IN THE SUPREME COURT OF FLORIDA

TERRY HYDEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,966

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Terry Hyden, was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida, and the Appellant in the Fourth District Court of Appeal. He will be referred to by name or as Petitioner in this brief. Respondent was the Prosecution in the trial court and the Appellee in the district court.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote the Record on Appeal documents.

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The symbol "SSR" will denote the Second Supplemental Record on Appeal (defense counsel's memorandum of law on motion to suppress).

STATEMENT OF THE CASE AND FACTS

Petitioner, Terry Hyden, was charged by information filed in the Nineteenth Judicial Circuit with possession of cocaine (R 7).

Petitioner filed a pretrial motion to suppress (R 19-21). A hearing was held on January 17, 1997, after which the trial court took the case under advisement (T 15-20; SSR). On January 31, 1997, the court entered a written order denying the motion to suppress (R 24-25).

On February 12, 1997, pursuant to a written petition to enter a plea of no contest (R 27-29), Petitioner entered a nolo contendere plea straight up to the court, reserving his right to appeal the denial of the motion to suppress (SR 2, 4-5). The parties had agreed that the motion to suppress was dispositive (T 21).

At sentencing on March 10, 1997, Petitioner was sentenced within the guidelines (R 30-32) to two (2) years on probation with enumerated special conditions including periodic urinalyses (SR 10-11; R 33-38, 39-40, 46). The court stated that it would sign final judgments for $200 in public defender fees and $42 for deposition costs (SR 11-12; R 47).

Timely Notice of Appeal was filed by Petitioner to the Fourth District Court of Appeal (R 48).

Initially, the Fourth District in a written opinion, *Hyden v. State*, 23 Fla. L. Weekly D677 (Fla. 4th DCA March 11, 1998), affirmed the trial court's denial of the motion to suppress but remanded for the trial court to correct the ministerial errors in the order of probation and order on charges/costs/fees as the written orders did not conform to the trial court's oral pronouncements. Respondent moved for rehearing. On rehearing *en banc*, on June 3, 1998, the Fourth District withdrew its opinion of March 11, 1998, and substituted a new opinion. *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998)(*en banc*). In the substituted opinion, the Fourth District held that it would "no longer entertain on appeal the correction of sentencing errors which are not properly preserved." *Hyden*, 715 So. 2d at 961. Relying on *Florida Rule of Appellate Procedure* 9.140(d), it further held that although it had previously corrected deviations from the oral pronouncement of sentence, that it would no longer do so unless the errors were preserved by the filing of a motion to correct pursuant to *Florida Rule of Criminal Procedure* 3.800(b). *Id.* In addition, the Fourth District held that error in the assessment of public defender fees and costs is no longer fundamental error and is not correctable on appeal without preservation in the trial court. In

doing so, the Fourth District receded from its prior holding in *Louisgeste v. State*, 706 So. 2d 29 (Fla. 4th DCA 1998), and certified conflict with *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA), *review denied*, 698 So. 2d 543 (Fla. 1997). *Id.* at 962. Petitioner moved for rehearing/rehearing *en banc* and/or certification of conflict and/or certification of two questions of great public importance. The Fourth District denied Petitioner's motion on August 18, 1998, and issued its mandate on September 4, 1998.

Timely Notice of Discretionary Review was filed by Petitioner on September 17, 1998. On September 25, 1998, this Court issued its Order postponing a decision on jurisdiction and setting a briefing schedule. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

POINT I

In the instant cause, the Fourth District Court of Appeal erronously held that the improper imposition of public defender fees and costs is no longer fundamental error since the enactment of Section 924.051(3), *Florida Statutes* (1997), and certified conflict with *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA), *review denied*, 698 So. 2d 543 (Fla. 1997). The *Neal* decision was correctly decided on the authority of this Court's decision in *Wood v. State*, 544 So. 2d 1004 (Fla. 1989). Thus, this Court must approve *Neal* and quash *Hyden*.

POINT II

This Honorable Court should also quash the instant decision as the opinion in is direct and express conflict on other points of law with numerous other decisions of this Court and its sister district courts of appeal. The Fourth District erroneously identified too narrow a class of sentencing errors which it will consider on appeal without preservation in the trial court: preserved sentencing errors, fundamental errors and illegal sentences as defined in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995).

ARGUMENT

POINT I

THE INSTANT DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH *NEAL V. STATE*, 688 SO. 2D 392 (FLA. 1ST DCA), *REVIEW DENIED*, 698 SO. 2D 543 (FLA. 1997), ON THE SAME QUESTION OF LAW.

On direct appeal to the Fourth District Court of Appeal, in the second point raised, Mr. Hyden challenged ministerial or scrivener's errors where the written order of probation and the written order on charges/costs/fees did not conform to the trial court's oral pronouncements at the sentencing hearing. First, due to a scrivener's error, special condition 15 in the written order of probation contained a requirement that Petitioner submit to random breath and blood testing at any time requested by his officer or the professional staff of any treatment center where he received treatment (R 36). However, at sentencing, the trial court did not orally impose this condition. Rather, the court ordered Petitioner to submit only to periodic urinalyses as a special condition of probation (SR 11). In addition, the written order of probation included conditions requiring Petitioner to pay $42 in "restitution" for deposition costs to the Board of County Commissioners and $200 in public defender fees (R 35). The "Order on Charges/Costs/Fees" included the same assessments (R 46). This

does not conform to the trial court's oral pronouncement that a final judgment would instead be entered for public defender fees and costs (SR 11-12), which was also done (R 47). The trial court never ordered Petitioner to pay these costs as conditions of probation.

