ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CLEON GREENWOOD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.94,142

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

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

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

The symbol "T" will denote the hearing and sentencing transcripts.

The symbol "RB" will denote Respondent, State of Florida's Answer Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner, Cleon Greenwood, relies on his Statement of the Case and Facts found in his Initial Brief.

ARGUMENT

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

Contrary to the suggestion by Respondent (RB 12-13), the instant decision of the Fourth District is in conflict with this Court's decision in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). In *Mancino*, this Court clarified its holding in *Davis v. State*, 661 So. 2d 1193 (Fla. 1995), as follows:

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

Id. at 433.[Emphasis Added].

This Court in *Davis* did **not** preclude the consideration of sentencing errors apparent on the face of the record on appeal even in the absence of an objection. When this Court clarified the *Davis* definition of an illegal sentence in *State v. Mancino*, *supra*, significantly, this aspect of the decision concerning

sentencing error apparent on the face of the record was not receded from by this Court. See also *State v. Montague*, 682 So. 2d 1085, 1088 (Fla. 1998).

In the very recent case of *Bain v. State*, 24 Fla. L. Weekly D 314 (Fla. 2d DCA January 29, 1999)[See Appendix], the Second District articulated its basis for ruling that an illegal sentence is not confined to only those sentences which exceed the statutory maximum:

> As do the First, Third, and Fourth Districts, we consider illegal sentences to be fundamentally erroneous. Indeed, an illegal sentence epitomizes error that, if left uncorrected, could undermine public confidence in our system of justice.
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> **We emphasize that our use of the adjective "illegal" in this context is not confined to a sentence that exceeds the statutory maximum sentence for the crime, as the term was employed in *Davis v. State*, 661 So. 2d 1193, 1196 (Fla.1995).** In *State v. Mancino*, 714 So. 2d 429 (Fla.1998), the supreme court disavowed the notion that under *Davis* only sentences that exceed statutory maximums are illegal for purposes of rule 3.800(a). Rather, the court held, "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" 714 So. 2d at 433. We believe that any sentence to which our judiciary is constrained to attach the opprobrium "illegal" must be corrected as fundamental error.

Id. at D318 [Emphasis Supplied].

In *Bain, supra*, the defendant guilty to robbery, without a weapon, and to grand theft. In his plea agreement, he acknowledged that he qualified for treatment as a habitual violent felony offender. He was sentenced to a fifteen-year minimum mandatory term of imprisonment as a habitual violent felony offender on the robbery charge, and to a concurrent term of ten years' imprisonment as a habitual felony offender on the grand theft charge.

On appeal to the Second District, he argued that the minimum mandatory aspect of the robbery sentence exceeds that permitted by the habitual violent felony offender statute. He also challenged the grand theft sentence on the ground that the State did not prove that he was a habitual felony offender. The defendant did not object to his sentences at the time they were imposed by the trial judge, nor did he move to correct them under *Fla. R. Crim. P.* 3.800(b), or to withdraw his plea. However, on appeal, the defendant challenged the legality of his sentences nevertheless on the ground that they constituted "fundamental error". The Second District initially ruled that they had jurisdiction to reached the sentencing issue because an illegal sentence represented

"fundamental error". The *Bain* Court also **reconsidered** its position on the separation of powers problems found by the Court in *Denson*. The Second District stated that:

> In *Denson*, we posited that when the legislature enacted section 924.051, its concept of fundamental error was narrower than that previously employed by the courts. On further reflection, we conclude otherwise. When crafting the statute the lawmakers were well aware that "fundamental error" is an important term of art in the law, and they were familiar with the range of compelling circumstances in which courts have applied the concept to permit appellate review of unpreserved errors. See *Ford v. Wainwright*, 451 So.2d 471, 475 (Fla.1984) (stating that legislature is presumed to be acquainted with judicial decisions on the subject matter of statutes it enacts). In light of this, the legislature's unqualified use of the term fundamental error in the first sentence of section 924.051(3) compels the conclusion that Florida's appellate courts are meant to continue exercising jurisdiction in cases presenting such circumstances. See *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 579 n. 2 (Fla.1984) (explaining that terms of special legal significance are presumed to have been used by legislature according to their legal meanings). Moreover, the specific use of the term in the second sentence of that section, in reference to sentencing, forecloses any suggestion that the legislature's concept of fundamental error excludes sentencing error. See *Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202, 204 (Fla.1958) (noting that legislature is presumed to have meant the same thing when it used same word in related statutory

> provisions). As we have seen, when the legislature enacted the Criminal Appeal Reform Act it did not alter the appellate courts' historic jurisdiction to correct fundamental error.
>
> The next question is whether the Florida Supreme Court has done so with respect to sentencing issues. Partly in response to the Act, the supreme court amended and promulgated various rules of criminal and appellate procedure. ***Maddox* concluded, and *Denson* suggested, that these rules evince an intent to abolish fundamental error in the sentencing context. We think not.** It is true, as we pointed out in *Denson,* that the promulgation of rule 3.800(b) now permits a trial court to correct its own sentencing errors upon the filing of a timely motion. But the 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, or a motion for relief from judgment under Florida Rule of Civil Procedure 1.540, could ever be reviewed as fundamental. Just as the availability of those 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.

