ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 94,142

CLEON GREENWOOD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

TABLE OF AUTHORITIES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the 19th Judicial Circuit, in and for St. Lucie County, Florida. Respondent was the Appellee and Petitioner was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "T" will be used to denote the transcripts of the trial, and "R" will be used to denote the record on appeal to the Fourth District.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts for purposes of this appeal in so far as it presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief and in the district court's opinion.

SUMMARY OF THE ARGUMENT

For the first time in the Fourth District, petitioner claimed as error the discrepancy between the written judgment of sentence and the oral pronouncement regarding credit for time served. Respondent contends that the Fourth District correctly held that the alleged sentencing error was not reviewable by the appellate court because it was not preserved. It is undisputed that the alleged error was not preserved because petitioner failed to file a Rule 3.800(b) motion in the trial court.

Further, the Fourth District's implicit holding that the sentencing error was not fundamental error was correct, because it is not so patent and serious, and it is not illegal. Additionally, after the enactment of the Criminal Appeals Reform Act of 1996, Florida courts no longer review nonfundamental errors which are apparent on the face of the record. Most importantly, the Fourth District did not hold that petitioner was <u>not</u> entitled to credit; it merely held that his claim was not

reviewable for the first time on appeal.

Furthermore, while the changes in the Criminal Appeal Reform Act and the rules changed the definition of fundamental error in the sentencing context, those changes are not unconstitutional, because petitioner is not foreclosed from seeking remedy in the trial court. Thus, the restriction prescribed by the Criminal Appeal Reform Act on the appeal of sentencing errors is both efficient and constitutional.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE UNPRESERVED DISCREPANCY BETWEEN THE ORAL PRONOUNCEMENT AND THE WRITTEN JUDGMENT OF SENTENCE REGARDING PETITIONER'S CREDIT WAS NOT REVIEWABLE ON APPEAL.

Petitioner challenges the holding of the Fourth District's opinion in Greenwood v. State, 720 So. 2d 548 (Fla. 4th DCA 1998). Petitioner contends that the Fourth District's reliance on Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998)(en banc), review granted, Case No. 93,966 (1998), was erroneous, because it "identified too narrow a class of sentencing errors which it will consider on appeal without preservation in the trial court." Petitioner, in essence, is asserting that his alleged sentencing error was fundamental, and that the enactment of the Criminal Appeal Reform Act is unconstitutional. Respondent disagrees.

The record shows that during the sentencing at the trial court, the trial judge pronounced petitioner's sentence of 69.75 months incarceration, and also awarded him credit of six months for time served (T 191). However, since the written judgment of sentence failed to reflect any credit (R 43), a discrepancy between the written order and the oral pronouncement in open court was created. Without filing any motion in the trial court, petitioner raised the allegation of entitlement to credit for time served on appeal in the Fourth District. The Fourth District declined to review his claim on the merits and held the

following:

> Although the written judgment of sentence does not conform to the oral pronouncement, no motion to correct the sentence was filed. See Fla.R.Crim.P. 3.800(b). The issue is thus not preserved for appeal. See Fla.R.App.P. 9.140(d); Hyden v. State, 23 Fla. L. Weekly D1342, 715 So.2d 960 (Fla. 4th DCA 1998).

Greenwood v. State, 720 So. 2d 548, 549 (Fla. 4th DCA 1998). The Fourth District also denied petitioner's motion for rehearing.

Respondent submits that this issue was properly decided by the district court in Greenwood v. State, 720 So. 2d 548 (Fla. 4th DCA 1998). Likewise, the opinion of Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998)(en banc) on which Greenwood relied, states the correct statement of the law.

