ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ALVIN COOPER MACK,
Petitioner/Appellant,

vs.

STATE OF FLORIDA,
Respondent/Appellee.

CASE NO.: SC00-2355
L. T. NO.: 5D00-1274

INITIAL BRIEF OF PETITIONER ON DISCRETIONARY REVIEW

On Discretionary Review From The
Fifth District Court of Appeal

Alvin Copper Mack
DC# 691443
South Bay Correctional Facility
Post Office Box 7171
South Bay, Florida 33493-7171

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
STATEMENT OF CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	10
ARGUMENT	
ISSUE ONE	
THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN KING V. STATE, 681 SO.2D. 1136 (FLA. 1996); AND MADDOX V. STATE, 760 SO.2D. 89 (FLA. 2000).....	11
CONCLUSION.....	20
OATH.....	21
CERTIFICATE OF SERVICE.....	21
CERTIFICATE OF COMPLIANCE.....	22

TABLE OF CITATIONS

PAGE

Cases

Bain v. State, 730 So.2d. 296 (Fla. 2d DCA 1999).....11, 15, 16, 19, 20

Baker v. State, 714 So.2d. 1167 (Fla. 1st DCA 1998)..... 11, 15

Davis v. State, 661 So.2d 1193, 1196 (Fla.1995)..... 18

Hagan v. Sun Bank of Mid-Florida, N.A., 666 So.2d 580, 584 (Fla. 2d DCA 1996)..... 17

Hayes v. State, 598 So.2d 135, 138 (Fla. 5th DCA 1992)..... 18

In re Alkire's Estate, 142 Fla. 862, 144 Fla. 606, 198 So. 475, 482 (1940)..... 17

King v. State, 681 So.2d. 1136, (Fla. 1996).....8, 10, 13, 17, 19, 20

Mack v. State, 766 So.2d 1254 (Fla. App. 5 Dist. 2000) 8

Maddox v. State, 766 So.2d. 89 (Fla. 2000).....8, 11, 15, 16, 19, 20

Poore v. State, 531 So.2d. 161 (Fla. 1988).....8,9

Sanders v. State, 698 So.2d 377, 378 (Fla. 1st DCA 1997)..... 18

State v. Mancino, 714 So.2d. 429 (Fla. 1998)..... 11, 15

State v. Montague, 682 So.2d. 1085 (Fla. 1996) 12, 15

Statutes

Fla. Stat. 775.082..... 13

Fla. Stat. 775.084..... 13

Rules

3.800(a), Fla.R.Crim.P. 12, 18, 20

Rule 9.210, Fla.R.App.P. 22

Rule 9.140(j), Fla.R.App.P. 20

STATEMENT OF CASE AND FACTS

On January 11th, 1990 Alvin Cooper Mack (Petitioner), was arrested in Brevard County and charged with five (5) counts of "Burglary of a Structure. A 3rd degree felony offense, to wit: Case No. 90-2585-CFA, Count I, 90-661-CFA, Count I, 90-657-CFA, Count I, 90-2580-CFA, Count I, 90-2582-CFA, Count I; four (4) counts of grand theft, a 3rd degree felony offense, to wit: Case No.: 90-2582, Count II, 90-2585-CFA, Count II, 90-661-CFA, Count II, and 90-657-CFA, Count II; and two (2) counts of petit theft, a 2nd degree misdemeanor offense, to wit: Case No.: 90-2584-CFA, Count II, and 90-2580-CFA, Count II and one (1) count of Burglary of a Conveyance, a 3rd degree felony offense, to wit: Case No.: 90-2584-CFA, Count I.

On 9/19/90, Petitioner appeared before the Honorable Judge John D. Moxley, Jr. in concern with the above stated information. Petitioner was adjudged guilty via a plea agreement and was sentenced to the following: On case no. 90-2582-CFA, Count I, "The defendant is hereby committed to the Department of Corrections for a term of five (5) years as an habitual felony offender. Defendant shall be allowed a total of 155 days jail credit for such time as he has been incarcerated prior to the imposition of this sentence. (See Exhibit #8, R1-22-23). As to Count II, Defendant is hereby sentenced to the Department of Corrections

for a term of three and a half (3½) years as an habitual felony offender. However, after serving a period of two (2) years imprisonment in the Department of Corrections, the balance of such sentence shall be suspended and the defendant shall be placed on probation for a period of one and a half (1½) years under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in this order. (See Exhibit #9, R1-24). The defendant shall be allowed a total of 155 days jail credit for such time as he has been incarcerated prior to the imposition of this sentence. It is further ordered that the sentence imposed for this count shall run "consecutive" with the sentence set forth in count I (See Exhibit #9, R1-24).