On rehearing *en banc*, the Fourth District held that it would "no longer entertain on appeal the correction of sentencing errors which are not properly preserved." *Hyden v. State*, 715 So. 2d 960, 961 (Fla. 4th DCA 1998)(*en banc*). Relying on *Florida Rule of Appellate Procedure* 9.140(d), it further held that although it had previously corrected deviations from the oral pronouncement of sentence, that it would no longer do so unless the errors were preserved by the filing of a motion to correct pursuant to *Florida Rule of Criminal Procedure* 3.800(b). *Id.* In addition, the Fourth District held that error in the assessment of public defender fees and costs is no longer fundamental error and is not correctable on appeal without preservation in the trial court. In doing so, the Fourth District receded from its prior holding in *Louisgeste v. State*, 706 So. 2d 29 (Fla. 4th DCA 1998), and certified conflict with *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA), *review denied*, 698 So. 2d 543 (Fla. 1997). *Id.* at 962. This Court thus has

jurisdiction pursuant to Article V, Section 3(b)(4) of the *Florida Constitution*.

This Court should accept jurisdiction, affirm *Neal* and quash *Hyden*. In addition, this Court should address other conflicts apparent in this decision between the Fourth District and decisions of this Court and decisions of other district courts of appeal (*see also* Point II, *infra*).

The initial issue thus presented by the certified conflict is whether the wrongful imposition of public defender fees and costs constitutes fundamental error which may be challenged on direct appeal without having been presented to the trial court, in light of Section 924.051(3), *Florida Statutes* (1997), amended Florida Rule of Criminal Procedure 3.800(b) and amended Florida Rule of Appellate Procedure 9.140(d).

In *Neal v. State*, the First District Court of Appeal relied on this Court's decision in *Wood v. State*, 544 So. 2d 1004 (Fla. 1989), in holding that it is fundamental error to order a criminal defendant to pay attorney's fees without affording adequate notice and an opportunity to be heard, and thus, that the issue may be raised on appeal notwithstanding the fact that it was never presented to the trial court. *Id.* at 395; *Matke v. State*, 23 Fla.

L. Weekly D469 (Fla. 1st DCA Feb. 13, 1998), *review granted, State v. Matke*, Case No. 92,476 (May 19, 1998)(trial court's failure to give defendant notice of right to hearing to contest imposition of public defender fees is fundamental error; but certifying conflict with two decisions of the Fourth District holding that such error is not fundamental). Petitioner notes that although the First District has certified a question of great public importance to this Court concerning whether the wrongful imposition of a public defender's lien still constitutes fundamental error which may be raised on direct appeal in light of the Criminal Appeal Reform Act and amended Rule of Criminal Procedure 3.800(b), *Dodson v. State*, 710 So. 2d 159 (Fla. 1st DCA 1998), *Mike v. State*, 710 So. 2d 159 (Fla. 1st DCA 1998), it continues to hold that the wrongful imposition is fundamental error. *Sculley v. State*, 23 Fla. L. Weekly D1356 (Fla. 1st DCA June 1, 1998).

Petitioner submits that the Fourth District was wrong in receding from *Louisgeste*, certifying conflict with *Neal* and holding that the improper imposition of public defender fees and costs is no longer fundamental error.

Section 938.29(6), *Florida Statutes* (1997), provides that "the defendant-recipient or parent, after adequate notice thereof, shall

have opportunity to be heard and offer objection to the determination, and to be represented by counsel, with due opportunity to exercise and be accorded the procedures and rights provided in the laws and court rules pertaining to civil cases at law." Florida Rule of Criminal Procedure 3.720(d)(1) provides: "The amount of the lien shall be given and a judgment entered in that amount against the accused. Notice of the accused's right to a hearing to contest the amount of the lien shall be given at the time of sentence."

In *Wood v. State*, 544 So. 2d at 1006, this Court held that it is fundamental error to order a criminal defendant to pay costs pursuant to Section 27.3455, *Florida Statutes*, without affording adequate notice and a meaningful hearing, and thus, that issue may be raised on appeal notwithstanding the fact that it was never presented to the trial court. This Court held:

> Here though, we are directly confronted with the question of fundamental error in failure to comply with *Jenkins* [*Jenkins v. State*, 422 So. 2d 1007 (Fla. 1st DCA 1982), *approved in part, disapproved in part*, 444 So. 2d 947 (Fla. 1984)]. Our opinion in *Jenkins* is founded upon constitutional rights of due process and the most basic requirements of adequate notice and meaningful hearing prior to the termination of substantive rights or some other state-enforced penalty. In *Jenkins* we held that court costs could not be assessed

> against a defendant without adequate notice and a judicial determination that the defendant has the ability to pay. *Id.* at 950.
>
> This holding goes to the very heart of the requirements of the due process clauses of our state and federal constitutions. The denial of these basic constitutional rights constitutes fundamental error.

