IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 93,781
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 5D97-2923
	)	
Respondent/Appellee.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

SUPPLEMENTAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

Imposing consecutive minimum mandatories is a fundamental sentencing error. These sentencing errors are correctable as fundamental error in light of Maddox vs. State, 25 Fla. Law Weekly S367 (Fla. May 11, 2000).

ARGUMENT

THE STACKING OF THE THREE-YEAR MINIMUM MANDATORIES FOR ALL OFFENSES AT ONE “RECIPE HOUSE” ROBBERY WAS IMPROPER.

Maddox v. State, 25 Fla. Law Weekly S367 (Fla. May 11, 2000) reads:

> Section 924.051(3) specifically gives defendants the right to raise, and appellate courts the authority to correct, "fundamental error." The Act neither defines "fundamental error" nor differentiates between trial and sentencing error.
>
> ***
>
> As Judge Altenbernd observed, "In its narrowest functional definition, 'fundamental error' describes an error that can be remedied on direct appeal, even though the appellant made no contemporaneous objection in the trial court and, thus, the trial judge had no opportunity to correct the error." Judge v. State, 596 So. 2d 73, 79 n.3 (Fla. 2d DCA 1991).
>
> ***
>
> This Court has also defined fundamental error as one "where the interests of justice present a compelling demand for its application." Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993) (quoting Ray v. State, 403

So. 2d 956, 960 (Fla. 1981)).

In Palmer v. State, 438 So.2d 1 (Fla. 1983), this Court held:

> We are primarily concerned with the issue of whether the trial court erred in imposing three-year mandatory minimums on each of thirteen consecutive sentences, for a total of thirty-nine years without eligibility for parole. We conclude that this portion of the sentences imposed constitutes reversible error.
>
> Subsection 775.087(2), Florida Statutes (1981), provides that any person who had in his possession a firearm during the commission of certain specified felonies, including robbery, shall be sentenced to a minimum term of imprisonment of three calendar years. Subsection 775.021(4), Florida Statutes (1981), requires separate sentences for separate offenses arising from a single criminal transaction or episode and allows the trial court to order the sentences served concurrently or consecutively. The state contends that these two sections, when read in pari materia, allow the "stacking" of consecutive mandatory three-year minimum sentences. We disagree.
>
> [1] We rely in part upon a fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in

favor of the person against whom a penalty is to be imposed. Ferguson v. State, 377 So. 2d 709 (Fla. 1979). We have held that " 'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms.' " State v. Wershow, 343 So.2d 605, 608 (Fla.1977), quoting Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927). This rule of construction has, in fact, been codified as part of the very statute on which the state relies. Nowhere in the language of section 775.087 do we find express authority by which a trial court may deny, under subsection 775.087(2), a defendant eligibility for parole for a period greater than three calendar years.

The Florida Constitution delegates exclusively to the executive branch the power to grant paroles or conditional releases to persons under sentences for crime. Art. IV, § 8(c), Fla. Const. It is true that we have previously rejected attacks on the constitutionality of statutes requiring that those persons convicted of certain offenses serve X number of years without eligibility for a parole. In Owens v. State, 316 So. 2d 537 (Fla. 1975), we held that the statute mandating a minimum sentence of twenty-five years without eligibility for parole, upon conviction of a capital felony, did not usurp the power of the Parole and Probation Commission, nor

did it violate Florida's constitutional scheme for separation of powers. Id. at 538. The statute under consideration sub judice was upheld against a similar constitutional attack in Scott v. State, 369 So. 2d 330 (Fla. 1979). In Owens and Scott, however, the sentences imposed, with no possibility of parole, were for exactly the term of years expressly authorized by statute. Palmer, on the other hand, was sentenced to thirty-nine years, without eligibility for parole, based on a statute expressly authorizing denial of eligibility for parole for only three years.