At the outset, respondent would note that the state agrees with petitioner that he is entitled to credit of six months, based on the trial court's pronouncement in open court. Respondent also agrees with petitioner that the oral pronouncement in open court controls over a written order.[1] Respondent further agrees with petitioner that his credit for time served is apparent on the face of the record, since the trial court pronounced it in open court and there was no objection to it by either party. The only question then before this Honorable Court is whether the district

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[1]"When there is a difference between a court's oral pronouncement and a written order, the oral pronouncement controls." D.F. v. State, 650 So. 2d 1097, 1098 (Fla. 2d DCA 1995); A.S. v. State, 714 So. 2d 1038, 1039 (Fla. 2d DCA 1998).

court was correct in declining to review the merits of petitioner's claim by holding that the allegation of error was not preserved and in implicitly holding that it was not fundamental error. Respondent notes that neither the Fourth District nor the trial court ever said that petitioner is not entitled to his credit. The Fourth District never reached the issue of entitlement to credit; rather, the court merely held that because petitioner failed to challenge the discrepancy between the written order and the oral pronouncement of his credit in the trial court, the issue was not preserved for review by the appellate court. The Fourth District's holding in Greenwood was a correct statement of the law and a correct interpretation of § 924.051, Florida Statutes (Supp. 1996), the Criminal Appeal Reform Act of 1996, Chapter 96-248, Laws of Florida ("Act").

As stated above, the Fourth District in this case relied on its decision in Hyden. As in this case, in Hyden, where the defendant raised sentencing issues for the first time on appeal, the district court held that it will "no longer entertain on appeal the correction of sentencing errors which are not properly preserved" by a contemporaneous objection or a motion under Florida Rule of Criminal Procedure 3.800. Citing to Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review granted, 718 So. 2d 169 (Fla. 1998), the Fourth District in Hyden held that with the exception of the illegality of a sentence as defined in Davis v.

State, 661 So. 2d 1193, 1196-97 (Fla. 1995), *every* sentencing issue must be preserved in the trial court in order for it to be reviewed on appeal.[2]

Theses cases in essence interpret the Act of 1996, which imposes the following two restrictions before an appeal can be taken:

> 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.

Subsection 924.051(3).

The appellate court then may entertain an appeal which alleges prejudicial error that has been properly preserved, or would

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[2] Shortly before Hyden the Fourth District expressed the same in Harriel v. State, 710 So. 2d 102, 103 (Fla. 4th DCA 1998), where the court said:

> [I]f the appellant were to allege a sentencing error, it may not be raised for the first time on appeal but must be brought to the attention of the trial court, either at the time of sentencing or by motion to correct the sentence, pursuant to Florida Rule of Criminal Procedure 3.800(b). See Johnson v. State, 697 So. 2d 1304, 1305 (Fla. 2d DCA 1997); § 924.051, Fla. Stat. (1997); Fla.R.App.P. 9.140(b)(2)(B)(iv), (d). No such motion was filed in this case. Thus, because there was no preserved issue, the appeal should be dismissed.

constitute fundamental error.

In order to be preserved, the issue had to be presented to, and ruled on by the trial court. § 924.051(1)(a), Fla. Stat. (1997); Fla. R. App. P. 9.140(b)(2)(B)(iv); and Fla. R. App. P. 9.140(d).

The enactment of the Act and the recent amendments to the Florida Rules of Appellate and Criminal Procedure, indicate that both the legislature and this Court view the trial court as the best judicial body to investigate and determine whether a sentencing error has occurred and, if so, to correct the error.

The Act and the amended rules provide ready remedies for every legitimate claim of sentencing error to be first raised in the trial court. Errors can be raised in the trial court contemporaneously, by a post-sentencing motion, or by a post-conviction motion. After the amendments, the definition of "rendition" of an order was changed to provide that a timely filed motion to correct the sentence stays rendition of the judgment of conviction and sentence for purposes of appeal. See Hyden; Fla. R. App. P. 9.020(h).[3] Thus, the amendments make it clear that a timely motion to correct a sentence preserves the defendant's

[3] The rules were amended to harmonize with the Act and to require that sentencing issues first be raised in the trial court. See Amendments to Fla.R.App.P. 9.020(g) and Fla.R.Crim.P. 3.800, 675 So. 2d 1374 (Fla. 1996); Amendments to the Fla.R.Crim.P., 685 So. 2d 1253 (Fla. 1996).

appellate rights. The defendant loses his or her appellate rights *only* when he or she does not observe the provisions of Rule 3.800(b); Rule 9.140(d); Hyden. In sum, in amending the Florida Rules of Appellate and Criminal Procedure, the Florida Supreme Court has provided numerous vehicles for defendants to raise sentencing errors in the trial court, regardless of the "fundamentalness" of the error alleged, and in a manner that continues to promote fairness.[4] Here, petitioner's claim was not preserved in the trial court.