As to Case No. 90-661-CFA, Counts I and II, the court hereby stays and withholds the imposition of sentence as to all counts and cases and places the defendant on probation for a period of one and one-half (1½) years concurrent on all counts but "consecutive" to prison sentence in #90-2582. (See Exhibit #1, R1-25-26).

As to case No. 90-657-CFA, Counts I and II, the court hereby stays and withholds the imposition as to all counts and cases and places the defendant on probation for a period of one and one half (1½) years to run concurrent on all counts but "consecutive" to prison sentence in #90-2582. (See Exhibit #2, R1-27-28).

As to Case No. 90-2585-CFA, Counts I and II, the court hereby stays and withholds the imposition of sentence as to all counts and cases and places the defendant on probation for a period of one and one-half (1½) years to run "concurrent" on all counts but "consecutive" to prison sentence 90-2582. (See Exhibit #7, R1-29-30).

As to Case No. 90-2584-CFA, Count I, the court hereby stays and withholds the imposition of sentence as to Count I, and places the defendant on probation for a period of one and one-half (1½) years, said probation to run "concurrent" with all other probation sentences given this date, but "consecutive" with D.O.C. time in 90-2582-CFA. As to Count II, defendant is hereby committed to the custody of the Sheriff of Brevard County, Florida for a term of sixty (60) days. It is further ordered that the defendant shall be allowed a total of 157 days jail credit for such time as he has been incarcerated prior to the imposition of the sentence. (See Exhibits #5, R1-31-32 and #6, R1-33).

As to Case No. 90-2580-CFA, Count I, the court hereby stays and withholds the imposition of sentence as to Count I. and places the defendant on probation of a period of one and one-half (1½) years, said probation to run "consecutive" to with D.O.C. in #90-2582-CFA but "concurrent" with all other probation sentences given this date (See Exhibit #3, R1-34-35). As to Count II, the defendant is hereby committed to the custody of the Sheriff of Brevard County, Florida for a term of

155 days. It is further ordered that the defendant shall be allowed a total of 155 days of jail credit for such time as he has been incarcerated prior to imposition of this sentence (See Exhibit #4, R1-36).

As it was clearly understood and reflected on the judgment and sentencing papers, petitioner was sentenced to serve a total of seven (7) years in the Florida Department of Corrections as an habitual offender, but in Case No. 90-2582-CFA only. For all other case numbers, Petitioner was sentenced to serve a total of one and one-half (1½) years probation following the prison sentence for all remaining counts, to wit: Case No. 90-2585-CFA, Count(s) I and II, Case No. 90-661-CFA, Count(s) I and II, Case NO. 90-657-CFA, Count(s) I and II, Case No. 90-2584-CFA, Count(s) I, and Case No. 90-2580-CFA, Count(s) I.

It is also important to note that because petitioner was given a true split sentence on Case No. 90-2582-CFA, Count II, petitioner was informed that after the completion of two (2) years imprisonment on this three and one-half year habitual felony offender sentence, the remainder would be suspended and the petitioner would have to serve the remaining one and one-half (1½) years on probation, and that this probation would run concurrent with all other probation sentences but "consecutive" to Count(s) I of Case No. 90-2582-CFA.

Petitioner was released from the Florida Department of Corrections on 3/31/1995, at which time the petitioner had served approximately 1,901 days, or 5

years, 2 months, 16 days within the Department of Corrections including 155 days jail credit for time incarcerated piror to the imposition of sentence. With this time completed, petitioner had served the maximum amount of time allowed to be served on the seven (7) year extended habitual felony offender sentence that was mandated by the courts.

On 4/3/1995, petitioner reported to the Florida Department of Probation in Titusville, Florida, where he requested, via his probation officer, that his probation be transferred to the State of Georgia, in the city of Atlanta, so that petitioner could be with his family. Approximately three (3) weeks later, petitioner's probation was legally transferred to Atlanta, Ga. and there petitioner was placed under supervision for the completion of the remaining one and one-half (1½) years probation in accordance with the true split sentence given him by the Honorable Judge John D. Moxley, Jr., on all remaining cases, including Case No. 90-2582-CFA, Count II.