Wood, 544 So. 2d at 1006. In so holding, this Court recognized the following:

> **Unfortunately, costs are sometimes incorrectly assessed against defendants. It is the rights of these persons whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights.** Without adequate notice and a meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful hearing, the requirements of due process have not been met.

Id. (emphasis supplied).

The fundamental due process tenets upon which *Wood* was based remain unchanged in the aftermath of the enactment of the Criminal Appeal Reform Act of 1996 and the ensuing rules amendments. Further, Section 924.051(3) **specifically** states that instances of fundamental error may be raised on appeal.

As this Court has determined that it is fundamental error to order a criminal defendant to pay attorney's fees without affording adequate notice and an opportunity to be heard, therefore, that

issue may be raised on appeal notwithstanding the fact that it was never presented to the trial court. *See Wood*. As the instant decision is in conflict with *Neal* and *Wood*, this Court must approve *Neal* and quash *Hyden*.

Additionally, the issue of public defender fees is distinguishable because it is the defendant's own counsel who has the burden of moving for the imposition of public defender fees against his or her own client. When the assigned public defender moves for costs and fees he or she is no longer representing the indigent criminal defendant at that point because the defendant has a statutory right to object to the imposition of the fee and/or the amount sought by appointed counsel. There is a conflict of interest. Therefore, a defendant's interests are essentially unrepresented as to this issue. That is why notice is so vital and the notion of an "objection" by a "*pro se*" litigant as suggested by *Hyden* so untenable and unworkable.

Since these fees are required by law, it is the trial judge who must be responsible for insuring that all the constitutional and procedural rights of the indigent criminal defendant are scrupulously honored. There is no one else to do so as the indigent defendant is all alone on this issue. The trial judges

must take responsibility for this one unique situation required by the laws of our state. This Honorable Court should insist that the trial court comply with the applicable law before imposing public defender fees and costs or face reversal on appeal.

However, the issue at bar was **not** the trial court's failure to provide Mr. Hyden with prior notice and an opportunity to be heard. At the sentencing hearing, the trial court determined that a lien should be entered for the public defender fees and costs. Nevertheless, in addition to the entry of a lien, due to a ministerial error, the written order of probation erroneously included the requirement that Mr. Hyden pay the fees and costs (termed "restitution") as **conditions of his probation**[1]. The Fourth District apparently decided the above fundamental error issue as the district court also held that it would no longer correct unpreserved errors where a written order failed to conform to the trial court's oral pronouncement (except apparently in the case of fundamental error).

Thus, the *Hyden* court held that this issue was not fundamental error in the context of considering it a sentencing error: "In this

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[1] A scrivener's error also resulted in the imposition of the additional unpronounced condition of probation that Petitioner submit to breath and blood testing.

district, we will no longer entertain on appeal the correction of sentencing errors which are not properly preserved. In this case, the appellant challenges two aspects of his sentence." *Hyden v. State*, 716 So. 2d at 961.

The Fourth District's refusal to correct these ministerial errors in the written order which resulted in the imposition of additional unpronounced conditions of probation is thus also erroneous for the following reasons.

First, the Fourth District in *Hyden* erred in holding that the well-settled case law that a written order which conflicts with a trial court's oral pronouncement must be corrected on direct appeal despite the absence of an objection below has been abrogated in light of Section 924.051(3), *Florida Statutes* (1997), amended Florida Rule of Criminal Procedure 3.800(b) and amended Florida Rule of Appellate Procedure 9.140(d) (*see* Point II, *infra*).

Further, this Court has held that an illegal sentence may be raised on appeal without preservation below. *State v. Mancino*, 710 So. 2d 159 (Fla. 1998); *Davis v. State*, 661 So. 2d 1193, 1196-97 (Fla. 1995). The scrivener's errors at bar resulted in the imposition of **additional** unpronounced conditions of probation which required payment of public defender fees and costs and that Mr.

Hyden submit to blood and breath testing. As such imposition constituted an unconstitutional enhancement of a sentence, the resulting sentence is an illegal sentence that is fundamental error that can be raised in a direct appeal under the definition set forth in *State v. Mancino*. *See* § 924.051(3); *Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998)("where it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal"); *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994)(trial court's enhancement of the terms of the defendant's probation after defendant had begun serving probation violated the double jeopardy prohibition); *Nelson v. State*, 23 Fla. L. Weekly D2241 (Fla. 1st DCA Oct. 1, 1998). In *Hopping*, this Court relied on the fact that the record reflected without dispute that the trial court had illegally increased the defendant's sentence after the defendant had already begun service of that sentence. *See Troupe v. Rowe*, 283 So. 2d 857 (Fla. 1973)(prohibiting the increase of a sentence once it has commenced being served).

Thus, the challenged written order of probation where scrivener's errors resulted in the imposition of additional unpronounced conditions of probation created an illegal sentence.

Hence, the Fourth District decided this issue erroneously. This Court must quash *Hyden* and remand with directions to reverse the written order and remand for correction to conform to the trial court's oral pronouncements by deleting the additional conditions of probation requiring Petitioner to submit to breath and blood testing and pay public defender fees and costs.

