IN THE FLORIDA SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 94,256

TERRY McKNIGHT, :

Respondent. :

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

I. PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. The opinion of the lower tribunal has been reported as McKnight v. State, 23 Fla. L. Weekly D2402 (Fla. 1st DCA Oct. 23, 1998).

Petitioner's brief will be referred to as "PB", followed by the appropriate page number. The record on appeal will be referred to as "R."

This brief is prepared in 12 point Courier New type.

II. NOTICE OF CONFLICT OF INTEREST ACCORDING TO FLORIDA BAR ETHICS OPINION #98-20.

According to Florida Bar Ethics Opinion #98-20, a judge must recuse himself in cases where his daughter is the attorney of record. Attorney of Record for Respondent is Laura Anstead. Laura Anstead is the daughter of Justice Harry Lee Anstead. Petitioner, the State of Florida, has stated in it's Initial Brief that it does not want Justice Anstead to recuse himself. Respondent will leave it up to the discretion of the Court.

III. STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation, but would add the following to PB, pg. 3, #4: Appellant noticed the 1st District Court of Appeal on pg. 13 of his initial brief of matters that arguably support the appeal. Number 5 stated the following: "Appellant was sentenced as a habitual offender to 10 years in prison for possession of cocaine. Appellant reserves his right to raise this issue in a 3.800 motion." At the time, this was done based on the First District Court of Appeal's recent decision in Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997)(defendant was precluded on appeal from raising issue of erroneous habitual offender sentence, where defendant failed to raise issue at sentencing or in timely motion before trial court to correct, reduce, or modify sentence).

IV. SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that the decision of the lower tribunal is well-founded and must be affirmed. The the majority of the lower tribunal properly vacated respondent's habitual offender sentence. The habitual offender statute does not authorize habitual offender sentencing for possession of cocaine. Appellant's sentence was not authorized by statute and was illegal. Because it was not authorized by statute, it was fundamental error.

There is no error more fundamental than an illegal sentence. It must be attacked for the first time on appeal. Even the reform act allows this remedy.

Judicial economy is not served by excluding sentences not authorized by statute from appellate review. It is easy for the appellate court to look at the sentence on its face and determine if it is authorized by statute. If it is not, like respondent's sentence, then the most economical method to correct it is to address it on direct appeal. Requiring the filing of a motion to correct an obviously unauthorized sentence is a roadblock which leads to more judicial and attorney labor.

The responsibility for ensuring that a defendant receives a sentence which is legal and authorized by statute rests on both parties, as well as the sentencing judge. Indeed, the Second District has recently held that it is the appellate attorney's

obligation to raise these issues, and it is the appellate judges' responsibility to reverse obvious sentencing errors.

The lower tribunal has properly realized that "illegal sentences," which may be attacked for the first time on appeal, include not only excessive sentences, but also sentences which are not authorized by statute.

To the extent that the Reform Act establishes procedures for the appellate courts to conduct their review on appeal and bars the consideration of unauthorized sentences for the first time on appeal, the Act is unconstitutional.

There are presently five methods of attacking an illegal sentence. If the sentence is excessive or not authorized by statute, it may be attacked for the first time on direct appeal. Otherwise, it may be attacked by a motion to correct or to vacate the sentence.

IV. ARGUMENT

A SENTENCE NOT AUTHORIZED BY STATUTE IS AN ILLEGAL SENTENCE AND CONSTITUTES FUNDAMENTAL ERROR WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

The opinion of the lower tribunal is well-reasoned and must be approved. The lower court properly held that a sentence not authorized by statute constitutes an illegal sentence which may be attacked for the first time on appeal because it is fundamental error.

The habitual offender statute does not authorize habitual offender sentencing for possession of cocaine. Appellant's sentence was not authorized by statute and was illegal. Because it was not authorized by statute, it was fundamental error. There is no error more fundamental than an illegal sentence.

In Nelson v. State, 23 Fla. L. Weekly D2241 (Fla. 1st DCA October 1, 1998), Judge Ervin concurred with the majority. He traced the historical development of cases, statutes and rules regarding illegal sentences, and concluded that the majority's holding was in harmony with them.