Id. at D316.[Emphasis Supplied].

SEPARATION OF POWERS

Article V, Section 2(a), of the *Florida Constitution* confers on this Court the exclusive power to adopt rules for the practice and procedure in all courts. A statute which purports to create or

modify a procedural rule of court is constitutionally infirm. *Markert v. Johnson*, 367 So. 2d 1003 (Fla. 1978). While this Court has stated that the legislature may place reasonable conditions on the constitutional right to appeal so long as the conditions do not thwart litigants' legitimate appellate rights, *Amendments to Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1104 (Fla. 1996), the pertinent provisions of the Criminal Appeal Reform Act conflict with rules of procedure.

Assuming *arguendo*, that this Honorable Court declines to find that the appellate courts of the state have authority to reach illegal sentencing errors as "fundamental error", then the Criminal Appeal Reform Act of 1996 violates the separation of powers provision of our Constitution. As articulated by the Second District in *Denson v. State*, *supra*:

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

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

> The second sentence attempts to restrict either our scope of review or our standard of review because, even if we have jurisdiction, the legislature is attempting to prohibit the court from reversing a sentence on an issue concerning a prejudicial error that is neither preserved nor fundamental. As a general rule, this statute comports with the appellate courts' own customary restrictions on their standard of review. However, there are rare occasions when the courts--for the orderly administration of justice and for due process concerns--have not followed this general rule. In light of the constitutional separation of powers, the legislature cannot unreasonably restrict our scope or standards of review when due process and the orderly administration of justice require that we review such issues. When this court already has jurisdiction over a criminal appeal because of a properly preserved issue, we do not avoid a frivolous appeal or achieve efficiency by ignoring serious, patent sentencing errors. Limiting our scope or standard of review in these circumstances is not only inefficient and dilatory, but also risks the possibility that a defendant will be punished in clear violation of the law.
>
> * * *
>
> As tempting as it may be to wash our hands of every unpreserved sentencing error on direct appeal, we are troubled by a rule which would require us to close our eyes when a serious error is obvious in the record.
>
> *Id.* at 1228-1230 (footnotes omitted).

The courts' inherent powers also include examining records on

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

At bar, the Fourth District citing its own decision in *Hyden v. State*, 715 So. 2d 960 (Fla. 4th DCA 1998), *review granted*, No. 93,966 (1998)refused to correct a sentencing errors which is apparent on the face of the record. Respondent in its Answer Brief candidly admits that the sentencing error occurred. RB 4-5. Petitioner urges this Court to clarify that sentencing errors apparent from the face of the record remain correctable on appeal when raised by appellate counsel or discovered by a reviewing court even if not raised in the lower tribunal by a timely objection or motion to correct sentence pursuant to *Fla. R. Crim. P.* 3.800(b).

Therefore, this Honorable Court should *quash* the instant decision of the Fourth District Court of Appeal and remand this

cause with directions to reverse and remand Petitioner's cause to the trial court for the entry of a written sentencing order in conformance with the trial court's oral pronouncements as to the award of credit for time served.

CONCLUSION

Based on the arguments and authorities contained herein, and those in the Initial Brief on the Merits Respondent urges this **quash** the instant decision of the Fourth District Court of Appeal and remand with appropriate directions.

Respectfully submitted,

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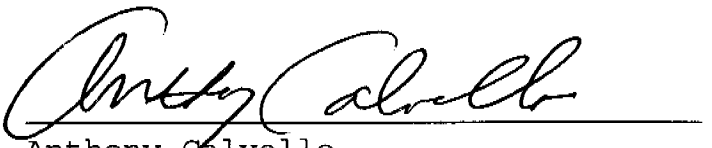

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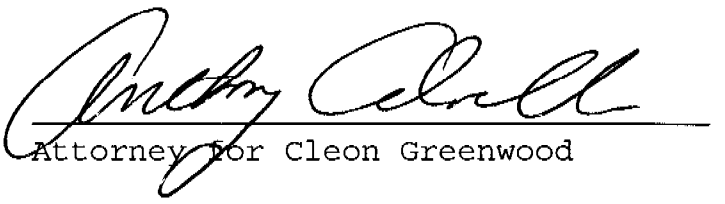
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celcia Terenzio And Ettie Feistmann, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier this 19th day of February, 1999.



Attorney for Cleon Greenwood

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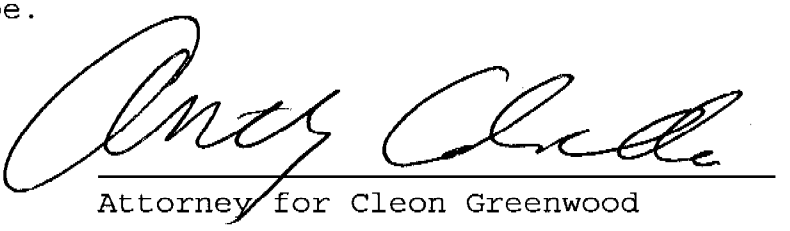

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