For the foregoing reasons, this Honorable Court should accept jurisdiction, approve *Neal* and quash *Hyden*.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL IN *HYDEN V. STATE*, 715 SO. 2D 960 (FLA. 4TH DCA 1998)(*EN BANC*), ERRONEOUSLY IDENTIFIED TOO NARROW A CLASS OF SENTENCING ERRORS WHICH IT WILL CONSIDER ON APPEAL WITHOUT PRESERVATION IN THE TRIAL COURT.

After accepting jurisdiction as established in Point I, Petitioner submits that this Honorable Court should also quash the instant decision as the opinion in is direct and express conflict on other points of law with numerous other decisions of this Court and its sister district courts of appeal.

The Fourth District in *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998)(*en banc*), erroneously identified too narrow a class of sentencing errors which it will consider on appeal without preservation in the trial court: preserved sentencing errors, fundamental errors and illegal sentences as defined in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995). To this end, the instant decision is also in conflict with this Court's recent decision in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), and numerous other decisions of this Court and the district courts of appeal[2]. In

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[2] Petitioner notes that the Fourth District has recently refused to apply the *Mancino* definition of an illegal sentence in deciding a defendant's claim that his written sentence was illegal because it did not conform to the oral pronouncement at his sentencing hearing. The Fourth District held that the rule that the oral

State v. Mancino, this Court clarified its holding in *Davis v. State* as follows:

> As is evident from our recent holding in *Hopping* [*Hopping v. State*, 708 So. 2d 263 (Fla. 1998)], we have rejected the contention that our holding in *Davis* mandates that *only* those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal...A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal".

Id. at 433. The errors at bar also fall within the *Mancino definition*.

Petitioner will also address the Fourth District's error in holding that the longstanding rule that an oral pronouncement controls over an inconsistent written order has been abrogated by Section 924.051(3), *Florida Statutes* (1997), amended Florida Rule of Criminal Procedure 3.800(b) and amended Florida Rule of Appellate Procedure 9.140(d). In addition, Petitioner submits that the well-settled law in Florida that sentencing errors apparent on the face of the record may be corrected on direct appeal is still

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pronouncement of sentence controls in the event of a discrepancy is found in Florida Rule of Criminal Procedure 3.700(1), not in the *Florida Statutes* or state or federal constitutions, and that therefore it does not result in an illegal sentence under the *Mancino definition*. *Campbell v. State*, 23 Fla. L. Weekly D2075 (Fla. 4th DCA Sept. 9, 1998).

viable despite the Criminal Appeal Reform Act of 1996 (CARA) and ensuing rules changes.

AN ORAL PRONOUNCEMENT CONTROLS OVER A WRITTEN ORDER

The well-settled law in Florida is that a trial court's oral pronouncement controls over an inconsistent written order and that such ministerial error may be raised on direct appeal despite the absence of an objection in the trial court. *Davis v. State*, 677 So. 2d 1366 (Fla. 4th DCA 1996)(written order of community control did not conform to the oral pronouncement; reversed for correction); *Allen v. State*, 640 So. 2d 1198 (Fla. 4th DCA 1994)(same); *Kord v. State*, 508 So. 2d 758 (Fla. 4th DCA 1987); *Thomas v. State*, 595 So. 2d 287 (Fla. 4th DCA 1992)(oral pronouncement controls over written order); *Baker v. State*, 676 So. 2d 1050 (Fla. 3d DCA 1996)(written order revoking probation does not conform to trial court's oral pronouncements); *Jackson v. State*, 707 So. 2d 775 (Fla. 2d DCA 1998)(pre-Cara offense); *Joly v. State*, 702 So. 2d 569 (Fla. 2d DCA 1997)(pre-CARA offense; special conditions of probation that appeal in the order of community control stricken where not orally pronounced); *Anderson v. State*, 616 So. 2d 200 (Fla. 5th DCA 1993); *Rowland v. State*, 548 So. 2d 812 (Fla. 1st DCA 1989); *Farmer v. State*, 670 So. 2d 1143

(Fla. 1st DCA 1996).

Petitioner submits that the Criminal Appeal Reform Act of 1996 and the ensuing rules amendments have not abrogated this longstanding principle of law that an oral pronouncement controls over a written order and that it is within the inherent authority of a reviewing court to correct such a scrivener's error apparent on the face of the record on direct appeal.

A "written sentence is merely a record of the actual sentence pronounced in open court." *Kelly v. State*, 414 So. 2d 1117, 1118 (Fla. 4th DCA 1982). It is the oral pronouncement that controls. *See State v. Williams*, 712 So. 2d 762 (Fla. 1998)(decided post-CARA; there is a judicial policy that the actual oral imposition of sanctions should prevail over any subsequent written order to the contrary); *Justice v. State*, 674 So. 2d 123, 125 (Fla. 1996).

