ORIGINAL

IN THE SUPREME COURT OF FLORIDA

GABRIEL JOCK KENON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

S. Ct. Case No.: 94,991

DCA No.: 97-991

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CERTIFICATE OF TYPE SIZE AND STYLE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

POINT I 3

WHETHER THE OFFENSE OF ATTEMPTED SECOND DEGREE MURDER VIOLATES DUE PROCESS AND THEREFORE CONSTITUTES FUNDAMENTAL ERROR

POINT II 6

WHETHER SENTENCING ERRORS HAVE TO BE INITIALLY PRESENTED TO THE TRIAL COURT IN ORDER TO BE PRESERVED

CONCLUSION 22

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

CASES:

Abney v. United States,
431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) 9

Amendments to the Florida Rules of Appellate Procedure,
685 So. 2d 773 (Fla. 1996) 9,10

Amlotte v. State,
456 So. 2d 448 (Fla. 1984) 4

Bain v. State,
24 Fla. L. Weekly D314 (Fla. 2d DCA Jan. 29, 1999) 16

Brown v. State:
Supreme Court case no. 95,844 5

Copeland v. State,
23 Fla. L. Weekly D1220 (Fla. 1st DCA May 12, 1998) . . . 14

Coston v. State,
24 Fla. L. Weekly D1441 (Fla. 2d DCA June 11, 1999) . . . 4

Dailey v. State,
488 So. 2d 532 (Fla. 1986) 8

Davis v. State,
661 So. 2d 1193 (Fla. 1995) 15

Edwards v. State,
case no: 93,000 6

Ellis v. State,
455 So. 2d 1065 (Fla. 1st DCA 1984) 7

Evitts v. Lucey,
469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) 9

Gentry v. State,
437 So. 2d 1097 (Fla. 1983) 4,5

Gilyard v. State,
718 So. 2d 888 (Fla. 1st DCA 1998) 5

Hyden v. State,
715 So. 2d 960 (Fla. 4th DCA 1998),
rev. granted, case no.: 93,966 6,17

Jenkins v. State,
444 So. 2d 947 (Fla. 1984), receded from,
State v. Beasley, 580 So. 2d 139 (Fla. 1991) 7

Jordan v. State,
case no.: 97-2002 (Fla. 3d DCA September 16, 1998) 18

Larson v. State,
572 So. 2d 1368 (Fla. 1991) 7

Lockhart v. Fretwell,
506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) . . . 20

Maddox v. State,
708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted,
No. 92,805 (Fla. July 7, 1998) . . 6,11,12,14,15,16,18,19,21

Matthews v. State,
714 So. 2d 469 (Fla. 1st DCA 1998) 14

Manka v. State,
720 So. 2d 1109 (Fla. 4th DCA 1998) 5

Mizell v. State,
716 So. 2d 829 (Fla. 3d DCA 1998) 18,19

Neal v. State,
688 So. 2d 392 (Fla. 1st DCA 1997),
rev. denied, 698 So. 2d 543 (Fla. 1997) 13

Pitts v. State,
710 So. 2d 62 (Fla. 3d DCA 1998) 5

Pryor v. State,
704 So. 2d 217 (Fla. 1st DCA 1998) 14

Quesenberry v. State,
711 So. 2d 1359 (Fla. 2d DCA 1998) 5

Ross v. Moffitt,
417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) 9

Sanders v. State,
698 So. 2d 377 (Fla. 1st DCA 1997) 13

Seccia v. State,
720 So. 2d 580 (Fla. 1st DCA 1998) 19

Speights v. State,
711 So. 2d 167 (Fla. 1st DCA 1998) 7,15,16

Speights v. State,
case no.: 93,207 6

State v. Beasley,
580 So. 2d 139 (Fla. 1991) 4

State v. Brady,
case no.: 91,951 (August 19, 1999) 5

State v. Gray,
654 So. 2d 552 (Fla. 1995) 3,4

State v. Hewitt,
702 So. 2d 633 (Fla. 1st DCA 1997) 13

State v. Overfelt,
457 So. 2d 1385 (Fla. 1984) 4

State v. Rhoden,
448 So. 2d 1013 (Fla. 1984) 8,12

Summers v. State,
684 So. 2d 729 (Fla. 1996) 11,12

Taylor v. State,
601 So. 2d 540 (Fla. 1992) 8

Vause v. State,
502 So. 2d 511 (Fla. 1st DCA 1987) 7

Walcott v. State,
460 So. 2d 915 (Fla. 5th DCA 1984),
approved, 472 So. 2d 741 (Fla. 1985) 6,8,9

