agreement, *see Green v. State,* 700 So.2d 384 (Fla. 1st DCA 1997), (FN7) or even clerical error. *See Johnson v. State,* 701 So.2d 382 (Fla. 1st DCA 1997); *Massey v. State,* 698 So.2d 607 (Fla. 5th DCA 1997). Additionally, fines and penalties are not always imposed as part of a defendant's sentence, but may constitute a civil penalty. *See, e.g., Bull v. State,* 548 So.2d 1103 (Fla.1989). All such errors, however, are properly regarded as "sentencing errors" within the meaning of section 924.051. Creating such multiple categories of errors which occur at sentencing also would result in the anomalies already seen in the current case law, wherein the courts (including this court) have reviewed minimal attorneys fees (FN8) and various cost assessments, (FN9) but refuse to review the wrongful imposition of a departure sentence or illegal habitualization without compliance with the dictates of section 924.051. *See Colligan v. State,* 701 So.2d 910 (Fla. 4th DCA 1997) (habitualization); *Cowan v. State,* 701 So.2d 353 (Fla. 1st DCA 1997) (departure sentence); *Johnson v. State,* 697 So.2d 1245 (Fla. 1st DCA 1997) (departure sentence); *Middleton v. State,* 689 So.2d 304 (Fla. 1st DCA 1997) (habitualization).

In view of our holding today, we must recede from several of our earlier opinions. As indicated, this court will no longer recognize fundamental error in the sentencing context, contrary to the statements made in *Medberry v. State,* 699 So.2d 857 (Fla. 5th DCA 1997), *Saldana v. State,* 698 So.2d 338 (Fla. 5th DCA 1997), *Rangel v. State,* 692 So.2d 277 (Fla. 5th DCA 1997), *Ortiz v. State,* 696 So.2d 916 (Fla. 5th DCA 1997) and *Bisson v. State,* 696 So.2d 504 (Fla. 5th DCA 1996). Nor will this court address illegal sentences on direct appeal, unless the issue has been preserved for review either by objection in the trial court or by means of a 3.800(b) motion for post-conviction relief. *Cf. Ortiz.* We stress, however, that rule 3.800(a) is always available to obtain collateral review of an illegal sentence. Moreover, where properly preserved for review, both unlawful and illegal sentences can be addressed on direct appeal, regardless of whether a plea is involved. *Cf. Robinson* (limiting right of appeal to illegal sentences); *Miller v. State,* 697 So.2d 586 (Fla. 1st DCA 1997); *Stone v. State,* 688 So.2d 1006, 1007-08 (Fla. 1st DCA 1997).

**5 Given our interpretation of section 924.051, we necessarily disagree with contrary results reached by other district courts of appeal, particularly insofar as these courts have continued to recognize fundamental error in the sentencing context. *See, e.g., Chojnowski v. State,* 22 Fla. L. Weekly D2660 (Fla. 2d DCA Nov.19, 1997); *Pryor v. State,* 22 Fla. L. Weekly D2500 (Fla. 3d DCA Oct.29, 1997); *Johnson,* 701 So.2d at 382-383; *Cowan,* 701 So.2d at 353; *Callins v. State,* 698 So.2d 883 (Fla. 4th DCA 1997). We also disagree that sentencing errors can be raised on direct appeal without preservation, simply because the sentence that results is illegal. *See, e.g., State v. Hewitt,* 702 So.2d 633 (Fla. 1st DCA 1997); *Sanders v. State,* 698 So.2d 377 (Fla. 1st DCA 1997). Finally, it seems clear that review under

section 924.051 is broader than that permitted under *Robinson*, in that it extends to unlawful sentences, if properly preserved.

At the intermediate appellate level, we are accustomed to simply correcting errors when we see them in criminal cases, especially in sentencing, because it seems both right and efficient to do so. The legislature and the supreme court have concluded, however, that the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief on appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing. Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the failure to preserve a sentencing error that would formerly have been characterized as "fundamental" would not support an "ineffective assistance" claim.