Once a final decision has been announced unequivocally, the court lacks jurisdiction to retract it by entering a subsequent written order that is not in compliance with the orally announced final order. *See Marcinek v. State*, 662 So. 2d 771, 772 (Fla. 4th DCA 1995); *Drumwright v. State*, 572 So. 2d 1029, 1031 (Fla. 5th DCA 1991); *Flowers v. State*, 351 So. 2d 387 (Fla. 1st DCA 1977). An order is rendered, valid and binding, when orally given. *Briseno*

v. Perry, 417 So. 2d 813 (Fla. 5th DCA 1982), *review denied*, 427 So. 2d 736 (1983). It may be corrected at any time to reflect what the court had, in fact, done. *Luhrs v. State*, 394 So. 2d 137 (Fla. 5th DCA 1981). Florida has long recognized a court's inherent power to correct clerical errors. *See Sawyer v. State*, 94 Fla. 60, 113 So. 736 (1927); *D'Alessandro v. Tippins*, 98 Fla. 853, 124 So. 455 (1929)("If the first sentence contained clerical or formal errors, the judgment as entered may at any time be corrected so as to speak the truth of what was in fact done by the court.").

"Florida Rule of Criminal Procedure 3.700...defines 'sentence' as a 'pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty.'" *Scantling v. State*, 711 So. 2d 524, 526, n.1 (Fla. 1998). The dictates of Rule 3.700 apply to the imposition of conditions of probation. *Justice v. State*, 674 So. 2d at 125.

In *Justice v. State*, 674 So. 2d at 125-126, this Court held:

> The requirement that special conditions of probation be pronounced in open court at the time of sentencing arises in part from Florida Rule of Criminal Procedure 3.700(b), which mandates that the sentence or other final disposition "shall be pronounced in open court." The requirement also addresses due process concerns that a defendant have notice and an opportunity to object...Most of the decisions which strike special conditions of

probation not imposed at the sentencing hearing appear to be grounded on a judicial policy that the actual oral imposition of sanctions should prevail over any subsequent written order to the contrary. *Vasquez v. State*, 663 So. 2d 1343, 1349 (Fla. 4th DCA 1995); *see, e.g., Rowland v. State*, 548 So. 2d 812 (Fla. 1st DCA 1989). Generally, courts have held that a written order must conform to the oral pronouncement as mandated by rule 3.700 because the written sentence is usually just a record of the actual sentence required to be pronounced in open court. *Vasquez*, 663 So. 2d at 1349. Consequently, when the written order conflicts with the oral pronouncement, the oral pronouncement prevails.

* * *

Some cases have held that the subsequent imposition of new conditions or terms to a sentence or order of probation violates a defendant's constitutional right against double jeopardy. In *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994), the trial court modified the defendant's probation eight months into the defendant's probationary term.[footnote omitted] In our review, we first indicated that the additional conditions imposed by the trial court constituted enhancements of the original sentence rather than modifications. *Id.* at 1064. We then held that the double jeopardy protection against multiple punishments for the same offense includes "the protection against enhancements or extensions of the conditions of probation." *Id.* Accordingly, we concluded that the trial court's enhancement of the terms of the defendant's probation violated the double jeopardy prohibition. *Id.; see also Clark v. State*, 579 So. 2d 109 (Fla. 1991) (holding that absent proof of violation, trial court cannot change order of probation or community control by enhancing terms thereof, even if

> defendant has agreed in writing to allow modification and has waived notice and hearing).
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> * * *
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> Judge Griffin's dissent in this case correctly refers to those same concerns:
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> An order of probation, like any other aspect of sentencing, ought not be a work in progress that the trial court can add to or subtract from at will so long as he or she brings the defendant back in and informs the defendant of the changes. To permit this would mean a lack of finality for no good reason and multiple appeals. It is not too much to ask of a sentencing judge to decide on and recite the special conditions of probation at the sentencing hearing, just as is done with the balance of the sentence. If the court has omitted a condition it wishes it had imposed, its chance has passed unless the defendant violates probation.
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> *Justice*, 658 So. 2d at 1032, 1035-36 (Griffin, J., dissenting) (citation omitted). We agree with this reasoning.

In post-CARA cases, not only has this Court recognized this policy, *State v. Williams*, 712 So. 2d 762, the First[3], Third and Fifth District Courts of Appeal have continued to remand for

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[3] Although the most recent case Petitioner has located from the First reflects this holding, Petitioner notes that prior cases appear to reflect without specifically holding, that the court will reverse where the error, although uncontested, is prejudicial. *See Palmer v. State*, 707 So. 2d 423 (Fla. 1st DCA 1998)(CARA bars correction of written order of violation of community control to conform to oral pronouncement; one judge concurring herein changes position and concurs in *Smith v. State*, 711 So. 2d 100 (Fla. 1st DCA 1998), decided one month later); *Padgett v. State*, 704 So. 2d 744 (Fla. 1st DCA 1998).

correction of a conflicting written order, finding that a trial court's oral pronouncement controls. *Walker v. State*, 701 So. 2d 401, 402 (Fla. 5th DCA 1997); *Smith v. State*, 705 So. 2d 1033 (Fla. 3d DCA 1998) (trial court's written finding that Smith failed to complete the community service condition did not conform to oral pronouncement finding that Smith completed the required hours; order to be corrected on remand); *Smith v. State*, 711 So. 2d 100 (Fla. 1st DCA 1998)(in violation hearing held post-CARA, written finding that defendant failed to pay costs conflicted with trial court's oral pronouncement; written finding erroneous).

Thus, the *Hyden* court erred in ruling that it will no longer correct unpreserved and nonfundamental errors where, due to a scrivener's error, a written order fails to conform to the trial court's oral pronouncement. This Honorable Court must also quash *Hyden* on this basis.

