IN THE SUPREME COURT OF FLORIDA

JOHNNY E. BRANNON, :

Petitioner, :

VS. : CASE NO. SC01-1538

STATE OF FLORIDA, :

Respondent. :

_____:

INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Johnny E. Brannon was the defendant in the trial court, and the appellant before the First District Court of Appeal. Brannon v. State 791 So.2d 1154 (Fla. 1st DCA July 10, 2001) (*op. on motion for rehearing, rehearing en banc or certifica-tion*).

The original one-volume record on appeal was missing a few pages. It was replaced with another one-volume record, which will be referred to as "R."

II STATEMENT OF THE CASE AND FACTS

Petitioner, Johnnie E. Brannon, was charged by information filed October 15, 1998, in Taylor County, with two counts each of possession of cocaine with intent to sell and sale, one incident allegedly occurred July 16, 1998, the other August 21, 1998 (R 3).

March 22, 1999, the state filed notice of intention to seek habitual offender sentencing (R 37).

April 8, 1999, Brannon pleaded guilty to one count each of possession with intent to sell and sale (R 82), and was placed on 4 years drug offender probation, with a condition that he serve 18 months in a "jailbed program," concurrent, with credit for time served of 215 days (R 43-46). He was also ordered to perform 100 hours community service work and pay various court costs, fees and a public defender lien; he had a curfew and his driver's license was revoked for 2 years. Brannon was adjudged an habitual offender (R 45).

His presumptive guidelines sentence was 71.2 months, with a range of 53.4 to 89 months prison (5.93 years, with a range of 4.45 to 7.4 years) (R 47-50). Brannon signed a written offer of plea, which included "agree that the state can seek habitual offender status" (R 39). The state nol-prossed Counts I and II (R 40).

An affidavit of violation of probation was filed September 23, 1999, alleging Brannon failed to file one monthly report; changed his residence and employment without knowledge or con-sent of probation officer, and his address was unknown; tested positive for and admitted cocaine use on two occasions and marijuana use once; failed to show at an appointment for drug/ alcohol evaluation; failed to make payments (R 55).

October 14, 1999, Brannon pleaded no contest/admitted the violations (R 103-04). The trial court sentenced him to 15 years in prison, concurrent, as an habitual offender, with credit for time served of 237 days (R 64-70). Another guide-lines scoresheet was prepared, showing a presumptive sentence of 77.2 months, with a range of 57.9 to 96.5 months (6.43 years, with a range of 4.825 to 8.04 years)(R 72-73). The court entered a written revocation order (R 119).

Notice of appeal was timely filed (R 120).

Another case will affect the court's decision in this case: February 20, 2001, the First District Court decided Harvey v. State, 786 So.2d 28 (Fla. 1st DCA 2001). Harvey raised a Heggs, infra, issue for the first time on appeal, without having filed in the trial court a motion to correct sentencing error under Rule 3.800(b)(2), Florida Rules of Crim-inal Procedure. The district court relied upon Maddox, infra, and held Harvey had failed to preserve his single-subject argu-ment under Heggs because neither trial nor

appellate counsel sought relief in the trial court under Rule 3.800(b).

Harvey moved for rehearing, rehearing en banc and certifi-cation, and the state moved for clarification. May 1, 2001, the district court denied rehearing, but certified the follow-ing as questions of great public importance:

> WHETHER THE CONCEPT OF FUNDAMENTAL SENTENCING ERROR, AS DISCUSSED IN MADDOX V. STATE, 760 SO.2D 89 (FLA. 2000), APPLIES TO DEFENDANTS WHO COULD HAVE AVAILED THEMSELVES OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCE-DURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO.2D 1015 (FLA. 1999)?
>
> and
>
> WHETHER AN APPELLANT IN THE FIRST DISTRICT COURT OF APPEAL, WHO COULD HAVE AVAILED HIMSELF OF THE PROCE-DURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO.2D 1015 (FLA. 1999), HAD AN OBLIGATION TO RAISE HIS SINGLE SUBJECT CHALLENGE TO THE 1995 SENTENCING GUIDELINES IN THE TRIAL COURT, DESPITE THE EXISTENCE OF ADVERSE PRECEDENT IN TRAPP V. STATE, 736 SO.2D 736 (FLA. 1ST DCA 1999), IN ORDER TO LATER OBTAIN APPELLATE RELIEF BASED ON HEGGS V. STATE, 759 SO. 2D 620 (FLA. 2000)?