Watkins v. State,
705 So. 2d 938 (Fla. 5th DCA 1998) 5

Wood v. State,
544 So. 2d 1004 (Fla. 1989), receded from,
State v. Beasley, 580 So. 2d 139 (Fla. 1991) 7,18

MISCELLANEOUS:

Florida Rule Appellate Procedure 9.140 10,12,17,21

Florida Rule of Criminal Procedure 3.390(d)
(requiring an objection to preserve
a jury instruction issue) 11,12,16,21

Florida Rule of Criminal Procedure 3.800(b) 11

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

The Petitioner in this case submits that the offense of attempted second degree murder violates due process and should be found to be fundamental error. The State disagrees. Even attempted felony murder was not found to be fundamental error, and its elimination was not applied retroactively. Unlike attempted felony murder, attempted second degree murder is not created by attempting an offense where the intent is supplied by a legal fiction. As this Court has previously recognized, it is simply a general intent offense just like the offense of second degree murder.

As to the Petitioner's second issue that the Fifth District Court of Appeal incorrectly eliminated from appellate review unpreserved sentencing errors, it is the position of the State that all the Fifth has done is correctly interpret the changes to the appellate process to require that all sentencing errors need to be initially presented to the trial court prior to being raised on appeal. If such is not done, then the alleged error is waived. Such a restriction on the appeal of sentencing errors is both efficient and constitutional. It is the position

of the State that the changes to the appellate process have placed such a requirement upon the appeal of sentencing errors eliminating the various exceptions to preservation including that of "fundamental" error.

ARGUMENT

POINT I

WHETHER THE OFFENSE OF ATTEMPTED SECOND DEGREE MURDER VIOLATES DUE PROCESS AND THEREFORE CONSTITUTES FUNDAMENTAL ERROR

The Petitioner submits that his conviction for attempted second degree murder constitutes fundamental error for violating due process. The State respectfully disagrees.

The amended information in this case charged the Petitioner with attempted first degree murder in count one based upon the fact that he shot his brother. (R 443). The jury returned a verdict of guilty of the lesser included offense of attempted second degree murder. (R 512). On appeal the defense submits that this conviction violates due process since it is logically impossible. It is the State's position that this offense does not violate due process and should continue to exist as an offense in the State of Florida.

The Petitioner bases its argument on this Court's case of State v. Gray, 654 So. 2d 552 (Fla. 1995), in which the offense of attempted felony murder was found not to exist. This Court in Gray noted that the completed offense of felony murder was based upon a legal fiction that implied intent from the underlying felony. Id. at 553. The opinion then held that further extending that fiction by maintaining that a defendant could then *attempt* some outcome which the intent to commit

itself had been created only by implication had proven[1] too difficult to define and apply. Id. at 553-554.

It is the State's position that reliance upon Gray is misplaced. This Court has already held in the case of Gentry v. State, 437 So. 2d 1097 (Fla. 1983), that

> [If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and that it comports with legislative intent....

Id. at 1099; see also, State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (attempted third degree murder is a general intent crime and exists in Florida). Quite unlike Gray where the underlying offense (felony murder) completely lacks any intent element except that transferred from the underlying felony, second degree murder is a general intent crime, and the attempt of a general intent crime requires the same level of intent. Unlike in Gray, there is no legal fiction of intent and there is no further extension of that fiction by charging attempt. This is the point recently recognized by the Second District Court of Appeal in rejecting this exact same challenge to the offense of attempted arson in the case Coston v. State, 24 Fla. L. Weekly D1441 (Fla. 2d DCA June 11, 1999).