SENTENCING ERRORS APPARENT ON THE FACE OF THE RECORD

The contemporaneous objection rule was created by the courts to promote fairness and judicial economy. *Castor v. State*, 365 So. 2d 701 (Fla. 1978); *Bateh 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").

This Court has held that the reasoning behind the contemporaneous objection rule does not apply to certain sentencing errors which are apparent from the face of the record. *Davis v. State*, 661 So. 2d 1193; *State v. Rhoden*, 448 So. 2d 1013 (Fla. 1984); *State v. Montague*, 682 So. 2d 1085 (Fla. 1996). In *Rhoden*, this Court decided that the need for a contemporaneous objection was not necessary as to the sentencing process since the consequence of reversal was to merely remand the case for resentencing:

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors...The rule prohibits trial counsel from deliberately allowing known error to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant... The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

448 So. 2d at 1016. This principal was reaffirmed in *Davis v. State*, 661 So. 2d 1193, and again in *State v. Montague*, 682 So. 2d

1085, a case decided since the enactment of the Criminal Appeal Reform Act. While *Davis* held that sentencing errors which did not result in an illegal sentence in excess of the maximum permitted by law did not constitute fundamental error which could be raised for the first time on postconviction relief, *it expressly held that such error, if apparent on the face of the record, could be raised for the first time on appeal*. *Davis*, 661 So. 2d at 1197. In *Davis*, this Court wrote:

> Normally, to raise an asserted error in an appeal, a contemporaneous objection must have been made before the trial court at the time the asserted error occurred. The general exception to this rule is that an asserted error may be raised for the first time on appeal if the error is "fundamental."...We have distinguished this general rule, however, as it pertains to claimed errors in the sentencing process that are apparent on the face of the record. *See, e.g., Taylor v. State*, 601 So. 2d 540 (Fla. 1992); *Rhoden*. When sentencing errors are apparent on the face of the record, the purpose of the contemporaneous objection rule is not present because the error can be corrected by a simple remand to the sentencing judge. [Citation omitted] Additionally,...it is difficult, if not impossible, for counsel to contemporaneously object to the absence of a written sentencing order at the sentencing hearing because, at the state, counsel does not know whether a written order is being filed or what it will say. [Citation omitted] While the failure to file written reasons [supporting a guidelines sentence departure]

> *is error that may be raised for the first time on appeal, it is not, in our view, "fundamental" error that may be raised at any time if the sentence is within the maximum period allowed by law.*

Davis v. State, 661 So. 2d at 197 (emphasis supplied). Thus, *Davis* did *not* preclude the consideration of sentencing errors *apparent on the face of the record* on appeal even in the absence of an objection. When this Court recently clarified the *Davis* definition of illegal sentence in *State v. Mancino*, significantly, this aspect of the decision concerning sentencing error apparent on the face of the record was not receded from.

In addition, and significantly, in a case decided since the enactment of the Criminal Appeal Reform Act, *State v. Montague*, 682 So. 2d at 1088, this Court held:

> We have repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, [footnote omitted] only sentencing errors "*apparent on the face of the record* do not require a contemporaneous objection in order to be preserved for review." *Taylor v. State*, 601 So. 2d 540, 541 (Fla. 1992) (emphasis added); *see also Merchant v. State*, 509 So. 2d 1101 (Fla. 1987) (holding that trial court's erroneous classification of defendant's prior conviction for second-degree murder as a life felony, which was apparent from *four corners of record*, and resulted in sentencing departure, could be raised for first time on appeal); *Forehand v. State*, 537 So. 2d 103, 104 (Fla.

> 1989) ("absent a contemporaneous objection...sentencing errors must be *apparent on the face of the record* to be cognizable on appeal") (emphasis added); *Dailey v. State*, 488 So. 2d 532, 534 (Fla. 1986)(alleged sentencing errors requiring an evidentiary determination may not be initially raised on appeal)...We have addressed the contemporaneous objection issue in its varying forms for well over a decade. The enduring policy rationale in our decisions is that there is an appropriate time and forum for making objections to alleged sentencing errors...By our decision today, we again emphasize that the sentencing hearing is the appropriate time **to object to alleged sentencing errors based upon disputed factual matters.**

(Emphasis supplied).

Article V, Section 2(a), of the *Florida Constitution* confers on the Supreme Court the exclusive power to adopt rules for the practice and procedure in all courts. In addition, "'All courts in Florida possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to valid existing laws constitutional provisions.'" *State v. Ford*, 626 So. 2d 1338, 1345 (Fla. 1993); *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1133 (Fla. 1990). 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).

Sections 924.051(3) and (8), *Florida Statutes*, create procedural barriers to the right to appeal by requiring a threshold showing of prejudice and preservation, and by restricting the appellate court's inherent authority to review errors apparent on the face of the record. Subsection (3) precludes reversal on appeal unless the 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, constituted fundamental error. While this Court has stated that the legislature may place reasonable conditions on the constitutional right to appeal so long as the conditions do not thwart litigants' legitimate appellate rights, *Amendments to Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1104 (Fla. 1996), the above provisions of the statute conflict with rules of procedure.