Id. This court has ordered briefs on the merits in Harvey, which is pending a decision on jurisdiction in this court.

March 19, 2001, while rehearing in Harvey was pending in the district court, that court decided the instant case. The court held the sentencing error was unpreserved, and the court did not reach the merits because the appeal fell

outside the Maddox window, citing Harvey and Reese v. State, 763 So.2d 537 (Fla. 4th DCA 2000). Brannon, supra.

Brannon moved for rehearing. He argued that before Mad-dox, the sentencing errors in his case were held to be funda-mental. Insofar as Maddox set out a new standard for raising fundamental sentencing errors in the trial court, he could not be held to a standard set out for the first time in Maddox, because his initial brief had been filed before Maddox was decided. The First District interpreted this as an argument that Maddox should be applied prospectively only, and held that only this court had the authority to make that decision:

> [Brannon] further argues that, even if the court adheres to its Harvey decision, and [Maddox] articu-lated a policy that all sentencing errors should be raised in a [Rule] 3.800(b)(2) motion, Maddox should be given prospective effect only. Further, [Brannon] argues that, since his initial brief was filed before the Florida Supreme Court decided Maddox, this court is not precluded from ruling on his unpreserved fundamental sentencing errors. We do not agree.
>
> We do not have the authority to apply Maddox only in a prospective manner. The Florida Supreme Court has the "sole power" to determine whether its deci-sion should be prospective or retroactive in effect. (cites omitted)
>
> However, we clarify our prior opinion. . .to make it clear that, because [Brannon]'s initial brief was filed after the close of the window period provided for in Maddox, we do not reach the merits of either of the unpreserved sentencing errors raised by appel-lant. While [Brannon]'s principle contention. . . concerned the trial court's alleged error in sen-tencing him as a habitual offender after he violated his probation, [he] also argued that the trial court committed fundamental error by imposing a habitual offender

> sentence for [his] conviction for possession of cocaine with intent to sell. See State v. McKnight, 764 So.2d 574 (Fla.2000)(affirming this court's decision that it could correct as fundamental error McKnight's 10-year habitual felony offender sentence for possession of cocaine noting this error was "correctable during the window period discussed in Maddox.").

791 So.2d at 1155-56. The court then certified two questions.

The first was identical to the first question certified in Harvey. The second was:

> WHERE THE DISTRICT COURT PREVIOUSLY RULED THAT A SENTENCING ISSUE IS FUNDAMENTAL ERROR, THE INITIAL BRIEF WAS FILED AFTER THE EFFECTIVE DATE OF RULE 3.800(B)(2), FLORIDA RULES OF CRIMINAL PROCEDURE, BUT BEFORE THE FLORIDA SUPREME COURT DECIDED MADDOX V. STATE, DOES MADDOX PRECLUDE THE DISTRICT COURT FROM RULING ON THE ISSUE AS A MATTER OF FUNDAMENTAL ERROR?

Notice to invoke discretionary jurisdiction was timely filed July 16, 2001.

III SUMMARY OF THE ARGUMENT

Issue I: The first question certified by the court below concerns whether the doctrine of fundamental sentencing error, where such an error can be corrected for the first time on appeal, still applies after Florida Rule Of Criminal Procedure 3.800(b) was modified effective November 11, 1999. Petitioner argues the answer to the question is "yes." Maddox was expressly limited to cases where the initial briefs were filed prior to November 11, 1999, thus the language pertaining to a "window period" is mere dicta. The Criminal Appeal Reform Act specifically recognizes the doctrine of fundamental error and does not distinguish between trial and sentencing error. Thus, properly understood, Maddox does not support the district court's opinion in Harvey.

The Court's authority to regulate "practice and procedure" does not allow it to abrogate substantive rights granted by both the constitution and the legislature. Even if it were the intent of the court in Maddox to totally eliminate the doctrine of fundamental sentencing error, and the Court had authority to do so pursuant to its obligation to regulate "practice and procedure," the concept of fair notice embodied within the Due Process Clause requires that the "window" remain open until the date Maddox was decided, May 11, 2000.