Because the failure to have underlying statutory authority for a sentence is fundamental error, the error may be raised for the first time on direct appeal. *Accord* Denson v. State, 711 So. 2d 1225 (Fla. 2nd DCA 1998)(habitual offender sentence for possession of cocaine not authorized by statute); Blatch v. State, 23 Fla. L. Weekly D2306 (Fla. 4th DCA Oct. 14, 1998)

(same); McKnight v. State, 23 Fla. L. Weekly D2402 (Fla. 1st DCA Oct. 23, 1998)(same); Copeland v. State, 23 Fla. L. Weekly D2529 (Fla. 1st DCA Nov. 10, 1998) (on rehearing) (same); Baker v. State, 23 Fla. L. Weekly D2562 (Fla. 1st DCA Nov. 17, 1998) and, Livingston v. State, 682 So. 2d 591 (Fla. 2nd DCA 1996); *contra* Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. pending,* case no. 92,805; and Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998). Even the Reform Act still allows this remedy:

> 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.

§924.051(3), Fla. Stat. (1997) (emphasis added). Clearly, an error that has been previously determined to be fundamental can still be raised. The plain language of the amended statute states exactly that. Further, the statute does not contain a new definition of what might constitute "fundamental error." Therefore, the logical conclusion is that fundamental error is still as viable as it was prior to the Reform Act.

The dissent in Nelson erroneously took the very narrow view that there is no such thing as fundamental error in the senten-

cing context. But there is no error more fundamental than an illegal sentence. Under the dissent's view, any illegal sentence may not be attacked for the first time on appeal, even if it is apparent from the face of the record and patently illegal and not authorized by statute. Under the dissent's view, in Nelson, if a defendant received the death penalty or a life sentence for a misdemeanor, he or she would have to serve out that sentence if it was not preserved for appellate review. Such a narrow view of illegal sentences is obviously ridiculous.

The responsibility for ensuring that a defendant receives a sentence which is legal and authorized by statute rests on both parties, as well as the sentencing judge. As stated by this Court in State v. Montague, 682 So. 2d 1085, 1088-89 (Fla. 1996): Sentencing proceedings should be conducted with the same level of preparation and care that is required for the guilt phase of criminal proceedings. Sentencing is obviously a critically important stage of the proceedings, and counsel must be responsible for ensuring the factual integrity of the findings made by the trial court. In short, our decision upholds the primary purpose of the contemporaneous objection rule discussed in *Rhoden*. **We caution that our holding, while emphasizing the responsibility of defense counsel, in no way lessens the ethical and legal duty of the State and the trial court to ensure that factual determinations made at sentencing are correct.**

As Judge Cowart noted in *Hayes v. State*, 598 So.2d 135, 138 (Fla. 5th DCA 1992):

> All persons in prison under a sentence for the commission of a crime are there because the judicial system declared they did not follow and obey the law but, to the contrary, they did an illegal act. **Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy it.** The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person. Further, as a practical matter, if relief from this obviously illegal sentence is not now given in this case, the defendant will, and should, be able to obtain it in other ways, either by an ineffective assistance claim against his former counsel or by way of habeas corpus in a state or federal court. **Courts should be both fair and practical and give relief as soon as it is recognized as due.** (emphasis added).

Indeed, it is also the appellate judges' responsibility to reverse obvious sentencing errors. In Denson v. State, *supra*, the defendant, just like respondent and Ms. Middleton and Mr. Speights and Mr. Blatch, received an habitual offender sentence for crimes which were not authorized by statute. The court held that appellate counsel had an ethical duty to present such issues to the appellate court, and once appellate counsel identified a

sentence which was not authorized by statute, the court had the obligation to address it:

> The question in this case, however, is not whether a prisoner left to his or her own resources may seek correction of such errors, but whether an attorney on direct appeal may identify these serious, patent errors in briefing and whether this court has the discretion to order the trial court to correct such errors. 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.**
>
> We recognize that the rules of procedure do not give the defendant the right to raise such serious, patent sentencing errors as formal issues on appeal for which he or she is entitled to relief. Fla. R.App. P. 9.140(d). Ethically, however, we will not prohibit appellate counsel from succinctly identifying such issues and requesting this court to exercise its discretion to order the trial court to correct them without need for additional postconviction motions when this court has jurisdiction due to a preserved issue or fundamental error.

Id. at 1226; emphasis added.

The Denson court also expressed concern that serious sentencing errors would go uncorrected:

> As tempting as it may be to wash our

hands of every unpreserved sentencing error on direct appeal, **we are troubled by a rule which would require us to close our eyes when a serious error is obvious in the record.** This court has held that Florida Rule of Criminal Procedure 3.800(a) cannot be used to review a sentencing error that could have been raised on direct appeal but for the failure to file a motion pursuant to rule 3.800(b). *See Chojnowski v. State,* 705 So.2d 915 (Fla. 2d DCA 1997). Prisoners are entitled to legal representation on direct appeal, but not in most postconviction proceedings. *See* § 924.051(9). **At least until our newly revised rules of appeal for sentencing errors have been fully delineated, there is a real risk that serious sentencing errors, raising significant due process concerns, may not be corrected or may not be corrected in time to provide meaningful relief to a prisoner filing pro se motions if they cannot be corrected with the assistance of counsel on direct appeal.**

If a goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we have jurisdiction over other issues. **Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal.** Both Mr. Denson and the Department of Corrections need legal written sentences that accurately reflect the trial court's oral ruling. **We conclude that our scope and standard of review in a criminal case authorizes us to order correction of such a patent error.**

Id. at 1229-30; emphasis added.

