IN THE SUPREME COURT OF FLORIDA

CURTIS LEON HEGGS,	:	
Petitioner,	:	
vs.	:	Case No. 93,851
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

SUPPLEMENTAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

The Court has requested supplemental briefs addressing the following questions:

> [W]hether sections 924.051(3) and 924.051(4), Florida Statutes (Supp. 1996), which are portions of the Criminal Appeal Reform Act, apply retroactively to appellate review of sentences imposed for crimes committed before the effective date of the Act, and if so, what effect those statutory sections, and the rules of criminal and appellate procedure implementing those sections, have on the present case.

It should be recalled that this appeal consolidates two lower court case numbers: CF95-6007, in which Petitioner was convicted of robbery by a jury, and CF95-5675, in which Petitioner pled guilty to a second robbery. The following chronology should be noted:

Oct. 24 and Nov. 2, 1995 - Offenses committed.

Dec. 4 and 29,1995 - Informations filed.

July 1, 1996 - Amendment to rule 3.800(b) takes effect, which allows defendants ten days after sentencing to file a motion to correct sentence in the trial court; Criminal Appeal Reform Act (hereinafter "the Act") takes effect.

Sept. 4, 1996 - Petitioner convicted by jury in Case No. CF95-6007.

Sept. 6, 1996 - Petitioner pleads guilty in Case No. CF95-5675.

Nov. 1, 1996 - Petitioner sentenced in both cases to concurrent guidelines sentences of eleven years imprisonment.

Nov. 18, 1996 - Petitioner files a single notice of appeal including both lower court case numbers.

Jan. 1, 1997 - Amendments to rules of criminal and appellate procedure take effect, which restrict defendants' ability to appeal unpreserved sentencing issues.

SUMMARY OF THE ARGUMENT

It should be immediately noted that the substantive issue in this case is quite different from the underlying substantive issues in most of the cases that have been bedeviling the districts courts trying to interpret the Act. In many of those cases, the underlying issues are relatively minor (e.g., costs issues, technical sentencing errors) and are case-specific (i.e., they are based primarily on the facts of the case on appeal). The issue in the present case concerns the facial constitutionality of the statute that authorized the sentences imposed on Petitioner. This issue (1) affects many other defendants; (2) will continue to arise until it is finally resolved by this Court; and (3) needs to be resolved by this Court as quickly as possible. Thus, whatever one might say generally about the Act's laudable goals of easing the appellate workload and encouraging bench and bar to resolve sentencing issues at the trial level, the issue in the present case needs to be addressed here and now. Thus, to the extent this Court has discretion to take jurisdiction and decide the merits of this case, that discretion should be exercised in Petitioner's favor.

As to the questions the Court asked:

First, neither the Act nor the amended rules (particularly the ones that took effect on January 1, 1997) should be applied here. Although the Act is not an ex post facto law, it nonetheless should not be applied retroactively because it is a substantive law that (1) affects the rights of, and imposes duties upon, defendants who wish to appeal their convictions, and/or (2) affects the jurisdic-

tion of, and imposes duties upon, Florida's appellate courts. Since the Act is substantive and there is no clear expression of a legislative intent of retroactive application, the Act must be applied prospectively.

Alternatively, if the Act is considered procedural in nature (and thus subject to a presumption of retroactive application), then the Act is an unconstitutional legislative infringement on this Court's rule-making authority. Thus, whether viewed as being substantive or procedural, the Act cannot be applied in the present case.

The rules changes prompted by the Act cannot be applied in this case either. Rules changes are prospective only, unless specifically provided otherwise, and there is no specific provision in these rules changes. In particular, when the 1997 rule changes took effect, Petitioner's appeal was already under way and the time limit for making use of the 1997 amended rules had already expired.

Assuming arguendo the Act does apply here, this Court has jurisdiction to hear this appeal because the issue raised in this appeal is one of fundamental error and illegality of sentence: violation of the state constitutional single subject requirement raises an issue of fundamental error, and an imposed sentence that was authorized by a constitutionally invalid statute is illegal and fundamentally erroneous. Since, under the Act, an appellate court has jurisdiction to correct a fundamentally erroneous or illegal sentence even though the issue was unpreserved, this Court has jurisdiction in the present case.

This conclusion is not changed by the assumption that the amended rules apply here as well. Even under the amended rules, this Court has jurisdiction to hear this appeal and the issue raised is a valid appellate issue, for the same reasons just stated: under the amended rules, appellate courts retain jurisdiction to correct unpreserved issues of illegal or fundamentally erroneous sentences. Indeed, the courts' power and duty to correct such sentences is an inherent part of judicial power, which cannot be taken away by the legislature or surrendered by the courts. Thus, neither the amended rules nor the Act can take this power from the courts.

Finally, assuming this Court has no jurisdiction to hear this appeal, the case should not be dismissed but rather should be transferred to the trial court, under the provisions of Article V, Section 2 of the Florida Constitution and appellate rule 9.040(b).

ARGUMENT

I. THE CRIMINAL APPEAL REFORM ACT AND THE AMENDED RULES

Sections 924.051(2), (3), (4), and (8) of the Act provide:

> (2) The right to direct appeal and the provisions for collateral relief created by this chapter may only be implemented in strict accordance with the terms and conditions of this section.
>
> (3) 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.
>
> (4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.
>
> . . .
>
> (8) It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to insure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

The other sections of the Act: (1) define the terms "prejudicial error" and "preserved", section 924.051(1); (2) prohibit collateral relief "on grounds that were or could have been

raised at trial and, if properly preserved, on direct appeal", section 924.051(5); (3) impose times limits for seeking collateral relief and delineate the grounds for avoiding those time limits, section 924.051(6); (4) impose "the burden of demonstrating . . . prejudicial error" on "the party challenging the judgment or order of the trial court" and prohibit the courts from reversing a judgment or sentence "absent an express finding that a prejudicial error occurred", section 924.051(7); and (8) prohibit the use of public funds, resources, and employees in appellate or collateral proceedings "unless the use is constitutionally or statutorily mandated", section 924.051(9).

The Act took effect on July 1, 1996. Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800 ("Amendments I"), 675 So. 2d 1374 (Fla. 1996).