The appellate rules do not require a showing of prejudice and preservation as a prerequisite to the right to appeal. Unlike the statute, there are no provisions in the rules or state constitution which limit the courts' ability to review cases or remedy errors where deemed reasonable and necessary for the administration of

justice. On the contrary, the rules clearly allow the courts to exercise their jurisdiction to achieve justice. *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"); *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 a party is entitled").

In fact, appellate courts have historically enjoyed the right to review issues on appeal where such review is deemed essential to the administration of justice, whether or not prejudice is alleged or the error preserved. *See, e.g., Bennett v. State*, 127 Fla. 759, 173 So. 817, 819 (1937) (appellate court may consider questions not raised or reserved in the trial court in the exercise of its inherent power "when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights"); *Cleveland v. State*, 287 So. 2d 347, 348 (Fla. 3d DCA 1973) (despite fact that no argument was raised challenging

the sentence on appeal, court held it was within scope of appellate review to consider an illegal sentence or illegal part of a sentence which appeared on appeal, relying on former Florida Appellate Rule 6.16 which provided in part: "The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appear in the appeal record, including instructions to the jury").

The legislature cannot interfere with this inherent judicial power without compromising the independence of the judiciary.

The courts' inherent powers also include examining records on appeal to determine whether an objection is sufficient to preserve an alleged error for appellate review, whether an error constitutes fundamental reversible error, or whether a sentencing error is apparent on the face of the record and reversible even in the absence of objection. *Davis; Rhoden; Montague*. This power cannot be abrogated by legislature fiat. To the extent that Section 924.051 establishes procedures for the courts to conduct their appellate review, it violates the separation of powers. Art. II, § 3, *Fla. Const.*

The expressed intent of the Criminal Appeal Reform Act was to reduce the volume of appeals and increase the efficiency of the

courts. This Court attempted to effectuate the intent of the legislature while striving to safeguard litigants' rights when it adopted the rules changes. However, Petitioner submits that at this point that it has become all too obvious that the Criminal Appeal Reform Act and the rules changes have not had the desired effect. Indeed, as recently recognized by the Third District Court of Appeal, it has had the opposite effect. *Mizell v. State*, 23 Fla. L. Weekly D1978 (Fla. 3d DCA Aug. 26, 1998).

While the legislature apparently only attempted to codify the existing case law regarding the contemporaneous objection rule, the statute has been given effect far beyond that, leaving the appellate courts in virtual chaos where the known has become the unknown, where instead of reducing appeals it has become obvious that a massive system of legal churning has been put in place depending upon which district court a defendant finds himself or herself. The statute and rules amendments have created confusion and uncertainty within the judicial system and generated conflicts throughout the district courts. *See e.g. Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998)(*en banc*), *review granted*, No. 92,805 (Fla. July 7, 1998); *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998); *Mizell v. State*; *Romano v. State*, 23 Fla. L. Weekly D2094

(Fla. 4th DCA Sept. 9, 1998) (court recognized that scoresheet error was apparent on the face of the record as alleged on appeal; however, error held not preserved and not "so fundamentally wrong" that court should address it on direct appeal in the absence of proper preservation below; affirmed without prejudice to raise issue of ineffective assistance of trial counsel in 3.850 for failing to adequately preserve challenge to improper assessment of victim injury points where incorrect scoresheet resulted in a sentence 3.8 years in excess of the maximum guidelines sentence; also recognizing that 3.800 relief might be available in light of *Mancino*); *Mason v. State*, 710 So. 2d 82 (Fla. 1st DCA 1998)(fundamental error where written order which conflicted with oral pronouncement created illegal sentence; remanded with directions to conform the probationary order to conform to the court's oral pronouncements); *Jordan v. State*, 23 Fla. L. Weekly D2130 (Fla. 3d DCA Sept. 16, 1998).

The district courts' opinions are vastly divergent and over time some courts have even changed positions. The most troubling aspects of the turmoil have been in the area of written orders which fail to conform to oral pronouncements and patent and prejudicial sentencing errors apparent from the face of the record

which previously the appellate courts would have easily ordered corrected on remand, but which several appellate courts have since refused to do. Instead, in some districts litigants with unpreserved nonfundamental errors apparent from the face of the record are being compelled to seek collateral relief unassisted by counsel. This results in increased case loads in the trial courts with the increased filings of motions pursuant to Florida Rules of Criminal Procedure 3.800 and 3.850, increased appeals from adverse rulings, and, most alarming, increased periods of incarceration defendants are being forced to serve while attempting to correct obvious and prejudicial sentencing errors. This has continued to the point that at least one district court has determined that rather than engaging in this legal churning, that as an attorney's failure to object to an error which once was either fundamental or correctable on direct appeal is ineffective assistance of counsel on its face, that court elected to exercise its inherent authority and simply find that ineffective assistance of counsel was rendered and order the error corrected when brought to the court's attention on direct appeal. *Mizell v. State*, 23 Fla. L. Weekly D1978. *See also State v. Salley*, 601 So. 2d 309, n. 1 (Fla. 4th DCA 1992)(affirming trial court's downward departure sentence despite

defense counsel's failure to perform ministerial act of preparing written order for court; court found that if the failure of defense counsel to submit the written order would be the reason for reversing and remanding for a sentence within the guidelines, court could not think of a clearer case where ineffective assistance of counsel would be apparent on the face of the record so as to give relief on direct appeal rather than in collateral proceedings); *Stewart v. State*, 420 So. 2d 862, 864 (Fla. 1982), *cert. denied*, 460 U.S. 1103, 103 S. Ct. 1802, 76 L. Ed. 2d 366 (1983). *But see Seccia v. State*, 1998 Fla. App. LEXIS 12794 (Fla. 1st DCA Oct. 12, 1998)(court declines defendant's invitation to correct scoresheet error apparent on the face of the record as one involving ineffective assistance of counsel; conflict certified with *Mizell*).