The Denson court also reminded itself of its obligations as judges:

> **Efficiency aside, appellate judges take an oath to uphold the law and the constitution of this state. The citizens of this state properly expect these judges to protect their rights.** When reviewing an appeal with a preserved issue, **if we discover that a person has been subjected to a patently illegal sentence to which no objection was lodged in the trial court, neither the constitution nor our own consciences will allow us to remain silent and hope that the prisoner, untrained in the law, will somehow discover** the error and request its correction. If three appellate judges, like a statue of the "see no evil, hear no evil, speak no evil" monkeys, declined to consider such serious, patent errors, we would jeopardize the public's trust and confidence in the institution of courts of law. **Under separation of powers, we conclude that the legislature is not authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.**

Id. at 1230; emphasis added; footnote omitted.

Prior to Nelson, supra, the lower tribunal had held in Middleton v. State, 689 So. 2d 304 (Fla. 1st DCA 1997), that one who received an unauthorized habitual offender sentence could not raise the error for the first time on appeal. Prior to the instant case, the lower tribunal had explained its very narrow view that an "illegal sentence" was only one which exceeded the statutory maximum. Under that very limited circumstance, the

lower tribunal would allow the error to be raised for the first time on appeal as fundamental error. Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997).

Prior to the Nelson, supra, the lower tribunal had read this Court's opinions in Davis v. State, 661 So. 2d 1193 (Fla. 1995) and State v. Calloway, 658 So. 2d 983 (Fla. 1995), too narrowly. As this Court recently recognized in State v. Mancino, 714 So. 2d 429, 433 (Fla. 1998), the term "illegal sentences" is not limited to those which exceed the statutory maximum. It should also include those which are not authorized by statute:

A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal."

Judicial economy is not served by excluding sentences not authorized by statute from appellate review. It is easy for the appellate court to look at the sentence on its face and determine if it is authorized by statute. If it is not, like respondent's sentence, then the most economical method to correct it is to address it on direct appeal. Requiring the filing of a motion to correct an obviously unauthorized sentence is a roadblock which leads to more judicial and attorney labor.

As a matter of public policy, it is not in this state's best interests to fill up its prisons with those who are serving unauthorized sentences. As the Fourth District recognized in Louisgeste v. State, 706 So. 2d 29 (Fla. 4th DCA 1998) and Porter

v. State, 702 So. 2d 257 (Fla. 4th DCA 1997), if an unauthorized sentence causes a defendant to serve more time than he or she normally would, then it may be raised for the first time on direct appeal.

This Court should follow Louisgeste and Porter and Denson and hold that a sentence which is not authorized by statute is illegal and fundamental error and may be raised for the first time on appeal.

This Court need not reach the following constitutional argument in order to approve the opinion below. But to the extent that the Reform Act establishes procedures for the appellate courts to conduct their review on appeal and bars the consideration of unauthorized sentences for the first time on appeal, the Act unconstitutionally violates separation of powers. Art. II, §3, Fla. Const.

Art. V, §2(a), Fla. Const., confers on this Court the power to adopt rules for the practice and procedure in all courts. State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993). Accordingly, 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).

Establishing the appropriate standard of review on appeal is inherent in this Court's rule-making authority. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ciccarelli v. State, 531

So. 2d 129, 131 (Fla. 1988)(Grimes, J., specially concurring); and Heuss v. State, 687 So. 2d 823 (Fla. 1996). *See also* Fla. R. App. P. 9.040(a) ("In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause.").

In addition to establishing the proper standard of review, the courts' inherent powers include examining records on appeal to determine whether an error constitutes fundamental reversible error in the absence of an objection. *See* Dewey v. State, 135 Fla. 44, 186 So. 224, 227 (1938)(on rehearing) ("established rules of practice and procedure" such as the rule that issues not presented below cannot be considered in the appellate court, should not be violated "unless it is shown that it is essential to do so to administer justice"); and Bateh v. State, 101 So. 2d 869, 874 (Fla. 1st DCA 1958)(on rehearing)(rule that questions not presented in the trial court will not be considered on appeal "is procedural in nature"); *see also*, Bennett v. State, 127 Fla. 759, 173 So. 817, 819 (1937)("to meet the ends of justice or to prevent the invasion or denial of essential rights," appellate courts may, in the exercise of their power of review, "take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved, or the question is imperfectly presented."); Fla. R. App. P. 9.040(d)("At any time

in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties"); and Fla. R. App. P. 9.140(h)(court "shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled").