In response to the Act, this Court amended the criminal and appellate rules in Amendments I. The criminal rules were amended by creating a new rule 3.800(b), which was titled "Motion to Correct Sentencing Error" and allowed defendants to "file a motion to correct the sentence . . . within ten days after the rendition . . . ." Id. at 1375. Appellate rule 9.020(g) was amended to provide that a timely filed motion to correct a sentence tolls the time for filing the notice of appeal and is not abandoned by the filing of the notice of appeal. Id. These amendments were designed "to insure that a defendant will have an opportunity to raise sentencing errors on appeal." Id. These amended rules also became effective on July 1, 1996. Id.

On November 22, 1996 -- four days after Petitioner filed his notice of appeal in the present case -- this Court again amended the appellate rules, in several significant ways. Amendments to Florida Rules of Appellate Procedure ("Amendments II")[1], 696 So. 2d 1103 (Fla. 1996). These amendments took effect on January 1, 1997. Id. at 1107. In this brief, Amendments I and II will collectively be called the "Amended Rules."

Amendments II made the following changes to rule 9.140 that are significant for present purposes:

> (b) **Appeals by Defendant.**
>
> (1) **Appeals Permitted.** A defendant may appeal . . .
>
> (D) an unlawful or illegal sentence;
>
> (E) a sentence, if the appeal is required or permitted by general law; or
>
> (F) as otherwise provided by general law.
>
> (2) **Pleas.** A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) [He] reserve[s] the right to appeal a prior dispositive order . . . .
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only

[1] The Amendments II opinion was originally published at 685 So. 2d 773; the version published at 696 So. 2d 1103 was called a "corrected" version. As best as the undersigned counsel can determine, the corrections made in the second version had no effect on the issues raised in this appeal. In the remainder of this brief, Petitioner will cite the "corrected" version of Amendments II.

> . . . .
>
> (iv) a sentencing error, if preserved; or
>
> (v) as otherwise provided by law.
>
> . . .
>
> (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).

The emphasized portion was added in Amendments II. Id. at 1129-30. Amendments II also increased the time limit for filing a motion to correct a sentence under rule 3.800(b) from 10 to 30 days. Id. at 1105.

In the commentary accompanying Amendments II, the Court receded from State v. Creighton, 469 So. 2d 735 (Fla. 1985) and held that the language in Article V, Section 4(b) of the Florida Constitution -- "appeals, that may be taken as a matter of right, from final judgments or orders" -- creates "a constitutional protection of the right to appeal." 696 So. 2d at 1104. The Court further commented:

> However, we believe that the legislature may implement this constitutional right and place reasonable conditions upon it, so long as they do not thwart the litigants' legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals.
>
> Applying this rationale to the amendment of section 924.051(3), we believe the legislature could reasonably condition the right to appeal

upon the preservation of a prejudicial error or the assertion of a fundamental error. Anticipating that we might reach such a conclusion, this Court on June 27, 1996, promulgated an emergency amendment designated as new Florida Rule of Criminal Procedure 3.800(b) to authorize the filing of a motion to correct a defendant's sentence . . . .

The other issue immediately before us is the effect of the Act on the proposed rule on appeals from pleas of guilty or nolo contendere without reservation. In Robinson v. State, 373 So. 2d 898 (Fla. 1979), this Court addressed the validity of section 924.06(3), Florida Statutes (1977), which read:

> A defendant who pleads guilty or nolo contendere with no express reservation of the right to appeal shall have no right to a direct appeal. Such defendant shall obtain review by means of collateral attack.

The Court agreed that the statute properly foreclosed appeals from matters which took place before the defendant agreed to the judgment of conviction. However, the Court held that there was a limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. These included: (1) subject matter jurisdiction; (2) illegality of the sentence; (3) failure of the government to abide by a plea agreement; and (4) the voluntary intelligent character of the plea. Robinson, 373 So. 2d at 902.

Section 924.051(b)(4)[2] is directed to the same end but is worded slightly differently. Insofar as it says that a defendant who pleads nolo contendere or guilty without expressly reserving the right to appeal a legally dispositive issue cannot appeal the judgment, we believe that the principle of Robinson controls. A defendant must have the right to appeal that limited class of issues described in Robinson.

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[2] The Court's reference to subsection (b)(4) is erroneous; it is simply subsection (4).

> There remains, however, another problem. Section 924.051(b)(4) also states that a defendant pleading guilty or nolo contendere without expressly reserving the right to appeal a legally dispositive issue cannot appeal the sentence. However, a defendant has not yet been sentenced at the time of the plea. Obviously, one cannot expressly reserve a sentencing error which has not yet occurred. By any standard, this is not a reasonable condition to the right to appeal. Therefore, we construe this provision of the Act 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.

Id. at 1104-05 (footnote omitted).

II. NEITHER THE ACT NOR THE AMENDED RULES APPLY IN THE PRESENT CASE

A. The Act Does Not Apply

The Act is not an ex post facto law. An ex post facto law retroactively alters the definition of criminal conduct or increases the penalty for such conduct. Calamia v. Singletary, 686 So. 2d 1337 (Fla. 1997). The Act does neither. However, as a matter of statutory interpretation, the Act nonetheless cannot be applied retroactively.

The question of retroactivity turns primarily on the question of "whether the [statute] is one of substantive or procedural law." Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994). "[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." Id. It is well-settled that

> [A]s a general rule, in the absence of clear legislative intent to the contrary, a law affecting substantive rights is presumed to apply prospectively. . . .
>
> [T]he presumption in favor of prospective application does not apply to "remedial" [i.e., "procedural"] legislation; rather, whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislature's intended purpose. . . . However, we have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of "remedial" legislation that should be presumptively applied in pending cases. . . .
>
> . . .
>
> [T]he mere fact that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient

> to rebut the presumption against retroactivity
> . . . .

Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424-25 (Fla. 1994) (citations and internal quotes omitted).

There is no clear expression of legislative intent in the Act; rather, the legislature simply said the Act "shall take effect July 1, 1996." Ch. 96-248, Laws of Florida, sec. 9.[3]

As to whether the Act is substantive or procedural/remedial, one's first reaction may be to classify it as the latter. However, the Act clearly "prescribes duties and rights" for criminal defendants: it defines the circumstances under which they have the right to appeal and seek collateral relief, and it imposes upon them certain duties they must abide by in order to exercise that right. It imposes the duty to prove prejudicial preserved error or fundamental error, and it imposes the duty to prove harmfulness. Further, some of these duties are "new legal burdens".[4] Arrow Air, supra, 645 So. 2d at 424. Thus, the Act is not the type of procedural/remedial statute that is an exception to the presumption against retroactive application.