Following this, after serving approximately thirteen (13) months abiding by the established criteria set forth by the Florida Department of Probation, via Atlanta, Ga., a warrant was issued for the arrest of petitioner for a technical violation of probation on the date of 7/23/1996 (See Exhibit #11, R1-38). On 9/19/1996, petitioner was arrested by the Atlanta, Ga. police department, and then extradited to Brevard County Jail in Sharpes, Florida on 9/23/1996 (See Exhibit

#10 - 15, R1-37-44). There, petitioner was charged with violating the conditions of his probation on all counts. The conditions were verbally stated as being: (1) Failure to report; (2) Failure to Pay restitution Fees for the months of April-May of 1996; (3) Failure to pay the supervision costs of forty dollars $40.00 per month for the months of April-May of 1996.

Petitioner was adjudicated guilty on all charges on 9/30/1996 before the Honorable Charles M. Holcomb and was sentenced to serve a total of six (6), Four (4) year extended probation sentences to run concurrent on all counts and all cases. (See Exhibit #16-20, R1-45-49). Petitioner was then released to begin serving the newly acquired probation sentences.

Upon release, petitioner immediately reported to the Florida Department of Probation and requested that his probation be transferred back to the State of Georgia. Afterwards, petitioner then moved back to Atlanta, Ga., with his family to continue his supervised probation sentence. (See Transcript of V.O.P. hearing dated 6/17/1998, pg. 25, beginning at Ln. 2).

On this same date of September, 1996, Petitioner was again technically violated for probation conditions, but did not find out until he was arrested in Atlanta, Ga., for the warrant issued against him for violation of probation on 12/18/97.

On 6/17/1998, petitioner was again brought before the Honorable Charles M. Holcomb. At this time, petitioner was sentenced as follows (Taken from the V.O.P. hearing of 6/17/1998): "As to Case No. 90-2580-CFA, the court orders that you be delivered to the custody of the Department of Corrections for a period of five (5) years, no probation to follow. (See TR. 33, Ln. 17).

As to Case No. 90-2585-CFA, on each count, the court will order you serve five (5) years in the state penitentiary. Those counts to be concurrent with each other and concurrent with the previous sentence. (See TR. 34, Ln. 1).

In Case No. 90-2584-CFA, it will be the sentence of the court that you be delivered to the Department of Corrections to be incarcerated for a period of five (5) years. That sentence to run concurrent with the previous two (2) sentences. (See TR. 34, Ln. 7).

As to Case No. 90-657-CFA, in Count I, and Count II, the court sentences you as a habitual felony offender to ten (10) years on each count to be concurrent with each other and concurrent with the previous sentences. (See TR. 34, Ln. 24).

As to Case No. 90-661-CFA, Count(s) I and II, the court will order that you be delivered to the Florida Department of Corrections to be incarcerated for a period of ten (10) years on each count, to be concurrent with each other, but consecutive to the other sentences imposed. (See TR. 36, Ln. 6).

As to Case No. 90-2582-CFA, Count II, the court places you in the custody of the Florida Department of Corrections for a period of five (5) years, to be concurrent to the last sentence imposed. So whatever credit you are entitled to, D.O.C. will figure it out. (See TR. 36, Ln. 24).

Defendant filed a 3.800(a) motion, asking the court to correct numerous errors it had made when imposing the above cited sentences. The trial court denied this motion on March 10th, 2000, overlooking and/or misapprehending that it had illegally sentenced Petitioner to habitual offender sentences, wherein his initial sentences, as part of the overall sentencing scheme, were all guideline probation sentences with the exception of case no. 90-2582-CFA, pursuant to King v. State, 681 So.2d. 1136, 1138 (Fla. 1996); and that his sentence in 90-2582 was illegal because it failed to patently conform with the definition and legality of a true split sentence as set forth in Poore v. State, 531 So.2d. 161 (Fla. 1988).

Petitioner appealed that order (R1-1-2) and fully briefed the Fifth District Court of Appeals R1-3-49). The Appellate Court entered a Show Cause Order (R1-1-53). The State responded to the specific issue listed in the show cause order (R1-54078). That Court granted relief as to the Poore issue, but chose to fully and totally ignore the former issue as meritless. They made their ruling on September 29, 2000 (R1-79-81). The Mandate was issued Ocotober 18, 2000 (R1-82). See Mack v. State, 766 So.2d 1254 (Fla. App. 5 Dist. 2000).