The next underlying question is whether the alleged error in this case is fundamental.[5] Respondent contends that the Fourth District was correct in implicitly holding that the discrepancy

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[4]A defendant has the following remedies to challenge his sentencing errors in the trial court. A defendant may file a motion to correct an illegal sentence under Rule 3.800(a) at any time. A defendant may raise a contemporaneous objection regarding a sentencing error during sentencing or file a motion under Rule 3.800(b) within thirty days of the rendition of the sentence. Additionally, a defendant may bring a sentencing error to the trial court's attention by filing a Rule 3.850 motion within two years of the rendition of the final judgment of conviction and sentence. Under each of these scenarios listed above, the defendant is entitled to appeal a trial court's adverse ruling on the motion or objection. Additionally, Rule 9.600(d), provides the trial court with concurrent jurisdiction to review sentencing errors pursuant to Rule 3.800(a) while the appellate court reviews trial claims and other preserved error on direct appeal.

[5]For the sake of argument respondent will assume that there is sentencing fundamental error. Compare Maddox (court held that no sentencing error can constitute fundamental error because of the provisions of fixing each errors by Rule 3.800).

between the written order and the oral pronouncement does not constitute fundamental error.

The legislature did not define "fundamental error," and the district courts differ on which sentencing errors constitute fundamental error. In Maddox the Fifth District has concluded that there is no such thing as fundamental sentencing error. The Fourth District in Hyden considers an illegal sentence to be fundamental error, and so do the First and the Third districts. See Nelson v. State, 23 Florida Law Weekly D2241 (Fla. 1st DCA 1998)(general division en banc) and Jordan v. State, 23 Florida Law Weekly D2130 (Fla. 3d DCA 1998).

The Second District in Denson v. State, 711 So. 2d 1225, 1230 (Fla. 2d DCA 1998), defined fundamental sentencing error as "illegal sentences and other serious, patent sentencing errors." Shortly afterwards in Bain v. State, 24 Florida Law Weekly D314 (Fla. 2d DCA January 29, 1999)(en banc), the Second District revisited the issue and joined the First, Third and Fourth districts in considering illegal sentence as fundamental, but expanded its definition to add to that employed by Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995)(sentence that exceeds the statutory maximum), a sentence "that patently fails to comport with statutory or constitutional limitations." Bain. (Citing State v.

Mancino, 714 So. 2d 429, 433 (Fla. 1998)).[6] But see Bain v. State, 24 Florida Law Weekly D314 (Altenbernd, J., dissenting)("I would not declare these unpreserved errors to be fundamental in an appellate court when there exists an avenue of redress in the trial courts that is now, and always has been, available to Mr. Bain").

Here, even under the expanded definition of the Second District, the sentence in this case is not illegal and does not patently fail to comport with statutory or constitutional limitations. Petitioner's sentence is not fundamental, and thus it was correctly not reviewed by the district court.

Petitioner also alleges that since his sentencing claim is apparent on the face of the record, the error should be considered fundamental. Petitioner is correct that under the *previous* case law, error of discrepancy between oral and written judgment would be found to be "fundamental." However, the Act was designed to eliminate such review of sentencing error for the first time on appeal. Because the amended rule 3.800(b) provides an opportunity to be heard in the trial court on such issue, the district courts receded from the cases which predate the newly adopted Rule 3.800(b) and Section 924.051(3), Florida Statutes (Supp. 1996). E.g. Dodson v. State, 710 So. 2d 159, 161 (Fla. 1st DCA 1998)(where the court summarized some cases on what constitutes

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[6]The court in Bain said that it would likely impress the court as fundamental "an error that improperly extends the defendant's incarceration or supervision."