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[3] The mere provision for an effective date is not the type of clear expression of legislative intent required in this context; after all, all new statutes have an effective date. See Arrow Air, supra (statute with effective date applies prospectively only).

[4] Clearly, the Act must impose some "new legal burdens" on criminal defendants who wish to appeal; if it did not, then the Act would do nothing but codify the pre-Act rules governing criminal appeals. As will be discussed, there is much dispute in the district courts regarding exactly what "new legal burdens" the Act imposes; however, no court doubts that the Act was intended to radically alter the criminal appellate landscape (and alter it to the defendant's disadvantage).

A holding that the Act applies retroactively would, of necessity, invalidate the Act on a different ground. In order for the Act to be applicable in the present case, it would have to be considered a procedural statute. Arrow Air, supra. However, if the Act is procedural in nature, it would violate Article V, Section 2 of the Florida Constitution. That article designates this Court as the sole authority to adopt procedural rules. Matters concerning the preservation of error, the allocation of the burden of persuasion on appeal, and the availability, scope, and standard of appellate and collateral review are clearly matters of practice and procedure. "The Legislature . . . has no constitutional authority to enact any law relating to practice and procedure." In Re Clarification Of Florida Rules Of Practice And Procedure, 281 So. 2d 204, 204 (Fla. 1973).

Thus, either as a matter of statutory construction or constitutional validity, the Act does not apply in the present case.[5]

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[5] It could be argued that the Act is not an improper invasion of this Court's rule-making authority, on the ground that the Act is an attempt to limit the jurisdiction of the appellate courts, a substantive power that Amendments II seems to feel the legislature properly possesses. See 696 So. 2d at 1104. However, at least one district court has expressly questioned this assumption. Bain v. State, 24 Fla. Law Weekly D 314, 315 (Fla. 2d DCA, Jan. 29, 1999). Bain will be discussed in section III, below; it will be concluded there that, regardless of whether the Act was meant to impose jurisdictional limits on the appellate courts and regardless of whether the legislature has that authority, this Court has jurisdiction in the present case. For present purposes, the following should be noted: assuming the Act is a proper non-procedural limit on appellate jurisdiction, then the Amended Rules cannot be read as being more jurisdiction-restricting than the Act, which at least one district court appears to have done. Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), discussed in section IV,

B. The Amended Rules Do Not Apply

The Amended Rules do not apply in the present case either. It is well-settled that "rules of procedure are prospective unless specifically provided otherwise." Mendez-Perez v. Perez-Perez, 656 So. 2d 458, 460 (1995). Over 100 years ago, this Court said that amendments to the appellate rules should not be applied in appeals that are pending when those amendments take affect. Poyntz v. Reynolds, 19 So. 649 (Fla. 1896). In the present case, the Amended Rules did not take effect until after Petitioner had been arrested and formally charged. Further, the 1997 amendment (Amendments II) did not take effect until six weeks after Petitioner filed his notice of appeal. Although amended rule 3.800(b) was in effect at that time, that rule provided only that a defendant "may file a motion to correct the sentence" (emphasis added); it did not (either by itself or in conjunction with the other then-existing rules) require the filing of such a motion as a prerequisite to raising a sentencing issue on appeal.[6] By the time the 1997

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below. In other words, if the Act is a proper substantive exercise of legislative authority, then this Court cannot, under the guise of its rule-making authority, negate that exercise of legislative authority by, in effect, declining to accept jurisdiction that the legislature has given it. This point will be discussed further in section IV, below.

[6] Further, amended rule 3.800(b) refers only to the correction of sentencing errors. It is not clear whether the facial invalidity of a statute is the type of sentencing "error" amended rule 3.800 was designed to correct. That amendment seems more geared to correction of the type of minor errors that have been plaguing the appellate courts for years, i.e., costs and public defender liens; probation conditions; clerical errors; credit for time served. As will be discussed in section IV below, there is a recognized distinction between an "illegal sentence" and an "erroneous sentence." Rule 3.800(b) seems designed to correct the latter type

amended rules took effect, it was too late for Petitioner to seek relief under rule 3.800(b), even under the 30-day time period allowed for by the newly amended rules. Those rules clearly cannot be applied in the present case. The only reported district court decision to address this issue agrees with this analysis. Green v. State, 700 So. 2d 384, 387 (Fla. 1st DCA 1997).

Thus, neither the Act nor the Amended Rules apply in the present case.

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of error, and rightly so: such minor errors are best corrected at the trial level, so valuable appellate judicial resources are not wasted on such trivialities. In contrast, the issue in the present case needs to be resolved (and quickly) at the appellate level; indeed, at the highest appellate level. The filing of a rule 3.800 motion to raise such an issue is a waste of time; regardless of who wins at the trial level, the other party is sure to take the issue to the next level. Thus, the strict application of rule 3.800(b) to an issue such as the one in the present case would be counterproductive.

III. ASSUMING THE ACT APPLIES IN THE PRESENT CASE, THIS COURT HAS JURISDICTION TO HEAR THE APPEAL BECAUSE THE PETITIONER HAS RAISED AN ISSUE OF FUNDAMENTAL ERROR

In Amendments II, this Court, after noting that the legislature may impose "reasonable conditions" on the constitutionally protected right to appeal, asserted "we believe the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error." 696 So. 2d at 1105. While this seems to indicate that the Act imposes jurisdictional requirements, the district courts are nonetheless divided on the issue.

The First, Third, and Fourth Districts have all concluded that the Act's requirement of a preserved prejudicial error or a fundamental error is not a jurisdictional requirement. Stone v. State, 688 So. 2d 1006 (Fla. 1st DCA 1998); Thompson v. State, 708 So. 2d 289 (Fla. 4th DCA 1998); Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998); Jefferson v. State, 23 Fla. Law Weekly D2305 (Fla. 3d DCA, Oct. 14, 1998).[7]

The Second District has concluded that both sections 924.051 (3) and (4) impose jurisdictional limitations. Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998); Bain, supra. However, Bain expressed some doubt about whether the legislature may restrict the constitutional right to appeal, even if those restrictions were

[7] However, Jefferson seems to disagree with Stone and Thompson on the issue of whether the failure to raise a proper Robinson issue in a plea appeal is a jurisdictional defect. 23 Fla. Law Weekly at D2350, fn. 1; White v. Singletary, 711 So. 2d 640 (Fla. 3d DCA 1998).

reasonable. 24 Fla. Law Weekly at D315. Nonetheless, that court felt that, in Amendments II, this Court had already decided this question in favor of legislative authority to impose reasonable conditions on appellate jurisdiction. Id.