The defendant in this case was sentenced on December 3, 1996 after entering a plea of no contest. He did not contest the assessment of costs at sentencing, and he did not file a motion to correct his sentence under rule 3.800(b). Thus, neither cost issue has been preserved for review and neither issue can be addressed on appeal.

AFFIRMED.

DAUKSCH, COBB, W. SHARP, GOSHORN, HARRIS, PETERSON and ANTOON, JJ., concur.

THOMPSON, J., concurs and dissents in part, with opinion, in which DAUKSCH, J., concurs.

THOMPSON, Judge, concurring in part, dissenting in part.

**6 To the extent that the decision recedes from prior opinions of this court, I agree with the majority that cost assessments cannot be reviewed as fundamental error. *See Medberry; Rangel; Ortiz; Bisson.* However, I do not agree there is support for the statement, which I consider to be dictum, that the Florida Supreme Court has eliminated "fundamental error" in the sentencing context. This court cites *Summers* and *Archer* in support of this statement, but the cases stand for different principles.

In *Summers*, the supreme court answered a certified question dealing with juvenile sentencing. The issue before the court was whether a trial court's failure to consider the criteria of section 39.05(7)(c), Florida Statutes (1991) and contemporaneously reduce its evaluations and findings to writing could be raised collaterally. The court, relying on its decision in *Davis v. State*, 661 So.2d 1193 (Fla.1995), held that absent a contemporaneous objection, "[T]he trial court's failure to comply with the statutory mandate is a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived." *Summers* at 729. *Davis* stands first for the principle that the failure of the trial court to file contemporaneous written reasons for a departure sentence which is within the statutory maximum is not an illegal sentence. *Id.* at 1196. Second, it stands for the principle that the failure of the trial court to file contemporaneous written reasons is not fundamental error if the sentence is within the statutory maximum. *Id.* at 1197.

Archer was a death penalty resentencing case. The issue on appeal relevant to this case was fundamental error as related to the failure of the trial court to give the reasonable doubt instruction to the resentencing jury. The defendant did not make a contemporaneous objection at trial and attempted to raise the issue for the first time on appeal. The supreme court held that the failure of the trial court to give a jury instruction defining reasonable doubt at the resentencing was not fundamental error. *Id.* at 20. Since the defendant did not object, review could only be granted if there was fundamental error. Repeating the definition of fundamental error from *State v. Delva*, 575 So.2d 643, 644-645 (Fla.1991) (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla.1960)), the supreme court found no fundamental error because there is no constitutional requirement that a trial court define reasonable doubt. The definition of fundamental error is

accurate, but in no manner supports the conclusion that the supreme court has done away with fundamental error in sentencing.

**7. I agree the supreme court is narrowing the idea of fundamental error. *See e.g. J.B. v. State,* 23 Fla. L. Weekly S44 (Fla. Jan. 22, 1998); *Cummins; Davis.* In *J.B.*, the court held that there was no fundamental error at trial in the admission of a confession although there was no independent proof of corpus delicti. Although *J.B.* did not involve a sentencing error, it is obvious the supreme court is reexamining the fundamental error doctrine in Florida and is narrowing its application. However, I believe it is left to be seen whether the court will adopt, as does the majority, the rule that "no sentencing error can be considered in a direct appeal unless the error has been 'preserved' for review i.e. the error has been presented to and ruled on by the trial court. This is true regardless of whether the error is apparent on the face of the record." At this juncture, I do not think we can say that the supreme court has definitively eliminated fundamental sentencing error or direct review thereof. That statement must be made by the supreme court and must be unequivocal. Therefore, I agree with the holding on costs, but disagree with the statement that fundamental error no longer exists in the sentencing context. I would also certify this issue to the supreme court.

DAUKSCH, J., concurs.

FN1. *See Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

FN2. § 810.02, Fla. Stat. (1995).

