IN THE SUPREME COURT OF FLORIDA

JASON TYRONE SPEIGHTS,

Petitioner,

v.

CASE NO. 93,207

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner files this brief in reply to respondent, whose brief will be referred to as "RB," followed by the appropriate page number in parentheses. The opinion of the lower tribunal has been reported as Speights v. State, 711 So. 2d 167 (Fla. 1st DCA 1998). Attached hereto as Appendix A is petitioner's motion to relinquish jurisdiction filed in the lower tribunal. Appendix B is respondent's response in opposition to the motion. Appendix C is the order denying the motion to relinquish.

This brief is prepared in 12 point Courier New type.

ARGUMENT

WHEN A HABITUAL VIOLENT FELONY OFFENDER SENTENCE IS IMPOSED WITHOUT RECORD EVIDENCE OF A PRIOR CONVICTION OF AN ENUMERATED PREDICATE FELONY, BUT WITHOUT ANY OBJECTION BY THE DEFENDANT TO THE IMPOSITION OF SUCH A SENTENCE, AND THE RESULTING SENTENCE IS ABOVE THE STATUTORY MAXIMUM WITHOUT HABITUALIZATION BUT BELOW THE STATUTORY MAXIMUM PERIOD OF INCARCERATION AFTER HABITUALIZATION, THE SENTENCING ERROR IS ONE THAT MAY BE RAISED ON APPEAL FOR THE FIRST TIME, AND CORRECTED DESPITE THE LACK OF ANY MOTION IN THE TRIAL COURT TO CORRECT THE SENTENCE PURSUANT TO FLA. R. CRIM. P. 3.800(b).

Respondent concedes that petitioner was sentenced as an habitual violent offender to 22 years in state prison, with a 10 year mandatory minimum, upon a predicate offense which did not qualify him as an habitual violent offender. Respondent wails at length about how petitioner's counsel was ineffective for failing to notice this defect, and how wasteful it is for the appellate courts to be confronted with admittedly-unlawful sentences.

Petitioner would like to point out that respondent does not come before this Court with clean hands. Petitioner's appellate counsel moved the lower tribunal to correct petitioner's unlawful sentence as soon as counsel discovered the error.[1] Appendix A. Respondent opposed the motion and

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[1]In adopting Fla. R. Crim. P. 3.800(b), this Court assumed that all sentencing errors would come to defense counsel's attention within 30 days of sentencing. This case demonstrates the fallacy of that assumption. The error here went unnoticed by all parties until appellate counsel discovered it four months after sentencing.

argued that relinquishing jurisdiction would not conserve judicial resources. Appendix B. The lower tribunal denied the motion. Appendix C.

Respondent cannot have it both ways. If respondent wishes to conserve judicial resources, then it should permit a defendant who is serving an unauthorized sentence to seek relief as soon as the error is noticed, on appeal, or via Fla. R. Crim. P. 3.800(a) or Fla. R. Crim. P. 3.850.

Respondent takes great delight in pointing out that petitioner's counsel did not object to the unauthorized habitual violent offender sentence. But one must remember that it was the prosecutor who lured the judge down the path of reversible error by affirmatively stating that attempted carjacking was a predicate offense for habitual violant offender sentencing (I R 73-74). The responsibility for ensuring that a defendant receives a sentence which is legal and authorized by statute rests on both parties, as well as the sentencing judge. As stated by this Court in State v. Montague, 682 So. 2d 1085, 1088-89 (Fla. 1996):

> Sentencing proceedings should be conducted with the same level of preparation and care that is required for the guilt phase of criminal proceedings. Sentencing is obviously a critically important stage of the proceedings, and counsel must be responsible for ensuring the factual integrity of the findings made by the trial court. In short, our decision upholds the primary purpose of the contemporaneous objection rule discussed

in *Rhoden*. **We caution that our holding, while emphasizing the responsibility of defense counsel, in no way lessens the ethical and legal duty of the State and the trial court to ensure that factual determinations made at sentencing are correct.**[fn. 6]

[fn. 6] As Judge Cowart noted in *Hayes v. State*, 598 So.2d 135, 138 (Fla. 5th DCA 1992):

> All persons in prison under a sentence for the commission of a crime are there because the judicial system declared they did not follow and obey the law but, to the contrary, they did an illegal act. **Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy it.** The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person. Further, as a practical matter, if relief from this obviously illegal sentence is not now given in this case, the defendant will, and should, be able to obtain it in other ways, either by an ineffective assistance claim against his former counsel or by way of habeas corpus in a state or federal court. **Courts should be both fair and practical and give relief as soon as it is recognized as due.**

(Emphasis added)

The state has argued that under the lower tribunal's opinion in Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997), petitioner cannot raise this issue on appeal. In Middleton and in Copeland v. State, 23 Fla. L. Weekly D1224 (Fla. 1st DCA May 12, 1998), the lower tribunal held that one who receives an unauthorized habitual offender sentence for simple possession of drugs cannot raise the error for the first time on appeal.