"fundamental" sentencing error after the enactment of the statute and the amendment of the rule); Maddox, 708 So. 2d at 618, n. 5 ("Under the court's *prior* decisions, an exception to the requirement of preservation of error was made for sentencing errors apparent on the face of the record which were reviewable on direct appeal, even in the absence of a contemporaneous objection and regardless of whether the error was fundamental, since as to these errors the purpose of the contemporaneous objection rule was not present" [e.s.]); Bain, 24 Florida Law Weekly D314 (*before* the enactment of the Act, Florida's courts routinely reviewed errors that were apparent on the face of the record). However, since the enactment of the Act, such nonfundamental errors can be reviewed by the appellate courts only if they were preserved. Bain (Citing Nelson, 23 Florida Law Weekly D2241)). Thus, petitioner's claim that his alleged sentencing error is fundamental because it is apparent on the face of the record must fail.

Petitioner also claims that State v. Mancino, 714 So. 2d 429 (Fla. 1998), conflicts with the holding of this case. Mancino, however, is distinguishable and does not provide any meaningful guidance in this case. Unlike in this case, in Mancino, the defendant was denied credit. There, the defendant filed a post conviction motion seeking jail credit which was denied. The issue presented to the court was whether such a request should be made by a motion under Rule 3.800 or 3.850. This Court held that under the

facts presented, the appropriate avenue was a Rule 3.800 motion. There was no mention of any issues regarding preservation of sentencing errors which do not constitute illegal sentences. More importantly, the opinion is completely silent as to whether the case arose under the amendments to the Rules of Appellate Procedure promulgated in November 1996 or the Act. Consequently, Mancino does not shed any light on the issues involved in this case. But see Johnson v. State, 24 Florida Law Weekly D_, Case No. 97-4049 (Fla. 1st DCA January 29, 1999)("A sentence whose illegality is apparent on the face of the record may be addressed on direct appeal" [e.s.]).

In the instant case petitioner was not denied entitlement to credit. Rather, the Fourth District held that the discrepancy between the oral pronouncement and the written order must be brought first to the trial court, because the sentence is not illegal. Cf. Smith v. State, 682 So. 2d 147, 149 (Fla. 4th DCA 1996) (affirming order denying appellant's 3.800 motion, alleging inter alia entitlement to credit for time served, because the sentence is not "illegal.").

In Campbell v. State, 718 So. 2d 886 (Fla. 4th DCA 1998), the defendant appealed the denial of his motion to correct illegal sentence. The Fourth District affirmed the trial court's denial, and explained that the discrepancy between the oral pronouncement and the written order cannot be raised in a motion to correct

illegal sentence, because the discrepancy does not result in an illegal sentence. The court further clarified that it does not conflict with this Court's holding in State v. Mancino, 714 So. 2d 429, stating the following:

> In Mancino, the Supreme Court explained that "A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal'." Id. at S303, at 433. The rule the oral pronouncement of the sentence that controls in the event of a discrepancy between the oral pronouncement and the written sentence is found in the Florida Rules of Criminal Procedure, not the Florida Statutes or the state or federal constitutions. Fla. R. Crim. Pro. 3.700(1) [sic]. If there was an error in Campbell's sentence, it was caused by noncompliance with a procedural rule, and therefore does not result in an "illegal sentence" under the Mancino definition.

The First District apparently agrees that a discrepancy between an oral pronouncement and a written order does not constitute fundamental error. See West v. State, 718 So. 2d 908 (Fla. 1st DCA 1998)(written judgment adjudicating defendant guilty of burglary of a structure, which incorrectly identified offense as a first-degree felony punishable by term of years not exceeding life in prison when in fact offense was of third-degree felony, did not constitute fundamental error). Thus, because Mancino is distinguishable, and does not support petitioner's case, there is no conflict between this case and Mancino.