Petitioner requested discretionary review on October 26, 2000/November 2, 2000 (R1-83-84), based in part on the 5th DCA's choice to ignore the primary issue of his motion, granting relief only on the least amount possible, and based in part on the ruling of this Court in Maddox v. State, 766 So.2d. 89 (Fla. 2000), which found that the 5th DCA was somewhat deficient in recognizing what constitutes a fundamental error and warrants correction in sentencing, particularly since King v. State issues were recognized as such. Maddox v. State, 760 So.2d. at 101.

Respondent answered saying that petitioner was not entitled to discretionary review, but that they were, based on their interpretation that the 5th DCA erred in granting relief as to the Poore v. State issue, and requested discretionary review on that basis.

This Court ranted discretionary review on March 27, 2001 (R1-85). Although it was not specific as to which review it had granted, Petitioner noted that the Court entitled the matter Mack v. State, thus informing Petitioner is was his request being granted.

This timely brief follows.

SUMMARY OF THE ARGUMENT

Petitioner contends that the habitual offender sentences for case numbers 90-657-CFA and 90-661-CFA are illegal, because he was not sentenced initially on those case numbers to habitual offender sentences, nor on his initial alleged violation of probation, the court choosing to impose habitual offender sentencing initially only in case number 90-2582-CFA. And that this illegal imposition of habitual offender sentencing flies in the face of this Court's ruling in King v. State, 681 So.2d. 1136, 1138 (Fla. 1996), and is thus in direct and express conflict.

Further, Petitioner would argue that the appellate court abused its discretion by granting relief only as to the "true split sentence issue" and ignoring the habitual offender sentencing issue, even though it constitutes fundamental error, is plainly apparent on the face of the record, is patent and serious, and fails to comport to statutory or constitutional limitations.

ARGUMENT

The standard of review for this argument, revolves around four primary cases. The first is King v. State, 681 So.2d. 1136 (Fla. 1996), wherein the Florida Supreme Court stated that the imposition of a habitual offender sentence is a two step process; that the court, upon fulfilling its ministerial duty of determining a defendant to be a habitual offender, has discretion whether to sentence him as one or not, and once that sentence is imposed, in particular, a probationary split sentence as in the instant case, and a habitual offender sentence was not initially imposed, than the court cannot, upon violation of probation, alter the guideline sentence into a habitual offender sentence.

Secondly, that an illegal sentence can constitute a fundamental error, and if it is shown that the error in sentencing is patent and serious, than it does constitute fundamental error. Maddox v. State, 760 So.2d. 89 (Fla. 2000); Bain v. State, 730 So.2d. 296 (Fla. 2d DCA 1999).

Thirdly, that the sentencing error qualifies as an illegal sentence under King, supra; and State v. Mancino, 714 So.2d. 429 (Fla. 1998) as it fails to comport to statutory or constitutional limitations. Further, that according to Baker v. State, 714 So.2d. 1167 (Fla. 1st DCA 1998), Petitioner must show that his sentence is

illegal; that it is plainly apparent on the face of the record; and that the record affirmatively demonstrates Petitioner's entitlement to relief.

Lastly, Petitioner will show that the appellate court and trial court abused their discretion by failing to correct the patent, serious, fundamental error when it was materially demonstrated to them, and that in so doing, they abdicated their judicial responsibilities to correct such error after they have been made aware of it. Bain, supra, State v. Montague, 682 So.2d. 1085 (Fla. 1996).

Petitioner would contend that the trial court abused its discretion by imposing habitual offender sentences on case numbers 90-657-CFA and 90-661-CFA; and that the appellate court abused its discretion, and whose decision is in direct and express conflict with this Court and its sister courts, when it denied relief to Petitioner, asserting that his claim as to the habitual offender sentences was "meritless", when it was anything but.

In the 1998 sentencing hearing the respondent claimed that Petitioner was found to be a habitual offender and sentenced as such in case numbers 90-657-CFA and 90-661-CFA, back in 1990. That argument convinced the court to sentenced Petitioner to consecutive terms of 10 years as an habitual offender on those two cases, even though the sentences initially imposed were anything but.

Petitioner argued to the court through his 3.800(a) motion that he could not be sentenced as a habitual offender in 1998, because the court did not impose

habitual offender sentencing when the court accepted his plea and chose to sentence him to a guideline sentence of probation for the cited case numbers back in 1990.

