IN THE SUPREME OF FLORIDA

DEREK ADSIDE,	)	
	)	
Appellant,	)	
	)	
vs.	)	DCA CASE NO. 97-672
	)	
STATE OF FLORIDA,	)	S. CT. CASE NO. 94,752
	)	
Appellee.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367
Florida Bar No. 0845566

COUNSEL FOR APPELLANT

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TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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STATEMENT OF THE CASE

The state charged the Petitioner, Derek Adside, by information in case number 96-8694, with possession of burglary tools and loitering or prowling. (R 224) In case number 96-8695, the state charged the Petitioner by information with burglary of a dwelling with an assault or a battery. (R 225) In case number 96-8790, the state charged the Petitioner by information with burglary of a dwelling, credit card theft, and petit theft. (R 226-8) In case number 96-8791, the state charged the Petitioner by information with burglary of a dwelling with an assault or battery. (R 229) In case number 96-8792, the state charged the Petitioner by information with burglary of a dwelling. (R 230) In case number 96-8793, the state charged the Petitioner with burglary of a dwelling with an assault or battery. (R 231) On November 8, 1996, the

state filed a notice of intent to use similar fact evidence in each of the aforementioned cases. (R 310-321) Defense counsel filed a response to state's notice of similar fact evidence on November 12, 1996, as untimely. (R 322-9)

Defense counsel additionally filed a motion to suppress and an amended motion to suppress on November 1 and 8, 1996, respectively, in each of the aforementioned cases seeking to suppress certain physical evidence and any statements made by the Petitioner to the police upon his being detained and subsequently questioned by the police. (R 304-9) Hearings were held on the suppression motion between November 20 through December 13, 1996, before Circuit Judge Alice Blackwell White. (R 1-170, 462-526) At the conclusion of the suppression hearing, Judge White denied the motion. (R 165-70) The state then filed a motion to consolidate on January 3, 1997, and an amended motion to consolidate on January 9, 1997. (R 354-7)

At the beginning of the jury trial held before Circuit Judge Michael Cycmanick on January 13, 1997, the trial court, over defense counsel's objection, granted the state's motion to consolidate the aforementioned cases during a pretrial hearing in which the Petitioner was not present. (R 527-31) During the trial, and at the close of all the evidence, defense counsel requested a continuance on behalf of the Petitioner in order to locate an alibi witness for one of the aforementioned cases which the trial

court denied. (T 79-80, 210; Vols. 1, 2) At the conclusion of the state's case-in-chief, which was the close of all the evidence, defense counsel made a motion for a mistrial, based on the trial court granting the state's motion to consolidate the aforementioned cases. The trial court denied the motion. (T 209-10; Vol. 1) Defense counsel also made a motion for judgment of acquittal as to each charged offenses, which was denied by the trial court as well. (T 208; Vol. 2) The jury returned guilty verdicts as charged in each of the aforementioned cases. (R 381-9; T 275-80; Vol. 3)

Defense counsel filed a motion for new trial on January 16, 1997, which was denied by the trial court. (R 396-8) The Petitioner received three concurrent incarceration terms of 200 months for the burglary with an assault or battery offenses in case numbers 96-8695, 96-8791, and 96-8793, followed by a five-year probation term for the burglary of a dwelling offenses in case numbers 96-8790 and 96-8792. (R 188-92, 407-12, 428-33) Petitioner received a 60-month incarceration term in case number 96-8694 running concurrently with the incarceration terms in the aforementioned cases. (R 188-9, 405-6)

Petitioner filed a timely notice of appeal on March 11, 1997. (R 450) The office of the Public Defender was appointed to represent the Appellant in this appeal on February 26, 1997. (R 449) The Fifth District affirmed each of the Petitioner's

judgments and sentences in *Adside v. State*, 722 So. 2d 228 (Fla. 5th DCA 1998). (See Appendix)

Petitioner's motion for rehearing and/or certification was denied by the Fifth District on December 17, 1998. Notice to invoke this Court's discretionary jurisdiction was filed on January 19, 1999.