The efficiency of granting exclusive jurisdiction to the trial court to correct unpreserved sentencing errors is supported by the

fact that where an error exists, the appellate courts must ultimately remand the case to the trial court to make the necessary corrections or affirm the trial court's order without prejudice to the defendant to file a motion to correct sentence.

The instant case is an excellent example of how judicial resources are unnecessarily wasted. So far, petitioner's defense counsel filed two briefs, a motion for rehearing and notice of intent to invoke jurisdiction in the Fourth District, in addition to two briefs which has been already filed in this Court. All this litigation could have been avoided by one motion to correct his sentence in the trial court, where the trial judge was in the best position to correct the discrepancy between the oral pronouncement and the written order.[7]

Petitioner also raises in this brief a challenge to the constitutionality of the Act. Respondent contends that the claim

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[7] In Perry v. State, 721 So. 2d 822 (Fla. 4th DCA 1998), the Fourth District said:

> This case has generated an initial brief, answer brief, reply brief and notice of supplemental authority, a staff memo by a judge's law clerk, the attention of the judges to the briefs and memos, and our *823 court's clerk's office processing of the opinion--all for $90 in fees. Bringing such errors to the attention of the trial court within 30 days is far more efficient than correcting such errors through the appellate process. See Hyden, 715 So.2d at 962.

721 So.2d 822, at 823.

is meritless. In Kalway v. Singletary, 708 So. 2d 267, 269 (Fla 1998), this Court rejected a separation of powers challenge to the Reform Act and reiterated its approval of the legislature's adoption of terms and conditions of appeal set out in the Reform Act, saying: "[W]e believe that the legislature may implement this constitutional right [to appeal] and place reasonable conditions up on it so long as [it does] not thwart the litigant's legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals." Thus, any concern regarding the abrogation of a defendant's right to appeal should cease to exist as the legislature and the Florida Supreme Court have provided defendants with access to both the trial and appellate courts.

The enactment of the Criminal Appeal Reform Act and the recent amendments to the Florida Rules of Appellate and Criminal Procedure indicate that both the legislature and the Florida Supreme Court view the trial court as the best judicial body to investigate and determine whether a sentencing error has occurred and, if so, to correct the error. Now the amendments to the statute and the rules provide ready and efficient remedies for claims of sentencing errors which without any denial of rights, require that sentencing errors be raised and ruled upon in the trial court while preserving a subsequent right to appeal. Thus, because petitioner has remedies to correct his sentencing errors, the statute is not

unconstitutional. The statute does not deprive one of the right to appeal. It merely requires preservation of the prejudicial error in the trial court, which is not a new concept. Neal v. State, 688 So. 2d 392, 395 (Fla. 1st DCA 1997), receded from on other grounds, 719 So. 2d 1249 (Fla. 1st DCA 1998)(general division en banc).

In sum, the Act requires that an appeal be taken only where prejudicial error was preserved or the sentencing error would be fundamental. The claimed error of discrepancy between the written order and the oral pronouncement in this case was not preserved for appellate review. More importantly, the alleged error was not a fundamental sentencing error. First, Mancino is distinguishable and thus does not apply to this case, because at bar petitioner was not denied entitlement to credit. Next, nonfundamental errors apparent on the face of the record are no longer reviewable since the enactment of the Act. And finally, petitioner's sentence is not an illegal sentence which is serious and patent. Thus, because petitioner's sentence is not illegal and does not constitute fundamental error the Fourth District correctly denied review based on its well reasoned analysis in Hyden; it should be adopted and upheld.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **UPHELD** and the judgment and sentence imposed by the trial court should be **AFFIRMED.**

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing respondent's brief on the merits by Courier to: Anthony Calvello, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 11th day of February, 1999.

Of Counsel

IN THE FLORIDA SUPREME COURT

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	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 94,142
	)	
STATE OF FLORIDA,	)	
	)	
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	)	

APPENDICES

1. Written Sentencing Order

2. *Greenwood v. State*, 720 So. 2d 548 (Fla. 4th DCA 1998)