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[1] Although the offense had been recognized to exist for about a decade (in the case Amlotte v. State, 456 So. 2d 448 (Fla. 1984)), it had proven almost impossible to create a workable jury instruction further, illustrating the fact that the offense was too great an extension of legal fictions.

Also, unlike attempted felony murder, there have been no troubles with the jury instructions and with defining the elements of the offense, and there have been no application problems. Each district court has recently reviewed the constitutional challenge before this Court and rejected it. See, Manka v. State, 720 So. 2d 1109 (Fla. 4th DCA 1998), Gilyard v. State, 718 So. 2d 888 (Fla. 1st DCA 1998), Quesenberry v. State, 711 So. 2d 1359 (Fla. 2d DCA 1998), Pitts v. State, 710 So. 2d 62 (Fla. 3d DCA 1998), Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998)[2].

In fact, just this month this Court upheld two convictions for attempted second degree murder (which like this case had been charged as attempted first degree murder) in the case State v. Brady, case no.: 91,951 (August 19, 1999). In Brady, this Court favorably cited Gentry, set out the elements of attempted second degree murder, and again recognized the fact that attempted second degree murder is a legal, general intent crime.

The Petitioner has presented no valid reason for eliminating this offense and has not shown that the offense in fundamentally flawed for violating due process. Put simply - one can attempt a general intent crime and such conviction does not violate the constitution; therefore, the State would ask that this Court not overturn what has been a long line of cases as well as legislation based upon this principle.

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[2] This issue now being addressed was certified as a question by the Fifth District Court of Appeal to this Court in the case Brown v. State: Supreme Court case no. 95,844.

POINT II

WHETHER SENTENCING ERRORS HAVE TO BE INITIALLY PRESENTED TO THE TRIAL COURT IN ORDER TO BE PRESERVED.

The Fifth District Court of Appeal affirmed the judgment and sentence in this case citing to its opinion of Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted, No. 92,805 (Fla. July 7, 1998).[3] In Maddox, the appellate court ruled *en banc* that only sentencing errors which have been preserved can be raised on direct appeal. This includes any sentencing errors which previously may have been labeled "fundamental." It is the position of the State that this is a correct interpretation of the recent changes to the appellate process. To understand how the Fifth District reached its conclusion, some background review of the previous law in this area is necessary.

First, a examination of case law prior to the Criminal Reform Act shows an inconsistent approach to whether an objection was needed to preserve a sentencing error. In the case Walcott v. State, 460 So. 2d 915, 917-921 (Fla. 5th DCA 1984), approved, 472 So. 2d 741 (Fla. 1985), Judge Cowart wrote a detailed analysis of the application of the contemporaneous objection rule to sentencing

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[3] This Court has sua sponte consolidated the cases of Maddox v. State, case no.: 92,805; Edwards v. State, case no: 93,000; Speights v. State, case no.: 93,207; and Hyden v. State, case no.: 93,966. Oral argument was held on May 11, 1999.

errors in his concurring opinion which pointed out many of the inconsistencies in the sentencing error cases. Adding to the inconsistencies of the necessity of a contemporaneous objection was the expansive definition of fundamental error when used in the sentencing context.[4] Case law held that an illegal sentencing error was fundamental error since it could cause a defendant to serve a sentence longer than is permitted by law; however, cases called sentencing errors fundamental which ranged from sentences in excess of the statutory maximum to jail credit to improper costs to improper conditions of probation. See, Larson v. State, 572 So. 2d 1368 (Fla. 1991) (illegal conditions of probation can be raised without preservation), Wood v. State, 544 So. 2d 1004 (Fla. 1989), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (failure to provide defendant notice and opportunity to be heard as to costs imposed constitutes fundamental error), Vause v. State, 502 So. 2d 511 (Fla. 1st DCA 1987) (improper imposition of mandatory minimum sentence constituted fundamental error); Ellis v. State, 455 So. 2d 1065 (Fla. 1st DCA 1984) (error in jail credit fundamental since defendant may serve in excess of sentence), Jenkins v. State, 444 So. 2d 947 (Fla. 1984), receded from, State v. Beasley, 580 So. 2d 139 (Fla. 1991) (costs could not be imposed without notice).