Assuming the Act was intended to be a restriction on appellate jurisdiction, this Court has jurisdiction in the present case. Under section 924.051(3), jurisdiction is provided if the appellant alleges a fundamental error. The facial validity of a statute under the state constitutional single subject requirement raises an issue of fundamental error. State v. Johnson, 616 So. 2d 1 (Fla. 1993). As noted in the initial brief -- and uncontested in the state's answer brief -- , Petitioner was sentenced under the 1995 guidelines to a sentence near the top of his 1995 guidelines range, his guidelines range would be significantly lower under the 1994 guidelines (indeed, the sentences imposed would be departure sentences under the 1994 guidelines), and he falls within the applicable "window period" for purposes of a single subject violation. See initial brief, p. 4. Thus, Petitioner has raised a legitimate fundamental error issue sufficient to provide appellate jurisdiction under section 924.051(3).[8]

[8] A question may arise about whether this Court has jurisdiction to hear both of the lower court cases consolidated in this appeal. As noted earlier, one of these cases was a trial and one was a plea. It may be argued that there are different jurisdictional requirements for the two types of cases. This will be discussed in section V, below; we first need to discuss the effect of the Amended Rules, assuming they apply here. That will be done in section IV.

IV. ASSUMING THE AMENDED RULES APPLY IN THE PRESENT CASE, THIS COURT HAS JURISDICTION AND PETITIONER HAS RAISED AN ISSUE OF A FUNDAMENTALLY ERRONEOUS OR AN ILLEGAL SENTENCE

The district courts have struggled with the meaning and effect of the combination of the Act and the Amended Rules, particularly when it comes to questions of unpreserved sentencing issues (most particularly in plea cases). The courts have disagreed about such basic questions as whether an appellate court has jurisdiction to decide unpreserved sentencing issues, whether the court can decide unpreserved sentencing issues if it otherwise has jurisdiction, and, assuming the court does have some jurisdiction, what types of unpreserved sentencing issues can be addressed.

To survey the existing legal landscape, we should begin with a line of cases that have addressed the meaning of the phrase "illegal sentence", as used in rule 3.800(a). The first significant case is State v. Calloway, 658 So. 2d 983 (Fla. 1995), which addressed the question of whether rule 3.800(a) could be used to attack the alleged improper imposition of consecutive habitual offender sentences.[9] In the course of answering this question in the negative, the Court said "rule 3.800 . . . is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary hearing." Id. at 988. The Court also identified "three different types of sentencing errors: (1) an 'erroneous

[9] In Hale v. State, 630 So. 2d 521 (Fla. 1993), this Court held it was improper to "impose consecutive habitual felony offender sentences for multiple offenses arising out of the same criminal episode." Id. at 523.

sentence' which is correctable on direct appeal; (2) an 'unlawful sentence' which is correctable only after an evidentiary hearing under rule 3.850; and (3) an 'illegal sentence' in which the error must be corrected as a matter of law in a rule 3.800 proceeding." Id. at 987-88. The Court did not expand upon these distinctions any further. However, since this three-part classification system originated in Judge v. State, 596 So. 2d 73 (Fla. 2d DCA 1991), it may be helpful to examine that opinion.

In Judge, the court held that a defendant could not use rule 3.800(a) to claim his habitual offender sentence was illegal because he did not personally receive written notice of the state's intent to habitualize him. Although Judge did not offer all-encompassing definitions for erroneous, unlawful, and illegal sentences, it did offer several instructive comments. Erroneous sentences were said to be those that were "considered fundamental", id. at 77; however, "fundamental" was not defined. Illegal sentences are those that "impose[] a penalty that is simply not authorized by law"; illegality does not include the question of "whether the procedure employed to impose the sentence comported with statutory law and due process", but rather only concerns the question of whether the sentence "fits within the confines of the law." Id. Illegality can be determined by "an examination of the basic public records concerning the adjudicated offense and the resulting sentence"; there are no issues of fact that need to be resolved. Id. Judge offered no further definition of unlawful sentences.

In Davis v. State, 661 So. 2d 1193 (Fla. 1995), this Court appeared to adopt a very restrictive definition for illegal sentences. Davis was given a sentence that was within the statutory maximum but above the guidelines; however, the written departure reasons were not timely filed. Rejecting Davis' argument that the untimely filing "constitutes fundamental error that can be raised for the first time on collateral review", the Court asserted:

> The confusion regarding whether this type of issue may be raised for the first time in postconviction relief proceedings is the apparent result of this Court's allowing such issues to be raised for the first time on appeal where there has been no contemporaneous objection below. Normally, to raise an asserted error in an appeal, a contemporaneous objection must have been made . . . . 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." . . . [With] errors in the sentencing process that 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.

Id. at 1196.

The Court concluded that "[w]hile the failure to file written reasons is error that may be raised for the first time on appeal, it is not . . . 'fundamental' error that may be raised at any time if the sentence is within the maximum period allowed by law." Id. A short time later, the Court applied Davis to conclude that "a hybrid split sentence of incarceration under the guidelines followed by probation as a habitual offender, although not authorized by statue or rule, is not an illegal sentence unless the

total sentence imposed exceeds the statutory maximum . . . ." King v. State, 681 So. 2d 1136 (Fla. 1996).

As will be discussed below, some district court opinions have relied on the narrow Davis-King definition of an illegal sentence under rule 3.800 when interpreting the Act and the Amended Rules. However, this Court has recently expanded this narrow definition. In Hopping v. State, 708 So. 2d 263 (Fla. 1998), the defendant's double jeopardy rights were violated when his sentence was increased several months after he began serving it. Holding this was an illegal sentence that could be corrected in a rule 3.800 motion, the Court emphasized the language in Calloway that said an illegal sentence included "sentencing issues that can be resolved as a matter of law without an evidentiary hearing." Id. at 265 (emphasis deleted). In State v. Mancino, 714 So. 2d 429 (Fla. 1998), the Court held that "a claim of credit for jail time served is cognizable in a rule 3.800 motion to the extent that court records reflect an undisputed entitlement to credit and a sentence that fails to grant such credit." Id. at 430. Again quoting Calloway, the Court said "Hopping . . . rejected the contention that . . . Davis mandates that only those sentences that facially exceed the statutory maximums may be challenged under rule 3.800(a) as illegal." Id. at 433 (emphasis in original). The Court concluded that "[a] sentence that patently fails to conform with statutory or constitutional limitations is by definition 'illegal'." Id.