Issue II: Petitioner was entitled to rely on precedential cases from the First District that held his sentencing issues were fundamental error which could be raised for the first time on direct appeal. His initial brief was filed before Maddox was decided. Assuming arguendo that Maddox requires funda-mental sentencing errors to be raised on a 3.800(b)(2) motion, although there was no express holding to that effect, peti-tioner could not comply with a rule from a case which did not exist at the time he filed his initial brief.

Issue III: On the merits, the sentencing errors are that the trial court imposed an habitual offender sentence for pos-session of cocaine, although it is statutorily excluded from habitual offender sentencing, and that the trial court impro-perly sentenced Brannon as an habitual offender for the first time on violation of probation.

IV ARGUMENT

ISSUE I - CERTIFIED QUESTION

WHETHER THE CONCEPT OF FUNDAMENTAL SENTENCING ERROR, AS DISCUSSED IN MADDOX V. STATE, 760 SO. 2D 89 (FLA. 2000), APPLIES TO DEFENDANT WHO COULD HAVE AVAILED THEMSELVES OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCE-DURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.111(E) AND 3.800 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.020(H), 9.140, AND 9.600, 761 SO. 2D 1015 (FLA. 1999)?

Petitioner contends that the answer to the above question, the first of two certified by the district court in Harvey and his own case is "yes". The standard of review is *de novo*.

In Maddox, the Court was construing the effect the Crimi-nal Appeal Reform Act, section 924.051, Florida Statutes (Supp. 1996), had upon various types of unpreserved sentencing errors. The Court ruled in Maddox that an unpreserved sentencing error can be corrected as fundamental error for the first time on direct appeal where the error is "both patent and serious." 760 So.2d at 99.

In Harvey, the district court recognized the defendant's 9-year sentence was imposed pursuant to a scoresheet prepared under the 1995 guidelines. Under Heggs, however, Harvey was entitled to be resentenced pursuant to the 1994 guidelines. Harvey's 9-year sentence was an upward departure from the 1994 guidelines without the required written reasons. Maddox determined this to be a fundamental sentencing error. 760 So.2d at 106-108. Moreover, Heggs

itself deems the error fundamental. Accord, State v. Johnson, 616 So.2d 1 (Fla. 1993).

Without question, the sentencing error in Harvey's case is "fundamental" under Heggs, Johnson and Maddox. The sentencing errors in Brannon's case here are also fundamental, but because they are not as brief as Harvey's Heggs issue, the substantive argument on the sentencing errors is presented in Issue III, rather than here. In any event, the First District did not decide the sentencing issues on the merits.

The issue posed by the first certified question is whether even fundamental sentencing errors must be first presented to the trial court pursuant to Florida Rule Of Criminal Procedure in cases where the first appellate brief was filed on or after November 12, 1999, the date the Court issued its decision in Amendments To Florida Rules Of Criminal Procedure 3.111(e) And 3.800 And Florida Rules Of Appellate Procedure 9.020(h), 9.140, and 9.600, 761 So.2d 1015 (Fla. 2000)("Amendments II"). The first appellate brief in this case was filed April 10, 2000, before Maddox was decided.

Petitioner asserts the doctrine of fundamental sentencing error as defined in Maddox, permitting such error to be corrected for the first time on appeal, has survived the establishment of the right to file a motion in the trial court pursuant to Florida Rule Of Criminal Procedure

3.800(b)(2) prior to the filing of the first brief.

First of all, nothing in the Amendments II opinion itself suggests in the slightest that ***fundamental*** sentencing errors must always be raised via Rule 3.800(b)(2).

Second, Maddox itself recognizes that the doctrine of "fundamental error" has survived the Criminal Appeal Reform Act; indeed, it is expressly referenced in the statutory language:

> Section 924.051(3) specifically gives defendants the right to raise, and appellate courts the authority to correct, "fundamental error." The Act neither de-fines "fundamental error" nor differentiates between trial and sentencing error. It is certainly reason-able to assume that, rather than attempting to alter the definition of fundamental error as it evolved through case law, the Legislature intentionally deferred to the judicially created definition of "fundamental error."