Clearly, courts have certain inherent powers to do things that are reasonable and necessary for the administration of justice. In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus, 709 So. 2d 101 (Fla. 1998); In re Order of Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990); and Huntley v. State, 339 So. 2d 194 (Fla. 1976). By abrogating the appellate court's duty to review records for fundamental sentencing errors, the Act encroaches on the court's inherent powers and is unconstitutional. Any statutory scheme which allows a defendant who receives an illegal or unauthorized sentence the right to appeal if he objects to the sentence but denies that right to a defendant who does not implicates serious due process and equal protection concerns.

There are other constitutional rights so basic to due process that their infraction can never be treated as waived by a plea, *e.g.*, the denial of the right to counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); and Foster v. State, 387 So. 2d 244 (Fla. 1980) (counsel's actual conflict of interest can be raised for first time on appeal even in absence of objection or motion for separate counsel); *see also*, Trushin v. State, 425 So. 2d 1126 (Fla. 1986)(facial validity of statute can be raised for first time on appeal). Such errors must be cognizable on appeal, regardless of whether the defendant has objected below.

The state legislature cannot eliminate or even limit federal or state due process by direct or indirect application of its laws. *See* Munoz v. State, 629 So. 2d 90, 99 (Fla. 1993) (legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional rights). To the extent the Act eliminates the right to appeal such fundamental sentencing errors, it violates due process and equal protection. To the extent the statute abrogates the appellate court's historic and inherent jurisdiction to review such matters on appeal when such review is essential to the administration of justice, it violates the separation of powers.

There are presently five methods of attacking an illegal

sentence. If the sentence is excessive, it may be attacked for the first time on direct appeal. Sanders v. State, *supra*.

If one objects to the sentence or moves to correct it within 30 days of sentencing, then the matter is preserved for direct appeal. Fla. R. App. P. 9.140(d) provides:

(d) Sentencing Errors. A defendant may not raise a sentencing error 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).

Fla. R. Crim. P. 3.800(b) provides:

(b) Motion to Correct Sentencing Error. A defendant **may** file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence. (emphasis added).

Thus, if a defendant objects at sentencing, he may raise the issue on direct appeal under Rule 9.140(d)(1). If he chooses to file a motion to correct sentence within 30 days, he may raise the issue on direct appeal under Rule 9.140(d)(2).

These two methods are not exclusive, however. Rule 3.800(b) is not mandatory; it says "may;" it does not say "shall" or "must." It gives the defendant the option of moving to correct his sentence within 30 days if he wants to raise the issue on

direct appeal.

Even without raising the error on direct appeal, the defendant may raise the error via Fla. R. Crim. P. 3.800(a) at any time, or via Fla. R. Crim. P. 3.850 within two years of his sentencing date.

Rule 3.800(a) was not repealed when Rules 3.800(b) and 9.140(d) were promulgated. Thus, a defendant still retains the right to move to correct his sentence at any time.

Rule 3.850 was not repealed when Rules 3.800(b) and 9.140(d) were promulgated. Rule 3.850(a) provides:

> (a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States or of the State of Florida, that **the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law,** that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, **to vacate, set aside, or correct the** judgment or **sentence.**

Thus, a defendant still retains the right to move to <u>correct</u> his sentence within two years of the sentencing date, under Rule 3.850, if he can allege and swear to any of the grounds in subsection (a). Please note that rule expressly relates to <u>illegal and excessive sentences</u>, and to sentences

entered without jurisdiction, and provides a vehicle to vacate, set aside or correct them.

But again, judicial economy is not served by excluding sentences not authorized by statute from appellate review. It is easy for the appellate court to look at the sentence on its face and determine if it is authorized by statute. If it is not, like respondent's sentence, then the most economical method to correct it is to address it on direct appeal. Requiring the filing of a motion to correct an obviously unauthorized sentence is a roadblock which leads to more judicial and attorney labor.

The opinion of the First District must be approved.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent asks this Court to approve the holding of the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sherri T. Rollison, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to appellant, on this 21 day of December, 1998.

Laura Anstead

LAURA ANSTEAD