STATEMENT OF THE FACTS

Diana Swartwoot testified that in May of 1996 she lived at 593 Clydesdale and was sleeping at approximately 12:30 a.m. in her bedroom with her daughters, Georgiana and Amanda, while her husband was in the living room. (T 24-6; Vol. 1) She further testified that she was awakened by a man trying to enter her bedroom through the sliding glass door as he reached through the glass door with his hand and touched her buttocks. (T 26-7; Vol. 1) Upon Diana sitting up and attempting to hit the individual's hand with the television remote control, the individual immediately took his hand away and ran away. (T 27-8; Vol. 1) When she was subsequently shown a photo-lineup by the police, she picked out two photos, one of which was the Petitioner's. (T 30-1; Vol. 1) At trial, she testified that she thought the photo of the other individual, not the Petitioner's photo, was the burglary suspect, but she was not sure. (T 32-3; Vol. 1)

Amparo Romero testified that on the evening of July 10, 1996, she lived at 5969 Curry Ford Road in apartment 369 and was sleeping when she was awakened by someone rubbing her vaginal and anal area. (T 34-5; Vol. 1) Ms. Romero immediately jumped up in her bed, grabbed the covers, and started screaming while the individual stood there for a minute and then ran out the door. (T 35-6; Vol. 1) She was subsequently shown two photo-lineup ups by the police during which she

picked out different individuals, one of whom was the Petitioner. (T 38-9; Vol. 1) At trial, Ms. Romero identified the Petitioner as the individual who was in her bedroom. (T 40-1; Vol. 1)

Dawn Haberle testified that she lived at 1623 Little Cross Circle in the Hidden Creek condominiums with her sister, Dana Haberle. (T 44; Vol. 1) Dawn further testified that in late June or early July of 1996 she discovered that the money which she received from an ATM machine several days earlier was missing along with a Visa Gold credit card from her wallet in her purse. (T 44-6, 206; Vols. 1, 2) The following weekend, Dawn awoke and was told by Dana that a man had come into Dana's bedroom during the early morning hours and had touched her. (T 48, 55; Vol. 1) Dana also, according to Dawn, had some money and a credit card taken from her wallet. (T 48; Vol. 1) Finally, Dana testified that on the following Wednesday she awoke and discovered that screen door next to the sliding glass door was halfway opened, as well as that the vertical blinds in front of the sliding glass door had been opened, and that the stationary glass door had been cracked opened and unbolted along with the outside area of the door frame appearing to have been bent. (T 49-50; Vol. 1)

Dana Haberle testified that in July of 1996 she woke up in her bedroom to find a black male attempting to lift up her shirt with his hand. (T 66-7; Vol. 1) She immediately grabbed for his hand and asked who he was. (T 67; Vol. 1) The

individual stated that his name was Jay Johnny and that he wanted to lick her pussy which prompted her to scream as the individual bolted to the door. (T 43-4; Vol. 1) As for the incident which occurred approximately a week later, Dana testified that she, her sister, and her sister's boyfriend had checked that evening to make sure that everything was shut up tight in the condominium. (T 69-70; Vol. 1) When they awoke the next morning, however, they found that the blinds to the sliding glass door, along with the screen door, were opened and that the stationary portion to the sliding glass door was opened approximately two inches. (T 70-1; Vol. 1)

Subsequent to these events, the police showed Dana the first of several photo lineups but she was unable to pick out a suspect except for something about the eyes of one person's photo. (T 72, 83; Vols. 1, 2) Upon being shown a second photo line up, Dana was told by the police that her first choice was not the person who was in the condominium. Dana then picked out another individual's photo. (T 82-3, 86-7; Vol. 2) After police again told Dana that the second photo she picked out was not the suspect, she was shown a third photo line up and she picked out two pictures. (T 73, 83, 86-7; Vols. 1, 2) One of those photos was a photo of the Petitioner, which Dana testified that she had picked out as the closer of the two photos because the face was long and the hair. (T 73, 83-5, 89; Vols. 1, 2) Finally, Dana identified the Petitioner in court as the person who was in her bedroom. (T 81, 85-6)

Sergeant James Brooks testified that he was working as part of an undercover tactical response team on the evening of early July 20, 1996, in the location of Oxalis and Curry Road, specifically, the six thousand block of Yorktown Drive in the Greens of Ventura Apartments, due to the residential burglaries which had occurred in that area. (T 93-4; Vol. 2) Brooks further testified that he first observed the Petitioner riding a bicycle east on Yorktown and then turning north onto Town Hall, where he did a U turn back onto Yorktown, followed by turning back onto Town Hall. (T 96-7; Vol. 2) The Petitioner was described by Brooks as looking left to right as he pedaled and then stopping at 1730 Town Hall, a condominium. (T 97; Vol. 2) This was followed, according to Brooks, by the Petitioner getting off his bike, placing his bike in some bushes, and then returning to the 1730 condominium where he bent down and looked into the driver's side window of a vehicle. (T 97; Vol. 2)