760 So.2d at 95.

Maddox expressly recognizes that "fundamental error" applies to both trial and sentencing errors and even the Appeal Reform Act allows parties to raise, and the courts to correct, fundamental errors. Maddox certainly does not ***hold*** that, after the date of Amendments II, a party must first raise fundamental sentencing errors in the trial court.

In point of fact, the Court in Maddox observed:

> In this opinion we address ***only*** the question of whether unpreserved sentencing errors should be corrected in those noncapital criminal appeals filed in the window period between the effective date of the Act and the effective date of our recent amend-ment to rule 3.800(b)....

760 So.2d at 95, note 4 (emphasis supplied).

Thus, with all due respect to the Court, petitioner argues that to the extent certain language in Maddox appears to con-cern cases where the initial brief was filed after Amendments II was decided November 12, 1999, that language is mere dicta.

Petitioner contends that Maddox, properly understood, means that, even subsequent to Amendments II, any type of error can be raised for the first time on appeal if fundamental, whe-ther the error be fundamental trial or fundamental sentencing error.

To rule otherwise would effectively amend Section 924.051(3), Florida Statutes (Supp. 1996) as follows:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged or, if not properly preserved, would consti-tute fundamental ***[trial]*** error. A judgment or sen-tence may be reversed on appeal only when an appel-late court determines after a review of the complete record that prejudicial error occurred and was pro-perly preserved in the trial court or, if not proper-ly preserved, would constitute fundamental ***[trial]*** error.

(emphasis supplied). The bracketed, emphasized language above illustrates how the district court's Harvey decision has amended the statute. The judiciary simply does not have the constitutional authority to effect such an amendment.

The right of a citizen of Florida to appeal in a criminal case is grounded in the Florida Constitution; a citizen has a constitutional right to appeal in a criminal case. Amendments to the Florida Rules of Criminal Procedure, 696 So.2d 1103, 1105 (Fla. 1996)("Amendments I").

The legislature is empowered to enact "substantive law," which is that part of the law which creates, defines, and regulates rights, or that part of law which courts are established to administer, and it includes those rules and principles which fix and declare the primary rights of individuals. Haven Federal Savings & Loan Associ-ation v. Kirian, 579 So.2d 730 (Fla. 1991). The Court's con-stitutional authority to regulate "practice and procedure" does not allow the Court to abrogate or modify substantive law. State v. Garcia, 229 So.2d 236 (Fla. 1969) and Julian v. Lee, 473 So.2d 736 (Fla. 5th DCA 1985).

Here, the legislature has defined the parameters of the constitutional right to appeal by enacting the substantive law known as the Criminal Appeal Reform Act. As Maddox itself recognizes, the Act does not eliminate the doctrine of funda-mental sentencing error and the courts have the power to cor-rect such errors. With all due respect, the Court's authority to regulate practice and procedure does not give it the power to unilaterally do away with the doctrine of fundamental sen-tencing error and declare that even fundamental sentencing errors must be first raised via the changes to Rule 3.800(b)(2) made in Amendments II.

Thus, to the extent dicta in Maddox tends to support what the district court has done in Harvey, such dicta simply cannot be squared with the separation of powers principles of the Florida Constitution.

Even if the dicta in Maddox was intended to be construed in the manner the First District interpreted it in Harvey, petitioner contends the window period should be deemed to remain open until May 11, 2000, the date Maddox was decided, rather than November 12, 1999, the date Amendments II was decided. This is required by the "fair notice" aspects of the Due Process Clause of both the state and federal constitutions. Rogers v. Tennessee 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) and Bouie v. City Of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

In both Bouie and Rogers, it was held that judicial abrogation of a legal doctrine by an appellate court decision violates the "fair warning" principle of the Due Process Clause and may not be given retroactive effect where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.

Here, nothing in either the Act or Amendments II placed the bench and bar on notice that ***fundamental*** sentencing errors could not be corrected on direct appeal, but must instead be always raised under Rule 3.800(b)(2), especially since funda-mental error was expressly referenced in the Act. At best, this did not occur until Maddox was decided May 11, 2000, with its language concerning a "window period," which was after petitioner in this case raised fundamental sentencing errors in the district court. It is

also noteworthy that in Harvey, the state conceded error in the district court.