In cases since Middleton, the lower tribunal has explained its very narrow view that an *illegal sentence* is only one which exceeds the statutory maximum. The lower tribunal recognizes that an excessive sentence is fundamental error and may be raised for the first time on appeal under §924.051(3), Fla. Stat. (1997).[2] Dean v. State, 702 So. 2d

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[2]Curiously, the lower tribunal will allow a defendant to attack dual convictions *and* sentences as a double jeopardy violation for the first time on appeal. *Jones v. State*, 711 So. 2d 633 (Fla. 1st DCA 1998) (resisting officers with violence); *Hill v. State*, 23 Fla. L. Weekly D1227 (Fla. 1st DCA May 12, 1998) (possession of two guns by convicted felon); *Henry v. State*, 707 So. 2d 370 (Fla. 1st DCA 1998) (burglary of five sheds); and *Austin v. State*, 699 So. 2d 314 (Fla. 1st DCA 1997) (burglary with assault and assault). *See also Marinelli v. State*, 706 So. 2d 1374 (Fla. 2nd DCA 1998) (misdemeanor stalkings); and *Hardy v. State*, 705 So. 2d 979 (Fla. 4th DCA 1998) (multiple leaving the scene of an accident).

The lower tribunal will also permit the defendant to attack a public defender lien for the first time on appeal. *Dodson v. State*, 710 So. 2d 159 (Fla. 1st DCA 1998), *rev. granted* case no. 93,077 (Fla. June 3, 1998).

1358 (Fla. 1st DCA 1997) (17 years for a second degree felony); Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997) (20 years for a second degree felony); McDaniel v. State, 704 So. 2d 686 (Fla. 1st DCA 1997) (excessive split sentence); Stanford v. State, 706 So. 2d 900 (Fla. 1st DCA 1998) (unauthorized 35 year habitual offender sentence only reached because it was greater than the statutory maximum and the guidelines); and Mason v. State, 710 So. 2d 82 (Fla. 1st DCA 1998) (excessive split sentence). The Second and Fourth Districts seem to agree. Orosco v. State, 710 So. 2d 1386 (Fla. 4th DCA 1998); Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998); and Denson v. State, 23 Fla. L. Weekly D1216 (Fla. 2nd DCA May 13, 1998). The First District has applied the rule equally to the state. State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997). The Fifth District has said it will not review anything unless it is preserved. Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted* case no. 92,805 (Fla. July 7, 1998).

Petitioner asks this Court to examine the lower tribunal's position and hold that an illegal sentence is also one which is not authorized by statute. The lower tribunal has read this Court's opinions in Davis v. State, 661 So. 2d 1193 (Fla. 1995) and State v. Calloway, 658 So. 2d 983 (Fla. 1995), too narrowly. As this Court recently recognized in State v. Mancino, 23 Fla. L. Weekly S301 (Fla. June 11, 1998),

the term *illegal sentences* is not limited to those which exceed the statutory maximum. It should also include those which are not authorized by statute. As this Court stated in State v. Mancino, 23 Fla. L. Weekly at S303:

> A sentence that patently fails to comport with statutory or constitutional limitations is by definition *illegal*.

Judicial economy is not served by excluding sentences not authorized by statute from appellate review. It is easy for the appellate court to look at the sentence on its face and determine if it is authorized by statute. If it is not, like petitioner's sentence, then the most economical method to correct it is to address it on direct appeal. Requiring the filing of a motion to correct an obviously unauthorized sentence is a roadblock which leads to more judicial and attorney labor.

As a matter of public policy, it is not in this state's best interests to fill up its prisons with those who are serving unauthorized sentences. As the Fourth District recognized in Louisgeste v. State, 706 So. 2d 29 (Fla. 4th DCA 1998) and Porter v. State, 702 So. 2d 257 (Fla. 4th DCA 1997), if an unauthorized sentence causes a defendant to serve more time than he normally would, then it may be raised for the first time on direct appeal.[3] Petitioner's unauthorized 10

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[3]The Fourth District's position in these cases would seem to conflict with its broad pronouncement in *Hyden v. State*, 23 Fla. L. Weekly D1342 (Fla. 4th DCA June 3, 1998), quoted at RB at 10.

year mandatory minimum sentence will cause him to serve more time than he normally would. This Court should follow Louisgeste and Porter and hold that a sentence which is not authorized by statute is illegal and fundamental error and may be raised for the first time on appeal.