Eventually it seems, case law evolved which provided that

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[4] The Second District Court recently wrote in a case which will be reviewed in more detail later in this brief that "It is no secret that the courts have struggled to establish a meaningful definition of 'fundamental error' that would be predictive as compared to descriptive." Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998).

sentencing errors apparent from the record could be reviewed by the appellate court whether preserved or not. See, Taylor v. State, 601 So. 2d 540 (Fla. 1992), Dailey v. State, 488 So. 2d 532 (Fla. 1986), State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). In Rhoden, the defendant was sentenced as an adult despite the fact he was seventeen years old. Id. at 1015. However, the trial court never addressed the requirements of the statute necessary to sentence a juvenile as an adult. There was no objection at the trial level. Id. The State's argument that the error was not fundamental and that an objection was needed was rejected by this Court which wrote

> If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made **at the time of sentencing**, the defendant could not appeal the illegal sentence.

Id. at 1016, (emphasis added).

The appellate system became more and more clogged with sentencing errors which were either raised for the first time on direct appeal or were not even raised at all by appellate counsel but were simply apparent on the record. As Judge Cowart wrote in his concurrence in the previously referenced Walcott:

> Those who legislate substantive rights and who promulgate procedural rules should consider if the time has not arrived to take action to improve the present rules and statutes. The first step might be to eliminate these vexatious questions, perhaps by eliminating the right of direct appeal of sentencing errors with the injustice that necessarily attends application of the concept of implied waiver to the failure of counsel to timely,

> knowingly, and intelligently present appealable sentencing errors for direct appellate review. **Perhaps it would be better to have one simple procedure,** permitting and requiring, any legal error in sentencing that can result in any disadvantage to a defendant, to be presented once, specifically, explicitly, but at any time to the sentencing court for correction with the right to appeal from an adverse ruling.

460 So. 2d at 920, (emphasis added). More than a decade later, the better, simpler approach urged by Judge Cowart was attempted with an extensive overhaul of the appellate system in regards to criminal appeals. Included in this process was the Criminal Reform Act (Reform Act) which was codified in section 924.051, Fla. Stat. (Supp. 1996) as well as changes to the Rules of Criminal and Appellate Procedure.

It should be noted there is no right under the United States Constitution to an appeal in a non-capital criminal case. This point was specifically recognized by this Court when it recently wrote

> The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985) ("Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors."). Accord, Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

See, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). However, this Court also noted that article V, section 4(b) of the Florida Constitution was a constitutional protection of the right to appeal. Id. This Court wrote

> . . . we believe that the legislature may implement this constitutional right and place **reasonable conditions** upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, **this Court continues to have jurisdiction over the practice and procedure relating to appeals.**

Id. (emphasis added)(footnote omitted).

Immediately after the passage of section 924.051 which was the legislature implementing reasonable conditions upon the right to appeal, this Court exercised its jurisdiction over the appellate process and extensively amended Florida Rule Appellate Procedure 9.140 to work with the Reform Act. As applied to appeals after a plea of guilty or nolo contendere, the amended Rule provides

> (2) Pleas. A defendant may not appeal from a guilty or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> (I) the lower tribunal's lack of subject matter jurisdiction;

> (ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;
>
> (iii) an involuntary plea, if preserved by a motion to withdraw plea;
>
> (iv) **a sentencing error, if preserved;** or
>
> (v) as otherwise provided by law.

(emphasis added). The Rule was also further changed in order to specifically refer to sentencing errors:

> (d) Sentencing Errors. A sentencing error may not be raised 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).

(emphasis added). The Rule 3.800(b) referred to above has itself been completely rewritten to provide that a "defendant may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence."