FN3. As to the motion to suppress, we find no error. *See Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *see also Popple v. State,* 626 So.2d 185 (Fla.1993); *Hosey v. State,* 627 So.2d 1289 (Fla. 5th DCA 1993), *review denied,* 639 So.2d 978 (Fla.1994).

FN4. It is likely that when *Robinson v. State,* 373 So.2d 898 (Fla.1979) was decided, the term "illegal sentence" was understood to have a somewhat broader meaning than later explained in *Davis v. State,* 661 So.2d 1193 (Fla.1995). In *Robinson,* the court held that a defendant who pleads guilty is permitted to appeal the *unreserved* issues of illegality of his sentence, subject-matter jurisdiction, the failure of the government to abide by a plea agreement, and the voluntary and intelligent character of the plea. The supreme court has now said that the statute must be construed to permit an appeal of all "sentencing errors," assuming those errors have been preserved for review. 685 So.2d at 775.

FN5. Under the court's prior decisions, an exception to the requirement of preservation of error was made for sentencing errors apparent on the face of the record, which were reviewable on direct appeal, even in the absence of a contemporaneous objection and regardless of whether the error was fundamental, since as to these errors the purpose of the contemporaneous objection rule was not present. *See generally State v. Montague,* 682 So.2d 1085 (Fla.1996) (stating that contemporaneous objection rule does not apply to sentencing errors apparent on face of record, and such errors may be raised for first time on appeal); *Davis v. State,* 661 So.2d at 1197; *cf. Taylor v. State,* 601 So.2d 540 (Fla.1992) (sentencing errors requiring resolution of factual matters not contained in record cannot generally be raised for first time on appeal).

FN6. At the same time it amended rule 3.800, the Florida Supreme Court also amended Florida Rule of Appellate Procedure 9.020(g) to toll the time for taking an appeal upon the filing of a motion to correct a sentence or order of probation. 675 So.2d 1375.

FN7. The problem addressed in *Green* has now been corrected by the promulgation of Florida Rule of Criminal Procedure 3.170(l), which requires a motion to withdraw a plea where there has been a failure to abide by the terms of the plea.

FN8. *See, e.g., Louisgeste v. State,* 23 Fla. L. Weekly D136 (Fla. 4th DCA Jan.7, 1998), *Strickland v. State,* 693 So.2d 1142 (Fla. 1st DCA 1997), *Beasley v. State,* 695 So.2d 1313 (Fla. 1st DCA 1997), *Neal v. State,* 688 So.2d 392 (Fla. 1st DCA), *review denied,* 698 So.2d 543 (Fla.1997).

FN9. *Bowen v. State,* 702 So.2d 298 (Fla. 1st DCA 1997) (striking payment of $100 to the Drug Abuse Trust Fund and $100 to the Florida Crime Lab because order failed to cite statutory authority for these costs); *Jones v. State,* 700 So.2d 776 (Fla. 2d DCA 1997) (striking imposition of discretionary

costs where costs were not orally pronounced at sentencing and the statutory bases for such were not otherwise indicated); *Fisher v. State*, 697 So.2d 1291 (Fla. 1st DCA 1997) (striking costs and fines which were imposed against defendant, but for which no statutory authority was cited); *Hopkins v. State*, 697 So.2d 1009 (Fla. 4th DCA 1997) (striking imposition of costs not orally announced at sentencing); *James v. State*, 696 So.2d 1268 (Fla. 2d DCA 1997) (striking investigative costs because they were imposed without request and without appropriate supporting documentation).

Alfonso Edwards v. State
Case Number 93,000

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point "Courier New," a font that is not proportionately spaced.

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August 7, 1998

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SID J. WHITE
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By _____
Chief Deputy Clerk

The Honorable Sid J. White
Clerk of the Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Alfonso Edwards v. State, Case Number 93,000

Dear Mr. White:

Enclosed are the original and seven copies of the Petitioner's brief on the merits in the above-styled cause.

Sincerely,

Brynn Newton

Brynn Newton
Assistant Public Defender

Enclosure.