Even if this Court does not wish to overrule Middleton, or follow Louisgeste and Porter, and even under the lower tribunal's narrow view of what constitutes an illegal sentence, petitioner's 22 year sentence is still illegal because it is in excess of the statutory maximum of 15 years for a second degree felony. §775.082(3)(c), Fla. Stat. (1997). This Court must reduce it to no more than 15 years.

This Court need not reach the following constitutional argument in order to reverse petitioner's sentence. But to the extent that the Reform Act establishes procedures for the appellate courts to conduct their review on appeal and bars the consideration of unauthorized sentences for the first time on appeal, the Act unconstitutionally violates separation of powers. Art. II, §3, Fla. Const.

Art. V, §2(a), Fla. Const., confers on this Court the power to adopt rules for the practice and procedure in all courts. State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993). Accordingly, a statute which purports to create or modify a procedural rule of court is constitutionally infirm. Markert v. Johnson, 367 So. 2d 1003 (Fla. 1978).

Establishing the appropriate standard of review on appeal

is inherent in this Court's rule-making authority. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ciccarelli v. State, 531 So. 2d 129, 131 (Fla. 1988)(Grimes, J., specially concurring); and Heuss v. State, 687 So. 2d 823 (Fla. 1996). *See also* Fla. R. App. P. 9.040(a) ("In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause.").

In addition to establishing the proper standard of review, the courts' inherent powers include examining records on appeal to determine whether an error constitutes fundamental reversible error in the absence of an objection. *See* Dewey v. State, 135 Fla. 44, 186 So. 224, 227 (1938)(on rehearing)("established rules of practice and procedure" such as the rule that issues not presented below cannot be considered in the appellate court, should not be violated "unless it is shown that it is essential to do so to administer justice"); and Batch v. State, 101 So. 2d 869, 874 (Fla. 1st DCA 1958)(on rehearing)(rule that questions not presented in the trial court will not be considered on appeal "is procedural in nature"); *see also*, Bennett v. State, 127 Fla. 759, 173 So. 817, 819 (1937)("to meet the ends of justice or to prevent the invasion or denial of essential rights," appellate courts may, in the exercise of their power of review, "take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair

and impartial trial, although no exceptions were preserved, or the question is imperfectly presented."); Fla. R. App. P. 9.040(d)("At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties"); and Fla. R. App. P. 9.140(h)(court "shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled").

Clearly, courts have certain inherent powers to do things that are reasonable and necessary for the administration of justice. In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus, 709 So. 2d 101 (Fla. 1998); In re Order of Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990); and Huntley v. State, 339 So. 2d 194 (Fla. 1976). By abrogating the appellate court's duty to review records for fundamental sentencing errors, the Act encroaches on the court's inherent powers and is unconstitutional. Any statutory scheme which allows a defendant who receives an illegal or unauthorized sentence the right to appeal if he objects to the sentence but

denies that right to a defendant who does not implicates serious due process and equal protection concerns.

There are other constitutional rights so basic to due process that their infraction can never be treated as waived by a plea, e.g., the denial of the right to counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); and Foster v. State, 387 So. 2d 244 (Fla. 1980) (counsel's actual conflict of interest can be raised for first time on appeal even in absence of objection or motion for separate counsel); *see also*, Trushin v. State, 425 So. 2d 1126 (Fla. 1986)(facial validity of statute can be raised for first time on appeal). Such errors must be cognizable on appeal, regardless of whether the defendant has objected below.

The state legislature cannot eliminate or even limit federal or state due process by direct or indirect application of its laws. *See* Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993) (legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional rights). To the extent the Act eliminates the right to appeal such fundamental sentencing errors, it violates due process and equal protection. To the extent the statute abrogates the appellate court's historic and inherent jurisdiction to review such matters on appeal when such review is essential to the administration of justice, it violates the separation of

powers.

This Court must answer the certified question in the affirmative, vacate petitioner's unauthorized habitual violent offender sentence, and remand for resentencing. Since the sentencing guidelines scoresheet reflects no other prior felony convictions and calls for a sentence between 45 and 75 months (I R 58-59), petitioner should receive a guidelines sentence of no more than 75 months.

CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in the initial brief, petitioner requests that this Court vacate his unauthorized habitual violent offender sentence, and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Reply Brief of Petitioner has been furnished to James W. Rogers and Trina Kramer, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, #548943, 3142 Thomas Drive, Bonifay, Florida 32425, this 10 day of August, 1998.

P. DOUGLAS BRINKMEYER

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APPENDIX TO REPLY BRIEF OF PETITIONER

A. Motion to Relinquish Jurisdiction

B. Response to Appellant's Motion to Relinquish Jurisdiction

C. Order Denying Motion to Relinquish Jurisdiction

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