It is these specific changes that led the Fifth District Court to find in Maddox that the concept of fundamental sentencing errors no longer exists.[5] As the court noted, only "preserved" errors can

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[5] As additional support for the fact that fundamental errors only apply to trial errors, the Fifth District Court relied in Maddox on the case of Summers v. State, 684 So. 2d 729 (Fla. 1996). In Summers, this Court analyzed the issue whether failure to file written reasons to sentence a juvenile as an adult constitutes fundamental error. This Court wrote that:

> The trial court's failure to comply with the statutory mandate is a sentencing

be appealed. Sentencing issues become much more like other issues with there now being a specific requirement that they be preserved in order to be presented on appeal. See, section 90.104(1)(a), Fla. Stat. (1997) (requiring a specific objection to preserve an evidentiary issue); Fla. R. Crim. P. 3.390(d) (requiring an objection to preserve a jury instruction issue). Further, the situation that was of concern in Rhoden that the subject matter of the objection would not be known to the defendant until the moment of sentencing is solved by the fact that there is still a thirty (30) day window in which to present any sentencing issues to the trial court for remedy and for preservation.

As the Fifth noted

> The language of Rule 9.140(b)(2)(B)(iv) could not be clearer. And why should there be 'fundamental' error where the courts have created a 'failsafe' procedural device to correct any sentencing error or omission at the trial court level? Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d 617, 620 (Fla. 5th DCA 1998).

This leads to a review of the facts of the instant case. The Petitioner submits that there are four sentencing errors to be reviewed and that two were preserved in a motion to correct sentence. (R 555-556). While there is a motion to correct in the

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> error, not fundamental error, which must be raised on direct appeal or it is waived.

Id.

record on appeal, it was filed the same day as the Petitioner's notice of appeal, and there is no order in the record showing that the trial court ever had the opportunity to review the motion. Such efforts should not be found to have preserved the issue for appeal, and the claims should be barred from being reviewed on direct appeal.

Returning to a review of the Reform Act itself, the analysis is complicated by the fact that despite its relatively young age, the Act has already led to multiple exceptions and interpretations. A review of just some of the First District Court of Appeals' cases shows a complete lack of consistency in its application of the Reform Act and helps highlight some of the perceived confusion:

> Neal v. State, 688 So. 2d 392 (Fla. 1st DCA 1997), rev. denied, 698 So. 2d 543 (Fla. 1997):
>
> -- improper departure issue was not preserved for appeal and is barred from review
>
> -- however, imposition of attorney fees is fundamental sentencing error which can be raised for first time on direct appeal
>
> Sanders v. State, 698 So. 2d 377 (Fla. 1st DCA 1997):
>
> -- imposition of a twenty year sentence for a second degree felony is an illegal sentence which must be classified a fundamental error and can be raised with no objection
>
> State v. Hewitt, 702 So. 2d 633 (Fla. 1st DCA 1997):
>
> -- case discusses whether the sentencing issue was unlawful or

illegal (with illegal being equated to fundamental); determines that issue of withholding adjudication with no probation was question of an unauthorized sentence which had to be preserved and was not.

Pryor v. State, 704 So. 2d 217 (Fla. 1st DCA 1998):

-- despite defendant's claim that the sentence was illegal since it exceeded the statutory maximum for a youthful offender, issue is barred from review since not fundamental and not preserved.

Mason v. State, 710 So. 2d 82 (Fla. 1st DCA 1998):

-- sentence imposed exceeded statutory maximum, was fundamental, and could be raised on appeal although not preserved.

Dodson v. State, 710 So. 2d 159 (Fla. 1st DCA 1998):

-- imposition of discretionary costs without oral pronouncement and of a public defender's fee is fundamental and reversible error although not preserved.

-- issue was certified.

Matthews v. State, 714 So. 2d 469 (Fla. 1st DCA 1998):

-- despite being decided only seven days after Dodson, held cost issue was not preserved and could not be raised on direct appeal.

Mike v. State, 708 So. 2d 1042 (Fla. 1st DCA 1998):

-- six days later, public defender fee and costs reversed with citation to Dodson and again certifying issue.

> Copeland v. State, 23 Fla. L. Weekly D1220 (Fla. 1st DCA May 12, 1998):
>
> -- as to fact defendant habitualized on possession charge, issue is fundamental and sentence illegal.
>
> -- as to fact, defendant did not even qualify to be found a habitual offender, sentences not illegal and issue not preserved.
>
> Speights v. State, 711 So. 2d 167 (Fla. 1st DCA 1998):
>
> -- one day after Copeland, the court again finds imposition of habitual sentence for which the defendant did not qualify not to be illegal and not to be preserved; however, this time court issue is certified.

