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IN THE SUPREME COURT OF FLORIDA

TOMMY THOMAS

Petitioner,

v. **CASE NO. 94,469**

STATE OF FLORIDA,

Respondent.

_____/

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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CERTIFICATE OF SIZE AND STYLE OF FONT

Your undersigned hereby certifies that the size and style of the font used in this brief is 12-point Courier New, a font that is not proportionately spaced. And, if footnotes are published, the same size and style of font is used and footnotes are single spaced.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts is substantially correct for the purpose of this appeal.

SUMMARY OF THE ARGUMENT

Florida has finite, limited judicial resources within its five (5) already overburdened state appellate courts which are established to review properly presented cases and controversies. If a scrivener's error is not preserved, collateral review is the best procedure to resolve this claim where a written order probation revocation does not conform to the oral pronouncement.

ARGUMENT

ISSUE

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL *CORRECTLY* INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 IN ITS DECLINATION TO APPLY THE FUNDAMENTAL ERROR DOCTRINE TO A NON-PRESERVED ISSUE

(As Re-Stated by Respondent)

The fundamental error doctrine has not been abolished by the Criminal Appeal Reform Act of 1996. See, §924.051, Florida Statutes (Supp. 1996). For example, in Bain v. State, 1999 WL 34708, 24 Fla. L. Weekly D314, ___ So.2d ___ (Fla. 2d DCA 97-02007)(Opinion filed January 29, 1999)[En Banc][Rehearing Pending], the Second District held that a sentencing error that improperly extends the defendant's incarceration or supervision would likely be considered fundamental.

In Thomas v. State, ___ So.2d ___, 23 Fla. L. Weekly D2483, 1998 WL 770692 (Opinion filed Nov. 6, 1998), the case at bar, the Second District writes:

> Tommy Thomas appeals the trial court's revocation of his probation and also seeks correction of a scrivener's error in the revocation order. The evidence presented at the revocation hearing supports the trial court's determination that Thomas wilfully violated his probation and, therefore, we affirm the revocation order. **Because Thomas failed to seek correction of the scrivener's error in the trial court and because the error is not fundamental, he is precluded from**

raising this issue on appeal. See §924.051, Fla. Stat. (Supp. 1996). [Emphasis Added]

The fundamental error doctrine has been addressed by this Court many times and it is an applied exception to Florida's contemporaneous objection rule. Error which is determined to be fundamental, even if not preserved in the trial court, can be raised for the first time on direct review. The Criminal Appeal Reform Act of 1996 does not legislate otherwise. This Court recognized in Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970) that in civil cases not every constitutional issue amounts to fundamental error cognizable on direct appeal. This Court noted that constitutional issues are waived unless timely raised. See, Sochor v. State, 619 So.2d 285, 290 (Fla. 1993)(A capital murder review where this Court applies the *Sanford* civil definition of fundamental error to the trial court's failure to give an unnecessary jury instruction.). In Sanford, this Court defined *fundamental error*:

> **[2,3]** "Fundamental error," which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate court should exercise its discretion under the doctrine of fundamental error very guardedly. See Holman v. State, 97 Okl.Cr. 279, 262 P.2d 456; State v. Heisler, 58 N.M. 446, 272 P.2d 660; Goodhue v. Fuller, 193 S.W. 170, 172 (Tex.Civ.App.).
>
> (Text of 237 So.2d at 137)

This Court has addressed the fundamental error doctrine in criminal cases in Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994) citing State v. Johnson, 616 So.2d 1, 3 (Fla. 1993). In Mordenti, a direct capital review, this Court defines *fundamental error*:

> **[1]** The majority of the issues raised by Mordenti were not objected to at trial and, absent fundamental error, are procedurally barred. *Davis v. State*, 461 So.2d 67 (Fla. 1984), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985); *Ashford v. State*, 274 So.2d 517 (Fla. 1973). "[F]or any error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So.2d 1, 3 (Fla. 1993). Under this standard, we find that only five of the nine issues merit further discussion--three involving the guilt phase and two involving the penalty phase. We summarily reject the remaining claims, find that they are procedurally barred and otherwise without merit.
>
> (Text of 630 So.2d at 1084)

Respondent urges that the decision below conforms to the fundamental error doctrine as defined by this Court in either civil or criminal cases. Respondent urges that the decision below conforms to The Criminal Appeal Act of 1996. The scrivener's error in the written order of revocation was not presented to the trial court and, thus, is not preserved for direct review. See, Wright v. State, 706 So.2d 952 (Fla. 1st DCA 1998)(Appellant's argument that the trial court erred in not conforming the written

judgment of conviction and sentence to the oral pronouncement of sentence was not properly preserved for appellate review and the state government's concession of error was declined.). In Sochor v. State, 619 So.2d 285, 290 (Fla. 1993), this Court addressed various errors where no objection had been made pursuant to Florida's contemporaneous objection rule:

> **[7]** As to the first argument, fundamental error occurs in cases "where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray v. State*, 403 So.2d 956, 960 (Fla. 1981). The error must amount to a denial of due process. *Ray; Castor v. State,* 365 So.2d 701 (Fla. 1978). After carefully reviewing the record, we find that the claimed errors, taken individually or collectively, do not constitute fundamental error. [*footnote 7 omitted*]. Thus, we reject Sochor's claim.
>
> (Text of 619 So.2d at 290)

This type of claim, a written order of probation revocation not in conformity with the oral pronouncement, does not reach fundamental error.

The purpose of The Criminal Appeal Reform Act of 1996 is to have litigants present claims to the trial court to perfect the record for direct review. This is the mission inherent in The Criminal Appeal Reform Act of 1996; and, that mission does direct each litigant to present an issue, objection, or legal argument to the trial court with sufficient precision so that the trial court is apprised of the relief sought. See, §924.051(a)(b), Florida

Statutes (Supp. 1996). As a matter of comity to the trial court, the interests of justice are best served when a trial judge has been presented with an error which harmfully impacts either the judgment or sentence.