Brooks also testified that the Petitioner next proceeded to look into the driver's side of another vehicle, which was parked on the roadway in front of the 1730 condominium, and then went to a privacy fence. (T 97-8; Vol. 2) The Petitioner then, according to Brooks, put his hand on a gate handle, pushed on the handle, and then went south to the condominium next door with his hand trailing along the fence and the building until Brooks lost sight of him. (T 98; Vol. 2) Approximately 45 to 60 seconds later, Brooks observed the Petitioner return to the 1730 condominium

where the privacy fence was, push again on the handle, and then got back on his bicycle and rode away. (T 99; Vol. 2) Brooks further testified that he then observed the Petitioner head south on Oxalis, turn east on Curry Road, and next observed the Petitioner riding his bicycle from a dead end cul de sac in the Palm Bay Apartments. (T 103-4) The decision to stop the Petitioner was made by Brooks upon his listening to radio transmissions concerning what Brooks described as the Petitioner's bicycle riding in an "aimless' fashion. (T 104-5; Vol. 2)

After Detective Elisio Cromartie initially detained the Petitioner at the Palm Bay Apartments, Sergeant Brooks and Detective James Berrish also arrived at the location and the Petitioner, upon being given his *Miranda* warnings, was interviewed by Berish and Brooks. (T 105-6; Vol. 2) According to Brooks, the Petitioner stated that he was riding his bicycle for exercise and that he had traveled from his residence taking a short cut through the Palm Bay apartment complex, upon being threatened by a car with some Hispanics, and so that he could get to Semoran Road. (T 107-8; Vol. 2) Brooks additionally testified that when the Petitioner was first questioned he responded that he had not made any stops in any other Apartment complexes, but then stated that he had been in the Liberty Square Apartments to check on a girlfriend he suspected of being unfaithful. (T 108; Vol. 2) The Petitioner further explained to Brooks that when he went to the condominium complex he stopped in front, started to

approach the fence and see if she was there, decided against it, and got back on his bike. (T 108-9; Vol. 20)

Upon the Petitioner providing two variations of the last name of his girlfriend, Brooks asked the Petitioner if he would be willing to go back to his girlfriend's residence to show the police specifically and to verify that they had the right condo unit as well as if they could contact someone there. (T 109-11; Vol. 2) Prior to this, according to Brooks, the Petitioner was additionally searched by Detective Berrish, after the Petitioner was asked if he had any weapons on his person, and a screwdriver wrapped in a cloth glove was taken from the Petitioner's pocket. (T 111-2; Vol. 2) Once the Petitioner was taken back to Tasawra Williams' residence, and after speaking with Ms. Williams, Brooks suspicions were not dissipated and the Petitioner was arrested. (T 112-3; Vol.2)

Tasawra Williams testified that she lived at 1730 Town Hall in a condominium with a gate or fence. (T 132; Vol. 21) Tasawra further testified that she did know the Petitioner, they had gone out twice, that she had been to his residence approximately seven times, but that she did not consider her and the Petitioner to be boyfriend/girlfriend. (T 133-4; Vol. 2) When the police contacted her at approximately 1:00 in the morning on July 20, she told the police that she had gone out with the Petitioner and had gone to his residence, but that they were not dating

because she did not date the Petitioner because he was in debt. (T 135-6; Vol. 2) She further told the police that the Petitioner had called her residence one evening and described what she was wearing, her company vehicle, and stated that he wanted to come over and show her a good time sexually. (T 136; Vol. 2) After telling the Petitioner that she did not want him to call her any more or to come by, she did not see the Petitioner again. (T 136; Vol. 2) Finally, Tasawra testified that she told the police about the telephone conversation she had with the Petitioner and that her vehicle had been broken into two weeks before she was contacted by the police and that her mother, who she lived with, had noticed on various mornings over that same two-week period that the gate to the condominium was unlocked after being locked in the evening. (T 139-40; Vol. 2)