These are just some of the cases applying the new appeals process.

Additionally, several of the other district courts have reviewed the Reform Act in *en banc* panel decisions. Much like in the Maddox, the Fourth District Court reviewed an appeal from a plea which had led the appellate attorney to file an Anders brief. See, Harriel v. State, 710 So. 2d 102 (Fla. 4th DCA 1998). The State had filed a motion to dismiss which the court had initially denied but which it ultimately granted. The Fourth specifically agreed with the majority of the Fifth's approach in Maddox; however, it noted disagreement with Maddox when holding that an illegal sentence exceeding the statutory maximum[6] was "fundamental error" which could be raised at any time. In a footnote, the

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[6]This definition of illegal sentence being taken from this Court's holding in Davis v. State, 661 So. 2d 1193 (Fla. 1995).

Fourth also agreed with Maddox that costs type issues could not be raised without being preserved; however, it viewed such sentences as being unlawfully imposed - not illegal.

Next, the Second District Court of Appeal in the case Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998)[7], reviewed the Reform Act and held that when an appellate court has jurisdiction through the proper appeal of a preserved error it could then address all other errors which it referred to as "serious, patent" errors[8] creating yet another exception for review. Interestingly, the court wrote

> . . . there is little question that 'fundamental error' for purposes of the Criminal Reform Act is a narrower species of error than some of the errors previously described as fundamental by case law. Because the sentencing errors in this case could have been challenged by a motion pursuant to Florida Rule of Criminal Procedure 3.800(b) prior to appeal and because they may still be challenged by postconviction motions, neither of the sentencing errors in this case fits within this definition of fundamental error. **Indeed, although we do not reach the issue, the Fifth District may be correct in concluding that no sentencing error is fundamental for purposes of this new act.**

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[7] The Second District recently in an en banc decision broadened its analysis in Denson and certified several questions to this Court for resolution. Bain v. State, 24 Fla. L. Weekly D314 (Fla. 2d DCA Jan. 29, 1999).

[8] There is also references in the opinion to "serious" errors, "patent" errors, and "illegal" sentence.

Id. at 1229. The Second also stated that it did not accept Harriel's position that an illegal sentence is fundamental error giving jurisdiction to the appellate court for its review. Id., n. 12.

The Fourth, then, again issued an *en banc* opinion again addressing the Reform Act in the case in the case of Hyden v. State, 715 So. 2d 960 (Fla. 4th DCA 1998), rev. granted, case no.: 93,966. Perhaps finally seeing the wisdom of the changes and the need for preservation, the court issued an aggressive decision in which it attempted to stress the fact the new changes existed and that they would be utilized. For example, the court used some of the following language:

> In this district, **we will no longer** entertain on appeal the correction of sentencing errors not properly preserved.
>
> Although in the past we have corrected such deviations from oral pronouncement of sentences, w**e will do so no more.** (as to the imposition of a condition of probation without that condition being oral pronounced).
>
> It is for the benefit of the criminal system as a whole, as well as the individual defendants, that this expeditious remedy of sentence correction has been made available. Our strict enforcement of Rule 9.140(d) should have the effect of alerting the criminal bar of the absolute necessity for reviewing the sentencing orders when received to determine whether correction is necessary. **If they do not, relief will not be afforded on appeal.**

(emphasis added). The court continued its analysis and held that the rule changes had *sub silentio* overruled the Wood issue finding that costs and fees now have to be preserved in order to be presented on appeal.