This line of cases is important for present purposes because the Amended Rules intended to incorporate the distinctions

recognized in Calloway. Recall that, in Amendments I, the Court divided rule 3.800 into two subsections: subsection (a), which allows "illegal sentences" to be "correct[ed]" "at any time"; and subsection (b), which gave defendants 30 days to "correct sentencing error[s]." In Amendments II, the Court promulgated amended rule 9.140, which: (1) added the phrase "unlawful or" to the phrase "illegal sentence" in 9.140(b)(1)(D) (which lists the circumstances under which the defendant "may appeal"); (2) reaffirmed (in a separate and coequal subsection, 9.140(b)(1)(E)) that a defendant may appeal "a sentence, if the appeal is required or permitted by general law"; (3) restricted a defendant who pleads guilty or no contest without reserving an issue to appealing "a sentencing error, if preserved", 9.140(b)(2) (B)(iv); and (4) provided that "sentencing error[s] may not be raised on appeal unless [preserved]", 9.140 (d). 696 So. 2d at 1129-30. The commentary to the amendments in Amendments II notes: "In view of our decision in Davis . . . , clarifying the definition of illegal sentences, we have provided in rule[] 9.140(b)(1)(D) . . . direct appeals may be taken from both illegal and unlawful sentences." 696 So. 2d at 1106.

It is clear that the use of the phrase "sentencing error" in rules 3.800(b) and 9.140(b)(2)(B)(iv) and (d) refers only to what Calloway called "erroneous sentences", which in turn means that the preservation requirements in those subsections do not apply to "illegal" and "unlawful" sentences. This reading is reinforced by the facts that: (1) rule 9.140(b)(1) provides separately for

appeals from both "unlawful or illegal sentence[s]" and "a sentence, . . . if permitted by general law"; and (2) rule 9.140(b)(2)(B)(iv) provides separately for appeals both from preserved "sentencing error[s]" and "as otherwise provided by law." If the phrase "unlawful or illegal sentence" is meant to be synonymous with, or to encompass, the phrase "sentencing errors", then the separate phrase "a sentence . . . if permitted by general law" would be unnecessary. Similarly, "as otherwise provided by law" must refer to the provision for appealing "unlawful or illegal sentences" in 9.140(b)(1)(D); as this Court made clear in Robinson, the legislature cannot take away the defendant's right to appeal an illegal sentence, even if he pleads without reserving the issue.[10]

The district courts have not unanimously accepted this reasoning; indeed, they have come to conflicting conclusions regarding the meaning of the Act and the Amended Rules. The most

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[10] In addressing the Robinson problem in Amendments II, this Court began by noting that Robinson says that the pleading defendant retains the right to appeal the "illegality of the sentence" and thus, despite section 924.051(4), "Robinson controls [and a] defendant must have the right to appeal that limited class of issues described in Robinson." 696 So. 2d at 1105 (emphasis added). The Court then went on to address "another problem": at the time of his plea, the defendant "cannot expressly reserve a sentencing error which has not yet occurred . . . ." Id. (emphasis added). The Court then addresses this "[]other problem" by construing the Act "to permit a [pleading] defendant . . . to . . . appeal a sentencing error, providing it has been timely preserved by a motion to correct the sentence." Id. (emphasis added). Here again we see the Court drawing the Calloway-based distinction between illegal and erroneous sentences. In effect, the Amended Rules, rather than imposing a preservation requirement on the raising of an illegal sentence issue, have added a new basis for appeals on pleas: a defendant can appeal, not only an (unpreserved) illegal sentence issue, but also a non-illegal-sentence sentencing error, if preserved.

restrictive approach is that taken by the Fifth District en banc in Maddox, supra. In that case, the defendant pled no contest, reserving the right to appeal the denial of a motion to suppress. On appeal, he raised an unpreserved costs issue. The court held that "[t]he net effect of the [Act] and the amended rules is that no sentencing error can be considered in a direct appeal unless the error has been 'preserved' for review . . . ." Id. at 619 (emphasis in original). The court further held "[t]his is true regardless of whether the error is apparent on the face of the record [a]nd it applies across the board to defendants who plead and to those who go to trial." Id. The court concluded "'fundamental error' no longer exists in the sentencing context." Id.

In reaching this conclusion, the court relied on two premises: 1) the phrase "'sentencing errors' [as used in the Amended Rules] appears to include those that are unlawful, as well as those that are illegal"; and 2) amended rule 9.140(d) must be read literally and strictly to require that all sentencing issues must first be preserved in order to be raised on appeal. Id. at 618. The court also felt this Court has concluded that there is no longer any doctrine of fundamental error 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. 1996) ("Fundamental error is 'error which reaches down into the validity of the trial itself to the extent that the verdict

> itself could not have been obtained without the assistance of the alleged error'"). . . . 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 . . . 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.

Id. at 619 (emphasis in Maddox).

Two judges dissented from the majority's conclusion that there is no longer any fundamental sentencing errors; they said the majority was misreading Summers and Archer. Id. at 621-22 (Thompson, J., concurring in part, dissenting in part). They pointed out that Summers addressed a question of what constitutes an illegal sentence under rule 3.800(a)[11], and Archer was a death

[11] The issue in Summers concerned the failure to make statutorily required written findings before imposing adult sanctions on a juvenile. Following Davis, the Court held this was "a sentencing error, not fundamental error, which must be raised on direct appeal or it is waived." 684 So. 2d at 729. While this sentence could be read as meaning that sentencing errors can never be fundamental error, it is more likely the Court was intending to say that the issue Summers was attempting to raise cannot be raised in a rule 3.800 motion.