Detective Berish testified that when he spoke to the Petitioner, after Sergeant Brooks had read the *Miranda* warnings to him, the Petitioner stated that he had been taking a shortcut home and gave his consent for Berrish to conduct a pat down search for safety. (T 144-8; Vol. 2) As Berish began patting the Petitioner down, he felt what he described as a hard, long object in the Petitioner's right front jacket pocket which the Petitioner stated was a screwdriver for fixing his bicycle. (T 148-9; Vol. 2) Berrish opened the jacket pocket and removed the screwdriver which was inside a glove. (T 148-9; Vol. 2) Berish further testified that when he asked the Petitioner

what was the purpose of having the screwdriver, the Petitioner explained that he used it to fix his bicycle because the chain to the bicycle would jump off the gears and get trapped in the spoke near the spoke guard and gears. (T 149; Vol. 2) According to Detective Berrish, who was a bicycle mechanic for the police department, when he ran the bicycle through all the gears, the chain did not jump off the gears and he did not see any scratches on the spoke guard or gears. (T 149-50; Vol. 2)

Detective Cromartie testified that he first observed the Petitioner on July 20 heading southbound on Oxalis and eventually followed him behind a K Mart over to the Palm Bay Apartments. (T 152-4; Vol. 2) As the Petitioner proceeded eastbound to another apartment complex, the Petitioner, according to Cromartie, got off of his bicycle and walked along a sidewalk. (T 154; Vol. 2) When the Petitioner was passed by Cromartie, he got back on his bicycle, headed southwest, then got off of his bicycle and was walking with the bicycle when Cromartie made contact with him on the street. (T 154-60; Vol. 2)

Detective Ernest Moyer testified that, subsequent to the Petitioner's arrest for loitering and prowling, he interviewed the Petitioner after the Petitioner agreed to provide a taped statement. (T 165-7; Vol. 2) Several days later, the Petitioner gave a second taped interview. (T 167, Vol. 2) During the two police interviews, the Petitioner stated he entered the residences of Diana Swartwoot and Amaro Romero at

night looking for money. He further stated he touched Ms. Swartwoot to tell her to be quiet and that he touched Ms. Romero between her legs. As for Dawn and Dana Haberle, the Petitioner stated in the interviews that he entered their residence on three separate evenings through a sliding glass door during which he took a credit card and money on the first incident, some money on the second incident, and that he took no money on the final incident. In addition, the Petitioner stated in the interviews that he touched Dana on her breast. (See state's composite exhibit # 3 of the taped interviews and state's exhibits B and F for identification of the transcripts of the interviews)

SUMMARY OF ARGUMENT

The Fifth District erroneously affirmed the trial court's assessment of separate court costs under Sections 27.3455, 943.25, and 960.20, Florida Statutes, in each of the instant cases. Because each of the cases was consolidated, they must be treated under Florida Criminal Rule of Procedure 3.151(b) as if they were charge in a *single information.* Thus, only a single assessment of such costs may be assessed by the trial court. The trial court additionally improperly assessed multiple public defender fees without affording the Petitioner notice that he could contest the amount of the

public defender fee.

Although the Fifth District acknowledged both of these sentencing errors by the trial court, the Fifth District incorrectly determined that both errors were not correctable on appeal, without an objection raised below, based on its decision in *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998). In so holding, the Fifth District has ignored these fundamental sentencing errors.

POINT ONE

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL HEREIN INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT OF 1996 AS ABOLISHING THE CONCEPT OF FUNDAMENTAL ERROR WITH REGARD TO THE INSTANT SENTENCING ISSUES.

The Petitioner raised for the first time on appeal the illegal imposition by the trial court of multiple court costs and Public Defender liens. Specifically, during the sentencing hearing, the trial court imposed court costs under Sections 27.3455, 943.25 (3), (13), and 960.20, Florida Statutes, and a public defender lien of $1,500.00 under Section 27.56, Florida Statutes, in each of the instant cases. (R 189-90, 413-18, 428, 431) As for the court costs, the Fifth District Court has held in *Rocker v. State*, 640 So. 2d 163 (Fla. 5th DCA 1994), that the court costs imposed under both Sections 27.3455, 943.25 and 960.20, Florida Statutes, must only be assessed on a **per case** basis and not on a per count basis. Further, because each of the six instant cases were consolidated, Florida Criminal Rule of Procedure 3.151(b) clearly states that, upon consolidation, the procedure thereafter "shall be the same as if the prosecution were under a **single** indictment or information. Thus, the consolidation of each of the instant six cases allows for only a single imposition of court costs based on a single indictment or information. The remaining court costs must, therefore, be stricken by this Court.