Also, the Third District wrote that a sentence in excess of the statutory maximum was a fundamental error which it could review even if not preserved; evidently, the court equates the definition of an illegal sentence with that of a fundamental sentencing error. See, Jordan v. State, case no.: 97-2002 (Fla. 3d DCA September 16, 1998). Still yet, another twist was added by the Third District in the case Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), in which it was confronted with the issue of whether the imposition of a fourteen year sentence for a misdemeanor could be corrected on appeal absent presenting the issue to the trial court. (seven felony counts were run concurrently; however, on one count the jury had found the defendant guilty of the lesser included misdemeanor and a fourteen sentence had been improperly imposed). The defendant argued that the sentencing error was fundamental and reviewable; whereas, the State submitted that Maddox was controlling. The Third District noted some of the above cited conflicting decisions such as Harriel and Denson, and wrote that "Because we are able to reach what we think is the correct result without doing so, we respectfully decline, at least in this case, to involve ourselves in this fratricidal warfare." The court, then, sua sponte found ineffective assistance of counsel on the face of the appellate record and ordered correction upon remand.

The court continued and stated that while it agreed with Maddox that lack of preservation is an ineffective assistance of counsel issue it "strongly disagree(d) that anything is accomplished by not dealing with the matter at once."

There are several problems with this approach. First, assuming Maddox is correct, the changes to the process require all sentencing issues to be preserved by having been presented to the trial court before appellate review. As to cases involving pleas, this requirement might even be jurisdictional. There is no exception in the rules for errors apparent on the face of the record. Additionally, to allow the appellate courts to circumvent the preservation requirement by use of ineffective assistance on its face could completely destroy the Reform Act. This exact point was recognized recently by the First District Court of Appeal when it refused to follow Mizell and wrote "[W]e decline appellant's invitation to address the issue as one involving ineffective assistance of counsel because to do so would effectively nullify the preservation requirement contained in section 924.051 (1997). See, Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1998). Further, under Mizell, even if the error is found not to be fundamental and not to be illegal (assuming these to be different for sake of argument), an appellate court could sua sponte find these errors to be the product of ineffective assistance.[9] Again, such an approach

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[9] Such an approach also is a concern given the fact the State is omitted from the process and is deprived of the opportunity to respond in any manner . As the United States Supreme Court noted,

would basically destroy the entire Reform Act.

What these cases show is that in just the space of a few months, we have the attempt to get sentencing issues preserved by presentation to the trial court being eroded by exceptions. We have the "patently serious error" exception, the "illegal sentence error" exception, the "fundamental sentencing error" exception, and now even the "apparent on the face of the record thus ineffective assistance" exception. Additionally, none of these is defined. Basically, the exceptions will consume the reforms unless the Fifth's interpretation is correct that only preserved sentencing issues can be raised, or if exceptions do exist, they must be extremely limited and well-defined.[10]

To repeat the point well made by the Fifth District Court as to the fact that only preserved sentencing errors can be raised on appeal:

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the analysis for prejudice involves the question of whether the proceeding was fundamentally unfair and is not merely outcome determinative. See, Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

[10] If some exception is found to be required by the changes, it should only be for those rare errors so fundamental that the process itself is tainted. Even an illegal sentence is simply a violation of statute which in some situations is now even proper since the clear definition of illegal sentence seems to be one which is beyond the statutory maximum; however, a sentence actually can legally exceed the so-called statutory maximum if such sentence is warranted by the guideline scoresheet.

Most seem to agree that all but "fundamental" sentences still can be barred for failure to preserve. The problem is no one can define fundamental with the defense using statements like "fundamentally trivial sentencing issue" at oral argument in reference to $2 in discretionary costs.

> Elimination of the concept of 'fundamental error' in sentencing will avoid the inconsistency and illogic that plagues the case law and will provide a much-needed clarity, certainty and finality.

Maddox, 708 So. 2d at 620. It is the State's position that this is the very reason that this Court amended the appellate rule specifically to address the appeal of sentencing errors. And to repeat the previously cited amendment of Rule 9.140(d) which specifically addresses the appeal of sentences:

> (d) Sentencing Errors. **A sentencing error may not be raised 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).**

(emphasis added).

Based upon this, it is the State's position that this Court has clearly limited appeals of sentencing errors to only those which are preserved by presentation to the trial court; thus, eliminating the potentially expansive exception of fundamental error.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the holding of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by hand delivery to the Public Defender's mail box at the Fifth District Court of Appeal, to Anne Moorman Reeves, 112 Orange Ave. Ste A., Daytona Beach, 32114, this 26th day of August 1999.

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