Maddox' reading of Summers illustrates the point the court made in Judge, see 596 So. 2d at 76, fn.1, a point that is quite significant in the courts' attempts to interpret the Act: we keep using the phrases "fundamental error", "sentencing error", "unlawful sentence", and "illegal sentence" as if those phrases have some objective meaning that can be ascertained independent of the factual and procedural context of the case in which the phrases are used. In fact -- as both Judge and Calloway indicate --, the distinctions between erroneous, unlawful, and illegal sentences are based, not on the inherent substantive properties of the different types of sentencing mistakes, but on the procedural device that is used to remedy them. Thus, erroneous=appeal, unlawful=3.850, and illegal=3.800. If we attempt to determine which procedure is to be used to correct a particular sentencing mistake by attempting to

penalty resentencing case in which the comments quoted by the Maddox majority were made in the context of rejecting the defendant's argument that it was fundamental error to fail to give the resentencing jury a definition of reasonable doubt.[12]

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classify the mistake as being one of erroneous, unlawful, or illegal, we run into either an unending circularity or a self-defining conclusion: an illegal sentence must be corrected in a 3.800 motion, so a sentencing mistake that is correctable in a 3.800 motion must be an illegal sentence. Thus, this Court has stated that an illegal sentence issue is one that can be "resolved as a matter of law without an evidentiary hearing" (Calloway) or "patently fails to conform with statutory or constitutional limitations" (Mancino), but it does not include a "fundamental [error] that [is] apparent on the face of the record" (Davis). The distinction between "resolved as a matter of law without an evidentiary hearing" and "apparent on the face of the record" is subtle at best.

The real issue that needs to be addressed is this: where, when, how, and by whom will potential sentencing mistakes be addressed? There are, of course, three basic possibilities: direct appeal, rule 3.800, and rule 3.850. The allocation of the various types of potential sentencing mistakes among these three potential remedies should be done by reference to a combination of factors, including the seriousness of the mistake, whether an evidentiary hearing is required, systemic concerns about finality, administrative concerns about who is in the best position to make the decision most efficiently, and the appearance of doing justice. Attempting to allocate the decision-making process through the use of such abstract and amorphous terms as "fundamental error", etc., seems doomed to failure; we are going to continue to encounter the type of problems we have been experiencing to date. It would seem that it might be better to simply list the various types of basic sentencing mistakes there are and then specifically allocate each to one procedure or another.

[12] The quote from Archer that the Maddox majority relied upon was actually a quote from State v. Delva, 575 So. 2d 643 (Fla. 1991), a case that addressed the issue of what amounts to fundamental error in the context of the giving of jury instructions. Thus, the use of the word "trial" in the Archer-Delva quote can hardly be read as a clear statement from this Court that there is no longer any fundamental error in the sentencing context.

The other district courts disagree with the Maddox majority's holding that there is no longer any such thing as fundamental sentencing error.

In Nelson v. State, 719 So. 2d 1230 (Fla. 1st DCA 1998), the defendant pled no contest to felony petit theft and, pursuant to a negotiated agreement, was sentenced as a habitual offender. On appeal, she claimed for the first time that the sentence was illegal because she could not be habitualized for that offense (which, in fact, she could not, under section 812.014 (3)(c), Florida Statutes (1997)). Relying on this Court's decisions from Calloway to Mancino, the First District en banc held the sentence could be challenged on direct appeal even though it was not challenged in the trial court:

> Although the term of the sentence does not exceed the non-habitual statutory maximum [,] the sentence is illegal, as the face of the record reveals that the sentence otherwise fails to conform with statutory limitations. [A]n illegal sentence constitutes fundamental error which may be addressed for the first time on appeal . . . .
>
> . . .
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> . . . [U]npreserved sentencing errors are no longer correctable on direct appeal merely because they are apparent from the face of the record. [Citing rule 9.140(d)]. . . .
>
> . . . But, consistent with the legislative intent that section 924.051 not be applied to prelude relief on direct appeal for unpreserved fundamental errors, . . . unpreserved sentencing errors which are fundamental may be addressed for the first time on direct appeal.
>
> Most prominent among the sentencing errors determined to be fundamental are those that result in "illegal sentences." . . .

. . .

> [T]he unpreserved sentencing error in the present case may be remedied in this direct appeal if the resulting sentence is illegal.

. . .

> [T]he sentence . . . clearly fails to comport with the statutory limitation of section 812.014 [and] is therefore an illegal sentence which is remedial as fundamental error.

Id. at 1231-33 (emphasis in original)[13].

The court disagreed with Maddox because:

> Maddox cannot be reconciled with [Amendments II], in which the supreme court clearly indicated that its 1996 amendments to [the criminal and appellate rules] were adopted in recognition of the legislature's prerogative to "reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error. . . . The construction of rule 9.140(d) applied in Maddox would frustrate, rather than recognize, this legislative intent. For this reason, and because the supreme court (1) has specifically recognized fundamental error in the sentencing context in cases such as Wood v. State, 544 So, 2d 1004 (Fla. 1989), (2) has held that an illegal sentence may be corrected at any time, and (3) has provided no clear indication that fundamental error now applies only to trial errors, we disagree with Maddox . . . .

Id. at 1233 (emphasis added in Nelson).

Four judges dissented, agreeing with Maddox that "all sentencing errors [must] be addressed initially . . . in the trial court." Id. at 1235 (Joanos, J., dissenting). Concurring, Judge

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[13] Note that Nelson says illegal sentences are fundamental error. But Davis said fundamental error does not establish an illegal sentence. 661 So. 2d at 1196. See footnote 11, above.

Ervin said that, pursuant to Robinson, supra, a defendant entering a plea still retained the right to appeal the legality of his sentence, even though the issue was unpreserved. He said that the problem in Maddox was that it "lump[ed] together indiscriminately the terms 'sentencing errors' and 'illegal sentences' [,which] are not . . . synonymous." Id. at 1234 (Ervin, J., concurring). He noted that, under amended rule 3.800, this Court drew a distinction between "illegal sentences", which may be corrected "at any time" under subsection (a), and "sentencing errors", which must be corrected in 30 days under subsection (b). Since the 1997 amendments to rules 9.140(b)(2)(B)(iv) and (d) specifically used the phrase "sentencing errors", this means that "the supreme court, in amending rule 9.140, made the same distinction between sentencing errors and illegal sentences as it had in its amendment to rule 3.800." Id. at 1235. "As a result, a defendant retains the right to attack collaterally an illegal sentence at the trial level, as well as the right to appeal an illegal sentence within 30 days of its rendition, whether such sentence follows a plea, or whether the error . . . has been preserved." Id.