That said, generally a written order of revocation must conform to the oral pronouncement. At bar, the oral pronouncement was made on November 14, 1996. (R 274) The written order of revocation was filed on December 6, 1996. (R 56) The Notice of Appeal was filed six (6) days later on December 12, 1996. (R 114) In fact, on December 12, 1996, trial counsel designates *revocation of probation* as a judicial act for the Second District to review. (R 115-116) However, trial counsel never brings this matter to the trial court's attention. It cannot be said that either the pronouncement of revocation and/or rendition of the written order of revocation itself was unknown to Mr. Thomas or his trial counsel. This is an all too common problem. Written documents not in conformity with oral pronouncements exist as continuing claims throughout this state and nation. Why? Most simply, the turnover and rotation of deputy courtroom clerks, on the trial court level, does not lend itself ministerial stability. Once the postconviction matter is brought to the trial court's attention, there exists an opportunity for the trial court to instruct the deputy courtroom clerk in how to prepare a true and accurate

written custodial document which conforms to the judge's oral pronoucement.

Respondent would point out that where there is a scrivener's error in the written order of probation, Florida has provided a mechanism for correction. See, Fla.R.Crim.Pr. Rule 3.800(b). Within thirty days after rendition of sentence, Petitioner may bring this matter to the attention of the trial court and have the written document corrected. As noted in Maddox v. State, 708 So.2d 617, 621 (Fla. 5th DCA 1998)[En Banc], *review granted*, Maddox v. State, No. 92,805 (Oral argument May 11, 1999):

> At the intermediate appellate level, we are accustomed to simply correcting errors when we see them in criminal cases, especially in sentencing, because it seems both right and efficient to do so. The legislature and the supreme court have concluded, however, the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief on appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing. Certainly, there is little risk that a defendant will suffer an injustice because of this new procedure; if any aspect of a sentencing is "fundamentally" erroneous and if counsel fails to object at sentencing or file a motion within thirty days in accordance with the rule, the remedy of ineffective assistance of counsel will be available. It is hard to imagine that the

> failure to preserve a sentencing error that would formerly have been characterized as "fundamental" would not support an "ineffective assistance" claim.
>
> (Text of 708 So.2d at 621)

The interests of justice do not present a compelling demand for correction of this ministerial error on direct appeal when the matter is not preserved. At bar, the error has not been corrected on direct appeal. Has there been a denial of due process? No. Petitioner has actual knowledge of this scrivener's error and Florida provides collateral relief as a mechanism to address the claim. See, Fla.R.Crim.Pr. Rule 3.800(b). This ***scrivener's error*** does not constitute ***fundamental error***. This aspect of this conviction does not go to the foundation of the case. Petitioner is not barred from another day in state court as he has a continuing opportunity to be heard at a meaningful time and in a meaningful manner in a collateral proceeding. For example, in State v. Mancino, 714 So.2d 429 (Fla. 1998), this Court has held that a claim of credit for jail time served is cognizable under a Fla.R.Crim.Pr. 3.800 motion as an illegal sentence. Again, in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)[En Banc], *review granted*, Maddox v. State, No. 92,805 (Oral argument May 11, 1999), the Fifth District writes:

> In view of our holding today, we must recede from several of our earlier opinions. As indicated, this court will no longer recognize fundamental error in the sentencing

> context, contrary to the statements made in *Medberry v. State*, 699 So.2d 857 (Fla. 5th DCA 1997), *Saldana v. State, 698 So.2d 338 (Fla. 5th DCA 1997), Rangel v. State*, 692 So.2d 277 (Fla. 5th DCA 1997), *Ortiz v. State*, 696 So.2d 616 (Fla. 5th DCA 1997) and *Bison v. State*, 696 So.2d 504 (Fla. 5th DCA 1997). Nor will this court address illegal sentences on direct appeal, unless the issue has been preserved for review either by objection in the trial court or by means of a 3.800(b) motion for post-conviction relief. *Cf. Ortiz*. We stress, however, that rule 3.800(a) is always available to obtain collateral review of an illegal sentence. Moreover, where properly preserved for review, both unlawful and illegal sentences can be addressed on direct appeal, regardless of whether a plea is involved. *Cf. Robinson* (limiting right of appeal to illegal sentences); *Miller v. State*, 697 So.2d 586 (Fla. 1st DCA 1997); *Stone v. State*, 688 So.2d 1006, 1007-1008 (Fla. 1st DCA 1997).
>
> (Text of 708 So.2d at 620-621)

Florida has finite, limited judicial resources within its five (5) already overburdened state appellate courts which are established to review properly presented cases and controversies. If a scrivener's error is not preserved, collateral review is the best procedure to resolve this claim where a written order probation revocation does not conform to the oral pronouncement.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the decision of the Second District must be approved.

Respectfully submitted,

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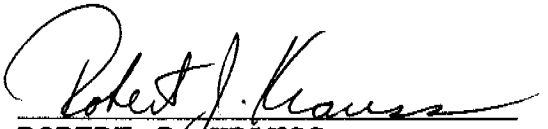

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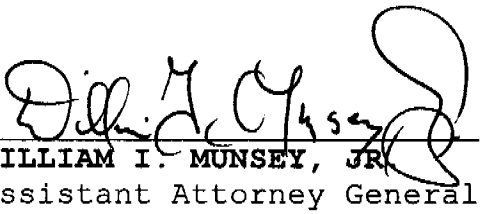

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to, Robert D. Rosen, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 25th day of March, 1999.

OF COUNSEL FOR RESPONDENT