Further, because the trial court failed to provide the Petitioner notice and an opportunity to object to the trial court's imposition of six public defender liens, as is required by Florida Rule of Criminal Procedure 3.720(d)(1), they too, must be stricken by this Court. *Dodson v. State,* 710 So. 2d 159, 161 (Fla. 1st DCA 1998); *Bailey v. State*, 693 So. 2d 142 (Fla. 5th DCA 1997); *Fontenont v. State*, 631 So. 2d 379 (Fla. 5th DCA 1994), and *Walker v. State*, 710 So. 2d 699 (Fla. 2nd DCA 1998). (R 190, 413-418)

The opinion of the Fifth District in the instant case, however, cited as controlling authority the case *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), which case is currently pending review by this Court, in affirming the Petitioner's court costs and Public Defenders liens. In *Maddox*, in an en banc opinion, the Fifth District Court of Appeal held that the Criminal Appeal Reform Act abolished the concept of fundamental error in the sentencing context. Id.; Fla. Stat. Section 924.051 (1996). Petitioner respectfully requests this Court not to follow the *Maddox* decision of the Fifth District, which will only result in an increase of "legal churning."

Petitioner maintains that Court should follow the decision in *Mizell v. State*, 716 So. 2d 829 (Fla. 3rd DCA 1998). The Court acknowledged the Fifth District's Court's opinion in *Maddox*, but found that not to be an impediment to granting relief:

It is apparent that, even if arguendo *Maddox* is correct,

> the defense counsel's failure to present the point precludes reversal, that very holding requires the concomitant conclusion that *Mizell* received ineffective assistance of counsel in failing to preserve a right which would have otherwise inevitably resulted in a correction of sentence. Applying a limited, but controlling, exception to the rule that ineffectiveness claims may not be reached on direct appeal which applies when, as here, "the facts give rise to such a claim are apparent on the fact of the record," [citations omitted], we simply ordered the amendment of the sentence after remand. While this resolution of the case may not satisfy some of the more rabid of the judicial Thomists among us we think it is easily more consistent with our duty to avoid the legal churnings. *See State v. Rucker*, 613 So. 2d 460 (Fla. 1993), which would be required if we make the parties and lower courts do the long what we ourselves should do the short. Thus, we agree with *Maddox*, 707 So. 2d at 621, that the lack of preservation in the sentencing area necessarily involves ineffective assistance of counsel, but strongly disagree that anything is accomplished by not dealing with the matter at once.

Id. at 830.

Petitioner believes the Third District's approach to unpreserved, yet improper, sentencing errors is the better approach. Furthermore, Petitioner asserts that not correcting illegal sentences will undermine public confidence in our system of justice. The Petitioner agrees with the holding of the Second District Court of Appeal in *Bain v. State*, 24 Fla. L. Weekly D314 (Fla. 2nd DCA January 29, 1999), where the Court found it had jurisdiction to review unpreserved sentencing errors which were

fundamental:

> 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. An institution charged with the duty to punish illegal conduct must not itself be seen to engage in illegality. When we discover that we have done so, we must undo our transgression regardless of when or how it was uncovered. *See Sanders v. State*, 698 So. 2d 377, 378 (Fla. 1st DCA 1997) (explaining that illegal sentences are regarded with disdain by the law); *Hayes v. State*, 598 So. 2d 135, 138 (Fla. 5th DCA 1992) (stating that when an illegal sentence is discovered, the system should willingly remedy it) (cited with approval in *State v. Montague*, 682 So. 2d 1085, 1089 n.6 (Fla. 1996)). *Bain* at D318.

Petitioner asserts the illegal multiple court costs and Public Defender liens imposed by the trial court are fundamental in nature and, therefore, should have been reviewed by the Fifth District. Accordingly, Petitioner requests the Supreme Court to vacate the instant decision and rule on the merits or in the alternative the Supreme Court is asked to quash the order of affirmance, and remand to the Fifth District Court of Appeal for review of the merits.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal, and strike the Public Defender liens, as well as the five additional assessments of court costs

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0845566
112 Orange Ave., Ste. A
Daytona Beach, FL 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Derek Adside, DC # X01968, Madison Correctional Institution, P. O. Box 692, Madison, Florida 32341, on this 12th day of April 1999.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced CG Times.

_____
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

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APPENDIX

Adside v. State 722 So. 2d 228 (Fla. 5th DCA 1998)