The Second District disagreed with Maddox in Bain, supra. Bain pled guilty in two separate cases, reserving no issues in either case. On appeal, he raised two unpreserved issues regarding his sentences. First, he argued that the fifteen year minimum mandatory prison sentence he received as a habitual violent offender on a robbery count (a second degree felony) exceeded the ten year minimum mandatory applicable to such offenses. Second, he argued

that the ten year habitual offender sentence he received on a grand theft count was unlawful because he did not qualify as a habitual offender. The court reversed both sentences, using the following logic: 1) the fifteen year minimum mandatory sentence was an illegal sentence and thus was fundamentally erroneous; 2) the court had jurisdiction to correct an illegal sentence even though the defendant pled guilty and preserved no issues; and 3) since the court had jurisdiction, the court could also correct other "serious patent [sentencing] error[s]" (such as the habitual offender theft sentence) even though such errors may not, in themselves, constitute a jurisdiction-providing illegal or fundamentally erroneous sentence. 24 Fla. Law Weekly at D317.

In reaching these conclusions, the court began by noting that "when the legislature enacted the . . . Act it did not alter the appellate courts' historic jurisdiction to correct fundamental error." Id. at D316. The court then concluded that this Court did not intend to accomplish that result when it enacted the Amended Rules:

> [T]he question of whether an error is fundamental has never turned on the existence vel non of a mechanism for correcting it in the lower court. If it did, no error that could have been corrected by a contemporaneous objection, or a motion for rehearing . . . could ever be reviewed as fundamental. Just as the availability of these remedies has no bearing on whether a particular error is fundamental, neither does rule 3.800(b) eliminate the possibility that a sentence could be fundamental error.
>
> . . .

> Although the preclusive language of [rule 9.140(d)] might support an inference that the supreme court meant to prohibit review of sentences under the fundamental error doctrine, we believe such an inference is unwarranted for several reasons. First, appellate review of fundamental error is, by its nature, an exception to the requirement of preservation. Indeed, it is only in this context that the concept has any meaning. Put another way, no rule of preservation can impliedly abrogate the fundamental error doctrine because the doctrine is an exception to every such rule. It makes no difference that this particular rule is codified. Over the years, Florida's appellate courts have applied the preservation requirement regardless of whether the codified rules expressly required it, and they have corrected fundamental error regardless of whether the codified rules expressly permitted it.
>
> The latter fact underscores the importance of the fundamental error doctrine. Its purpose extends beyond the interests of a particular aggrieved party; it protects the interests of justice itself. It embodies the courts' recognition that some errors are of such magnitude that failure to correct them would undermine the integrity of our system of justice. . . . As such, the correction of fundamental error is not merely a judicial power; it is an unrenunciable judicial duty. . . . Given that . . . the Act embraced this critically important safeguard, we do not believe that the supreme court simply would discard it by implication. Indeed, the supreme court's comment [in Amendments II] . . . that "[r]ule 9.140 was substantially rewritten so as to harmonize with the . . . Act" . . . contradicts the notion that the rule amendments were meant to eliminate jurisdiction that the Act retained.

Id. at D316-17 (emphasis added in Bain).

Bain agreed with Nelson that, in plea cases, the defendant still retained the right to appeal an illegal sentence, even though the issue was unpreserved; further, although illegal sentences were fundamentally erroneous, the court said it "cannot declare that

only 'illegal' sentences can constitute fundamental sentencing error." Id. at D317-18.[14] As to what qualifies as such sentences, the court offered no all-encompassing definitions. Quoting this Court's Mancino case, Bain said illegal sentences were not limited to those "that exceed[] the statutory maximum" but rather include "sentence[s] that patently fail[] to comport with statutory or constitutional limitations . . . ." Id. at D318. As to what qualifies as fundamental sentencing error, the court noted that this would involve assessment of both "qualitative" and "quantitative" factors:

> Our societal values are such that in the sentencing context we are more solicitous of personal liberty than of pecuniary interests. Thus, an error that improperly extends the defendant's incarceration or supervision likely would impress us as fundamental. But only in an extreme case would an improper cost assessment or public defender's lien qualify as fundamental error.

Id.

Three judges dissented, asserting that the court had no jurisdiction to hear the appeal because "an illegal sentence is [not] 'fundamental error' for purposes of the . . . Act." Id. (Altenbernd, J., dissenting). They felt that "unpreserved errors [are not] fundamental in the appellate court when there exists an avenue of redress in the trial court . . . ." Id. However, recognizing the unfairness in requiring the defendant to proceed pro se to correct an error made by his trial counsel, the

[14] Note that, like Nelson, Bain believes illegal sentences are fundamentally erroneous. See footnote 13, above.

dissenters said appointed counsel should be available to file a rule 3.800 motion. Id. at D319-20.

Although the Third District has not definitively weighed in on this issue, the case of Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998) should be noted. In that case (a trial case), the defendant was convicted on several charges and, on one misdemeanor count, was sentenced to 14 years imprisonment (concurrent with identical sentences he properly received on the other counts). Avoiding the "fratricidal warfare" between Maddox and the other district courts, Mizell finessed the question of whether the doctrine of fundamental error still applies to sentencing issues by using the doctrine of ineffective assistance of counsel, finding that "the facts giving rise to such a claim are apparent on the face of the record when trial counsel fails to preserve such an obvious sentencing error." Id. at 830 (citation omitted). The court "agree[d] with Maddox, 708 So. 2d at 621, that the lack of preservation necessarily involves ineffectiveness of counsel, but strongly disagree[d] that anything is accomplished by not dealing with the matter at once." Id.[15]

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[15] In Maddox, the court had commented that "there is little risk that the defendant will suffer an injustice" if the doctrine of fundamental sentencing error is eliminated because "the remedy of ineffective assistance of counsel will be available" and "[i]t is hard to imagine that the failure to preserve a sentencing error that would formerly be characterized as 'fundamental' would not support an 'ineffective assistance' claim." 708 So. 2d at 621. However, the court did not consider the possibility of considering this issue as fundamental error in the direct appeal. Nor did the court consider the problem noted by the Bain dissenters: in such cases, is the defendant entitled to appointed counsel (which, presumably, would have to be new counsel, since we cannot expect the original trial counsel to file a motion accusing himself of

Finally, the en banc Fourth District disagreed with Maddox on the question of "whether a defendant can raise the illegality of a sentence, as defined in Davis . . . , without preservation." Hyden v. State, 715 So. 2d 960, 963, fn. 1 (Fla. 4th DCA 1998); Harriel, supra. However, neither Hyden nor Harriel addressed the effect of the expanded definition of illegal sentence in Hopping and Mancino.