He further argued that even though it may have been the respondent's intent to have Petitioner habitualized for the cited cases, that is not what the trial court did. As the record and exhibits clearly demonstrate, the court chose to impose habitual offender sentence only as to case 90-2582 and no where else. Why is not important or relevant, since no one challenged the imposition of said sentence, thus establishing the law of the case. That's just simply the way it was done. Therefore, when Petitioner came back to be resentenced on a VOP for the second time, even though Petitioner may have qualified for habitual offender sentencing, the court could not, in mid-stream, change or alter his sentences from a guideline probation sentence governed by the statutory maximum as to 3rd degree felonies (5 years, Fla. Stat. 775.082) to habitual offender sentences (10 years, Fla. Stat. 775.084), as that was not part of the plea agreement nor part of initial sentencing scheme.

In King v. State, 681 So.2d. 1136, 1138 (Fla. 2000), this Court made it clear that the imposition of a habitual offender sentence was a two-step process. First, the court had the ministerial duty of making a determination as to whether or not the defendant could be classified as a habitual offender. Once that determination

was made, then the court had the discretion as to whether or not to impose habitual offender sentencing on the defendant. They made it equally clear that once the court opted not to impose habitual offender sentencing, that it could not go back and impose habitual offender sentencing on that particular case, should the accused violate probation or other terms of sentence not involving incarceration. Id. at 1140.

The concept is not a difficult one to follow and is fairly simple in its operation. In the instant case, there is no question that the respondent served notice to the court that they were seeking habitual offender sentencing. They claimed it was as to case numbers 90-657-CFA and 90-661-CFA, However, for whatever reason, after the court performed its ministerial duty of determining that Petitioner qualified to be classified as a habitual offender, the court proceeded to sentence him as a habitual offender in a case for which it was not sought, 90-2582-CFA, and further proceeded to sentence him to probation on all other cases. Not habitual probation, not with habitualization hanging over the Petitioner's head should he violated, just straight probation.

This fact is not only confirmed by the available record found in the court transcripts and sentence and judgment papers. It is also confirmed by the action of the court upon the Petitioner's first violation of probation in 1996, wherein the court chose to impose probation sentences of 4 years across the board for all case

numbers and counts, with the exception of count 1 of 90-2582-CFA, which was expired by the completion of Petitioner's initial prison term.

Therefore, it can only be said that the trial court chose to exercise its discretion and not sentence Petitioner to habitual offender sentences, even though he qualified, on case nos. 90-657-CFA and 90-661-CFA, and on that basis, the trial court abused its discretion in sentencing Petitioner as a habitual offender in those case numbers when it chose not to do so initially, regardless of the state's misrepresentations that were not supported by the record.

The question for this Court then, is since the sentence imposed is patently illegal as defined in State v. Mancino, 714 So.2d. 429 (Fla. 1998), is plainly apparent on the face of the record, and the record affirmatively demonstrated Petitioner's entitlement to relief, Baker v. State, 714 So.2d. 1167 (Fla. 1st DCA 1998), and constitutes sufficient error to warrant correction when the court is made aware of it on a collateral relief motion, State v. Montague, 682 So.2d. 1085 (Fla. 1996) then why did the appellate court choose to abuse its discretion and claim the issue was meritless, when it was anything but, and be in direct conflict with King v. State, supra, and Maddox v. State, 760 So.2d. 89 (Fla. 2000) and Bain v. State, 730 So.2d. 296 (Fla. 2d DCA 1999). Regardless, correction of the illegal sentence is warranted and necessary to preserve the integrity of the courts.

Petitioner's faith and confidence in the judicial system is severely shaken when he sees an appellate court grant relief on one issue, which was the smallest amount of relief possible to be granted, and have the rest ignored, like the court has performed its ethical duty by granting the smallest amount of relief and to heck with the other issues. Like its going to clear their conscience because they granted relief on one issue only, regardless of the merits of the remainder.

Petitioner would hope that every court had the conviction of principle demonstrated by the Second DCA in its opinion in Bain v. State, 730 So.2d. 296 (Fla. 2d DCA 1999). Instead of trying to skirt the law, or ignore it altogether on some procedural hang-up, that court made it abundantly clear that any sentence to which the "opprobrium" illegal could be attached, constituted fundamental error, and failure to correct such error would constitute an abdication of judicial duty and responsibility.