Further, in addition to many other decisions, the instant decision conflicts with the recent decision of the Second District Court of Appeal in *Denson v. State*, 711 So. 2d 1225.[4] In *Denson*,

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[4] However, although whether the appellate court had jurisdiction was not an issue in the instant case, Petitioner must emphasize that he does **not** agree with the *Denson* decision wherein it states that illegal sentences are not fundamental errors which give jurisdiction to the district courts of appeal to review these issues on direct appeal as a matter of right, which conflicts with *Harriel v. State*, 710 So. 2d 102 (Fla. 4th DCA 1998). *Denson v.*

the Second District held:

> Notwithstanding the broad language in section 924.051(3), we hold that when this court otherwise has jurisdiction in a criminal appeal, it has discretion to order a trial court to correct an illegal sentence or a serious, patent sentencing error that is identified by appellate counsel or discovered by this court on its own review of the record. To rule otherwise would be contrary to the intent and goals of the Criminal Appeal Reform Act and would raise substantial constitutional concerns undermining the integrity of the courts.

Id. at 1226. In arriving at this conclusion, the *Denson* court also wrote:

> The second sentence attempts to restrict either our scope of review or our standard of review because, even if we have jurisdiction, the legislature is attempting to prohibit the court from reversing a sentence on an issue concerning a prejudicial error that is neither preserved nor fundamental. As a general rule, this statute comports with the appellate courts' own customary restrictions on their standard of review. However, there are rare occasions when the courts--for the orderly administration of justice and for due process concerns--have not followed this general rule. In light of the constitutional separation of powers, the legislature cannot unreasonably restrict our scope or standards of review when due process and the orderly administration of justice require that we review such issues. When this court already has jurisdiction over a criminal appeal because of a properly

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State, 711 So. 2d at 1229, n. 12.

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.

* * *

As tempting as it may be to wash our hands of every unpreserved sentencing error on direct appeal, we are troubled by a rule which would require us to close our eyes when a serious error is obvious in the record. This court has held that Florida Rule of Criminal Procedure 3.800(a) cannot be used to review a sentencing error that could have been raised on direct appeal but for the failure to file a motion pursuant to rule 3.800(b). *See Chojnowski*, 705 So. 2d at 915. Prisoners are entitled to legal representation on direct appeal, but not in most postconviction proceedings. *See* § 924.051(9), .066(3). At least until our newly revised rules of appeal for sentencing errors have been fully delineated, there is a real risk that serious sentencing errors, raising significant due process concerns, may not be corrected or may not be corrected in time to provide meaningful relief to a prisoner filing *pro se* motions if they cannot be corrected with the assistance of counsel on direct appeal.

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 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 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, 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. at 1228-1230 (footnotes omitted).

The law does not exist for the convenience of the appellate courts; its purpose is to protect the citizens of this state -- all

of the citizens, including those who have become lawbreakers. The *Maddox* court's sanguine faith in the power of postconviction attacks on the effectiveness of trial counsel to prevent an injustice to the defendant is unduly optimistic and ignores the reality of the procedural morass into which some defendants will be (and already have been) placed under the judicial interpretations which are emanating from some district courts.

As this Court recognized when citing Judge Cowart's admonition in *Hayes v. State*, 598 So. 2d 135, 138 (Fla. 5th DCA 1992), with approval in *Montague*, 682 So. 2d at 1089, n. 6, and *Bedford v. State*, 617 So. 2d 1134 (Fla. 4th DCA 1993)(cited in then Judge, now Justice, Anstead's dissent), *quashed*, 633 So. 2d 13, 14 (Fla. 1994):

> 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.

Thus, the *Hyden* court also erred in refusing to correct these sentencing errors which are apparent on the face of the record. Petitioner urges this Court to clarify that sentencing errors apparent from the face of the record remain correctable on appeal when raised by appellate counsel or discovered by a reviewing court.

Therefore, this Honorable Court should *quash* the instant decision of the Fourth District Court of Appeal and remand the instant cause with directions to reverse and remand for the entry of written orders in conformance with the trial court's oral pronouncements.

CONCLUSION

Based on the arguments and authorities contained herein, Respondent urges this Honorable Court to accept jurisdiction and **quash** the instant decision of the Fourth District Court of Appeal and remand with appropriate directions.

Respectfully submitted,

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10/23/98 filed 10/23/98

RE: TERRY HYDEN
V.
STATE OF FLORIDA

CASE NO. 93,966

I have this date received the below-listed pleadings or documents:

Petitioner's Brief on the Merits (Original & 7). Please file an appendix (Original & 7) immediately.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

SJW/bhp

cc: Ms. Elaine L. Thompson