Due to time and space constraints, Petitioner will not attempt to analyze these cases, noting only that the divergent opinions seem to reinforce the comments made in footnote 11, above. Rather, Petitioner will simply suggest that the following analysis is the correct analysis under the Act and the Amended Rules:

In trial cases, section 924.051(3) controls. An unpreserved sentencing issue may be addressed on appeal "if [it] constitute[s] fundamental error." The phrase "sentencing errors" in rule 9.140(d) does not include fundamental errors. This conclusion can be reached several ways. If section 924.051(3) is a proper limit on appellate jurisdiction, then this Court cannot, in effect, reject that jurisdiction by imposing a preservation requirement that the legislature did not impose. If section 924.051(3) is not a proper jurisdictional limitation, this Court nonetheless cannot, in effect, abdicate the courts' judicial responsibility to correct fundamental errors. That power and duty is an inherent part of the constitutionally given judicial power; it is part of what makes a

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ineffectiveness). Nor did the court consider the question of the net effect of such a procedure on the system as a whole: in the interest of appellate efficiency, the trial court's post-conviction workload will significantly increase.

court a court. Thus, regardless of whether section 924.051(3) is facially valid, this Court has the power -- and the duty -- to correct fundamental error. See also Fla. R. App. P. 9.140(h) ("In the interest of justice, the court may grant any relief to which any party is entitled").

In plea cases, Robinson establishes that courts have the inherent power to correct illegal sentences on appeal, even if the defendant preserved no issues for appeal. This, of course, reinforces the point just made: courts have the inherent power and duty to correct fundamental error, at least to the extent that that error results in an illegal sentence. Thus, neither the Act nor the Amended Rules can be read as taking away that power. Section 924.051(4) must be interpreted as not precluding the raising of Robinson issues (as this Court did in Amendments II). The phrase "sentencing errors", as used in rule 9.140(b)(2)(B)(iv) and (d), does not include illegal sentences.

In the present case, Petitioner's "trial" sentence clearly raises an issue of fundamental error under section 924.051(3). State v. Johnson, supra.

As to his "plea" sentence, there are no cases from this Court addressing the question of whether a sentence authorized by a constitutionally defective statute is an illegal or fundamentally erroneous sentence under Robinson. The Fourth District has recently addressed a question similar to that raised in this case. In Freshman v. State, 24 Fla. Law Weekly D707 (Fla. 4th DCA, March 17,1999), the defendant, relying on his being within the "Johnson

window"[16], filed a rule 3.800(a) motion alleging his habitual offender sentence was illegal because the statute that authorized it violated the state single subject constitutional requirement. The court held he was entitled to relief under the Mancino-Hopping definition of illegal sentence because "the order declaring Freshman a habitual offender affirmatively shows a failure to comport with the statutory requirements of the habitual offender statute which were not unconstitutional." Id. at D707.

The same logic should apply in the present case. A sentence authorized by a facially unconstitutional statute is a prime example of "a sentence that patently fails to comport with statutory or constitutional limitations . . . ." State v. Mancino, supra, 714 So. 2d at 433. Thus, Petitioner's "plea" sentence is the type of illegal sentence that can be appealed even though unpreserved.

[16] See State v. Johnson, supra, 616 So. 2d at 2-3.

V. TWO FINAL POINTS

In this section, we address two final points: what should the Court do if it finds it has jurisdiction over one of Petitioner's cases (presumably the "trial" case) but not the other (presumably the "plea" case), and what should the Court do if it finds it has no jurisdiction at all (presumably because Petitioner preserved no issues in either case)?

If the Court believes it should have jurisdiction over only one case, Petitioner would argue that (1) the filing of the joint notice of appeal gives the Court jurisdiction over both cases and (2) having acquired jurisdiction over at least one case, the Court should go on and decide all issues in both cases (which, of course, is the same issue in both cases in the present appeal).

As to point #1, it is well-settled that the inclusion of two lower court case numbers in a single notice of appeal is permissible, provided there is sufficient connection between the two and the opponent is not unduly prejudiced. Milar Galleries v. Miller, 349 So. 2d 170 (Fla.1977); Webster v. State, 235 So. 2d 499 (Fla. 1970); Lowe v. State, 232 So. 2d 394 (Fla. 1970. In the present case, Petitioner was sentenced on the same day to concurrent terms of imprisonment and both cases raise the same issue. Thus, the joint notice of appeal was proper.

As to point #2, it is well-settled that this Court has the discretion to decide all the issues in an appeal once it obtains jurisdiction, even though that jurisdiction was obtained only to address a limited issue in the appeal. Allen v. State, 326 So. 419

(Fla. 1975). Given that there is, in effect, only one issue here, this Court should address that issue in both cases.

Finally, assuming this Court believes it has no jurisdiction to decide one or both of Petitioner's cases, Article V, Section 2 of the Florida Constitution should come into play. Rather than an outright dismissal, this Court should "transfer [this matter] to the court having jurisdiction" i.e., the trial court, so that the "[]proper remedy [i.e., a motion under rule 3.800 or 3.850 may] be[] sought." An outright dismissal would be unfair to Petitioner; after all, it was his trial lawyer's failure to preserve the issue that cost him his right to appeal. If the Amended Rules are meant to substitute rule 3.800 or 3.850 motions for direct appeals as the method for correcting unpreserved sentencing errors, then transfer back to the trial court must be the method for dealing with the "improvident" filing of a notice of appeal. This would eliminate the problem that Judge Altenbernd noted in his Bain dissent: that we cannot expect the pro se defendant to file his rule 3.800 or 3.850 motion on his own. Transfer back to the trial court would insure that the matter gets brought back to the court's attention, and it would insure the defendant is given any help from counsel he might need.

Transfer would also eliminate any potential problem under the state constitutional access to courts provision contained in Article I, Section 21. It is well-settled that that right should be "construe[d] . . . liberally in order to guarantee broad accessibility to the courts for resolving disputes." Psychiatric

Associates v. Siegel, 610 So. 2d 419, 424 (Fla. 1992). "[C]ourts generally oppose any burden being placed on the right of a person to seek redress of injuries from the courts, [and] the legislature may abrogate or restrict a person's right access to the court's if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity." Id. at 424 (emphasis in original). Eliminating a defendant's right to appeal without providing him with the reasonable alternative of a transfer back to the trial court would violate this constitutional provision.

CONCLUSION

This Court has jurisdiction to hear this appeal. If not, the cause should be transferred back to the trial court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to James Rogers and Edward Hill, Office of the Attorney General, PLO1, The Capitol, Tallahassee, FL 32399-1050, (850) 414-3300, on this _____ day of February, 2000.

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