This Court addressed a similar matter when it issued its ruling in Maddox v. State, 760 so.2d. 89 (Fla. 2000), wherein it approved Bain v. State, and informed the appellate court of the Fifth District, that some errors are sufficiently egregious and serious that they need to be corrected on direct appeal, whenever it is brought to their attention. So also, in Bain, it indicated the same treatment be given those who have no direct appeal due to their entering into a plea agreement when the matter is brought to their attention via a collateral motion.

The error in Petitioner's case that is in direct and express conflict with King v. State, constitutes a fundamental error, as his sentences on case 90-657-CFA and 90-661-CFA have been enhanced illegally to twice the statutory maximum for a third degree felony, i.e. 10 years, when by the court's own use of its discretion, precluded it from ever sentencing him to more than 5 years after it initially chose to sentence him to probation instead of habitualizing him.

As stated by the 2nd DCA in Bain v. State when it comes to fundamental error:

> The latter fact underscores the importance of the fundamental error doctrine. Its purpose extends beyond the interests of a particular aggrieved party; it protects the interests of justice itself. It embodies the courts' recognition that some errors are of such a magnitude that failure to correct them would undermine the integrity of our system of justice. See Hagan v. Sun Bank of Mid-Florida, N.A., 666 So.2d 580, 584 (Fla. 2d DCA 1996) (explaining that doctrine functions to preserve the public's confidence in the judicial system). As such, the correction of fundamental error is not merely a judicial power; it is an unrenunciable judicial duty. See In re Alkire's Estate, 142 Fla. 862, 144 Fla. 606, 198 So. 475, 482 (1940) (holding that judicial power vested by constitution cannot be abdicated in whole or part by the courts).... under the Criminal Appeal Reform Act our jurisdiction to review a sentence may be founded on an allegation either of a preserved sentencing error or of an unpreserved fundamental sentencing error. Also, if our jurisdiction is properly invoked by the allegation of any preserved or fundamental error, we have discretion to correct unpreserved nonfundamental sentencing errors

> that rise to the level of serious, patent errors... 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)). We emphasize that our use of the adjective "illegal" in this context is not confined to a sentence that exceeds the statutory maximum sentence for the crime, as the term was employed in Davis v. State, 661 So.2d 1193, 1196 (Fla.1995). In State v. Mancino, 714 So.2d 429 (Fla.1998), the supreme court disavowed the notion that under Davis only sentences that exceed statutory maximums are illegal for purposes of > rule 3.800(a). Rather, the court held, "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.' " 714 So.2d at 433. We believe that any sentence to which our judiciary is constrained to attach the opprobrium "illegal" must be corrected as fundamental error.

Therefore, Petitioner contends and avers that once this patent and seriously illegal sentence became known to the appellate court, had demonstrated to it that it was not only illegal but clearly apparent on the face of the record, and that the record affirmatively demonstrated an entitlement to relief, the appellate court had

an obligation to correct said error and remand the petitioner to be resentenced, pursuant to the precedent set forward in King v. State, supra, to no more than five years across the board on all cases, pursuant to the initial sentence imposed that was not challenged by the respondent at the time of imposition, and thus was, "locked in concrete."

Instead, the appellate court chose to ignore the holdings of this Court in King v. State, supra; State v. Mancino, supra; Maddox v. State, supra; and the holdings of its sister courts in Bain v. State, supra; and Baker v. State, supra, and in direct and express conflict with those holdings, specifically and undeniably stated in its written order of denial that the illegal habitual offender sentences that extended Petitioner's sentences to twice that legally authorized by law, was "meritless" and refused to address it.

Thus, the appellate court's order is in direct and express conflict with this Court's cited holdings, and its sister court's cited holdings, in addition to their respective progeny. There is no gray area to walk on here. Either the habitual offender sentences are illegal under King v. State, or they are not. The record clearly speaks to the fact that they are. At no time in any of the proceedings have the state or any court produced any record to refute Petitioner's claim, which was and is clearly supported by his initial judgment and sentencing papers, and the oral sentence pronounced in open court, and quoted in the statement of facts.

CONCLUSION

WHEREFORE, Petitioner has fully demonstrated to this Court that his habitual offender sentences are illegal and are imposed in direct conflict with the holdings of this Court in King v. State, supra. He has demonstrated that the illegality of the sentences rises to the level of fundamental error, that the error is patent and serious, and that it is plainly apparent on the face of the record.