[2] As we noted in Owens, the legislature reserved to itself, at the time it created the Parole and Probation Commission, the power to proscribe consideration for parole for those convicted of certain statutorily designed classes of crime. In the present case the state contends, in essence, that subsections 775.021(4) and 775.087(2), when read in pari materia, amount to a delegation of the parole authority to the trial court, whereby, in the exercise of its discretion, it may deny parole for three years multiplied by the number of separate offenses of which a defendant is convicted. We do not believe the legislature intended such a result as the sentence under review here when it added subsection (4) to section 775.021. In any event we are unwilling to construe these two statutes in such a way as to allow the imposition of any

> sentence without eligibility for parole greater than three calendar years. By this holding, we do not prohibit the imposition of multiple concurrent three-year minimum mandatory sentences upon conviction of separate offenses included under subsection 775.087(2), nor do we prohibit consecutive mandatory minimum sentences for offenses arising from separate incidents occurring at separate times and places. See Vann v. State, 366 So. 2d 1241 (Fla. 3d DCA 1979). Id. at 3-4.

In the case at bar, the minimum mandatories are for offenses which both happened at the robbery of a single restaurant. (Trial Volume 1, pages 62-64, 89-91) The minimum mandatories should be concurrent.

And *See* Parks v. State, 701 So. 2d 653 (Fla. 4th DCA 1997) (Appellant argues that the consecutive mandatory minimum portions of his sentence for first degree murder and three counts of armed robbery are illegal because they arose from a single criminal episode. We agree....That portion of appellant's sentences which imposed a three year firearm mandatory minimum on the robberies consecutive to the twenty-five year mandatory

minimum for the first degree murder conviction is illegal.) Id. at 654.

CONCLUSION

For the reasons expressed in herein and in Petitioner's Merit Brief, Petitioner respectfully requests that the sentencing error herein is correctable in light of Maddox v. State, 25 Fla. Law Weekly S367 (Fla. May 11, 2000).

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

_____
LYLE HITCHENS
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112-A Orange Avenue
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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, in his basket at the Fifth District Court of Appeal, and to Mr. Darryle T. Cook, Inmate No. X-06747, East Unit, #P-1-110-U, Apalachee Correctional Institution, 35 Apalachee Drive, Sharpes, Florida 32460, this 8th day of June, 2000.

_____
LYLE HITCHENS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DARRYLE T. COOK,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	S.CT. CASE NO. 93,781
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 5D97-2923
	)	
Respondent/Appellee.	)	
_____	)	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1998

98-43
Lyle

DARRYLE T. COOK,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

v.

Case No. 97-2923

STATE OF FLORIDA,

Appellee.

Opinion Filed August 7, 1998

Appeal from the Circuit Court
for Orange County,
A. Thomas Mihok, Judge.

James B. Gibson, Public Defender, and Lyle Hitchens,
Assistant Public Defender, Daytona Beach, for Appellant.

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

UPON MOTION FOR REHEARING

PER CURIAM.

We previously dismissed this appeal by order relying on *Maddox v. State*, 23 Fla. Law Weekly D720 (Fla. 5th DCA 1998). The appellant asks that we withdraw that order and issue an opinion so that his appeal may be considered by the Supreme Court of Florida in conjunction with, or in light of *Maddox*, currently before that court for review.

We grant his request, withdraw the previous order and formally dismiss his appeal on the authority of this court's opinion in *Maddox*.

APPEAL DISMISSED.

GRIFFIN, C.J., DAUKSCH and PETERSON, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

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	)	
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versus	)	S.CT. CASE NO. 93,781
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 5D97-2923
	)	
Respondent/Appellee.	)	
	)	

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is 14 point Courier New, a font that is non-proportionately spaced.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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JAMES R. WULCHAK
Chief, Appellate Division

CHRISTOPHER S. QUARLES
Chief, Capital Appeals

MARLEAH K. HILBRANT
Administrative Assistant

June 8, 2000

Honorable Thomas D. Hall
Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Darryle T. Cook v. State, Our file No. 98-719, DCA Case No. 5D97-2923, S.Ct. Case No. 93,781

Dear Mr. Hall:

Enclosed please find the original and seven copies of the supplemental brief of the Petitioner. Attached as an appendix is a copy of the Fifth District Court of Appeal opinion dated June 10, 1998, and the certificate of font. Also enclosed is a 3 ½ inch floppy disk containing the Supplemental Brief of Petitioner as directed in your order of June 1, 2000.

If you have any suggestions or questions, please do not hesitate to let me know.

Sincerely yours,

LYLE HITCHENS
Assistant Public Defender

LH/lbh

Enclosures