Petitioner has also materially demonstrated to this Court how the sentences came to be as a result of the misrepresentation of the respondent in open court, and how the trial court and appellate court, for reasons unknown to the Petitioner, chose to ignore their illegality instead of correcting them, when the error was brought to their attention on a properly filed motion to correct sentence pursuant to Fla.R.Crim.P. 3.800(a) and a timely filed appeal under Rule 9.140(j), Fla.R.App.P..

Petitioner has also demonstrated to this court what he believes to be the proper standard or review under King v. State; Maddox v. State; State v. Mancino; Baker v. State, and Bain v. State, clearly showing both the conflict and Petitioner's entitlement to relief.

Wherefore, Petitioner respectfully encourages this Honorable Court to correct the conflict, and remand the matter for further proceedings so that Petitioner can be appropriately resentenced to a legal, guideline sentence.

OATH

I, Alvin Cooper Mack, under the penalty of perjury, and pursuant to Fla. Stat. 92.525(2), do hereby affirm that I am the petitioner in the foregoing Initial Brief, that I have read and am familiar with its contents, and that they are true and correct.

Executed this 16th day of April, 2001, in Palm Beach County, Florida.

Alvin Cooper Mack, DC# 699143

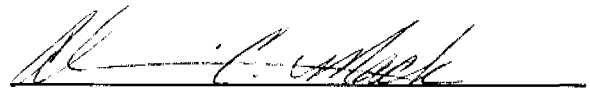
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to the Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118 by U. S. Mail this 16th day of April, 2001, by the undersigned.

Alvin Cooper Mack, DC# 699143
South Bay Correctional Facility
Post Office Box 7171
South Bay, Florida 33493-7171

CERTIFICATE OF COMPLIANCE

I, the Petitioner, Alvin Cooper Mack, appearing pro se, hereby certifies that this Initial Brief is submitted in compliance as to type size, pursuant to Rule 9.210, Fla.R.App.P., as this Brief is computer typed in Times New Roman 14.



Alvin Cooper Mack, DC# 699143
Pro se

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2000

ALVIN COOPER MACK,

Appellant,

v. CASE NO. 5D00-1274

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed September 29, 2000

3.800 Appeal from the Circuit Court
for Brevard County,
John Dean Moxley, Jr., Judge.

Alvin Cooper Mack, South Bay, Pro se.

Robert A. Butterworth, Attorney General,
Tallahassee, and Alfred Washington, Jr.,
Assistant Attorney General, Daytona Beach,
for Appellee.

PER CURIAM.

Alvin Cooper Mack appeals the summary denial of his motion to correct sentence filed pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure. Mack was sentenced under Count II in trial court case number 90-2582 to three and one-half years incarceration as a habitual offender. The true split sentence required Mack to serve two years of the three and one-half year sentence. The balance of incarceration, one and one-half years, would be suspended and probation imposed.

Having served the first two years of his sentence, Mack was placed on probation.

He was then sentenced to five years incarceration upon violating the terms of that probation. We agree with Mack that when he was resentenced to five years incarceration, a sentence that exceeded the three and one-half years originally imposed, he was sentenced a second time for the same offense and for a longer time than originally imposed in violation of double jeopardy principles. *See Poore v. State*, 531 So. 2d 161 (Fla. 1988).

In *Jefferson v. State*, 677 So. 2d 29 (Fla. 1st DCA 1996), the First District held that when a trial court imposes a sentence after revoking the probationary portion of a true split sentence, any sentencing error would not result in an illegal sentence unless the statutory maximum penalty was exceeded. If we followed *Jefferson*, Mack's five year habitual offender sentence that was imposed after the probationary portion of his true split sentence was revoked would not be illegal because it did not exceed the enhanced statutory maximum penalty under the habitual offender statute of ten years incarceration for grand theft, a third degree felony. However, we do not choose to follow *Jefferson* in this case. Instead we find Mack's sentence to be an illegal sentence that is apparent on the face of the record and subject to correction under Rule 3.800(a). *See State v. Mancino*, 714 So. 2d 429 (Fla. 1998). Included in the record before this court is the State's appendix that shows (1) the sentence imposed in case number 90-2582, when Mack received five years incarceration on count II after his probation was revoked, and (2) the original true split sentence for count II verifying Mack's claim of error.

We find no merit in the remaining points raised by Mack and affirm the order denying relief as to all other cases except case number 90-2582. As to case number 90-2582, we reverse the order denying relief and remand for resentencing on count II to the

unserved portion of the three and one-half years incarceration.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

PETERSON, GRIFFIN and SAWAYA, JJ., concur.