In Florida, the proposition that appellate courts have the authority to correct fundamental sentencing errors for the first time on direct appeal goes back to at ***least*** to the 1959 decision of the Court in Stanford v. State, 110 So.2d 1 (Fla. 1959)(dissenting opinion). In 1965, the Court in Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965), held that where the defendant received a 30-year sentence where the statutory maximum was 20 years, it would be corrected via habeas corpus due to "fundamental error appearing on the face of the sentence which renders it void." *Id*.

Thus, for at least 40 years the doctrine of fundamental sentencing error, where the error can be corrected by an appellate court even if not preserved in the trial court, has been part and parcel of the business of Florida appellate courts. Not until Maddox was decided was anyone on notice that even fundamental sentencing errors must now be raised via Rule 3.800(2)(b). To rule that the "window period" mentioned in Maddox closed November 12, 1999, before Maddox was decided, is a violation of the Due Process Clause as construed in Bouie and Rogers. In order to comply with the fair notice requirement, the window must remain open until May 11, 2000, the date of Maddox, rather than November 12, 1999, the date of Amendments II.

ISSUE II - CERTIFIED QUESTION

WHERE THE DISTRICT COURT PREVIOUSLY RULED THAT A SENTENCING ISSUE IS FUNDAMENTAL ERROR, THE INITIAL BRIEF WAS FILED AFTER THE EFFECTIVE DATE OF RULE 3.800(B)(2), FLORIDA RULES OF CRIMINAL PROCEDURE, BUT BEFORE THE FLORIDA SUPREME COURT DECIDED MADDOX V. STATE, DOES MADDOX PRECLUDE THE DISTRICT COURT FROM RULING ON THE ISSUE AS A MATTER OF FUNDAMENTAL ERROR?

Petitioner contends the answer to this certified question is "no."

While it is not very smooth to discuss petitioner's pro-cedural right to rely in his appeal on precedence holding the sentencing errors in his case to be fundamental, without dis-cussing the substance of the sentencing errors, the certified question addresses only procedure. Petitioner discusses the substance of the errors in Issue III, infra.

The essence of this argument, acknowledged in the First District's opinion, is that there was controlling caselaw in the First District which held the two sentencing errors to be fundamental error. Assuming arguendo that Maddox held even fundamental sentencing errors must or should be raised on a 3.800(b)(2) motion, that point was far from clear before Maddox was decided in May, 2000. Brannon's initial brief was filed in April, 2000, before Maddox was decided.

At the time his initial brief was filed, Nelson, infra, was controlling caselaw in the First District which held an habitual offender sentence could not be imposed for possession of cocaine, and Nelson held this issue could be raised on appeal as fundamental error. Spencer, infra, was

controlling caselaw in the First District which held an habitual offender sentence could not be imposed for the first time on violation of probation, and Spencer held this issue could be raised on appeal as funda-mental error.

Since Maddox upheld the concept of fundamental error, it is far from clear how it precludes Brannon from raising funda-mental sentencing errors for the first time on appeal, but for the First District's decision in Harvey. Whatever the resolu-tion of that issue, however, Brannon cannot fairly be held to a procedure - which must be employed before the initial brief is filed - when that procedure was not articulated - assuming arguendo that Maddox articulated a policy that **all** sentencing errors must be raised in a 3.800(b)(2) motion - until after his initial brief was filed.

Petitioner was entitled to rely on precedential cases from the First District that held these sentencing issues were fun-damental error which could be raised for the first time on direct appeal. Assuming arguendo that Maddox requires funda-mental sentencing errors to be raised on a 3.800(b)(2) motion, although there was no express holding to that effect, peti-tioner could not comply with a rule from a case which did not exist at the time he filed his initial brief.

ISSUE III - THE SENTENCING ERRORS

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN IMPOS-ING AN HABITUAL OFFENDER FOR THE FIRST TIME ON VIOLA-TION OF PROBATION, AND IN IMPOSING AN HABITUAL OFFEN-DER SENTENCE FOR POSSESSION OF COCAINE.

A. No habitual offender sentence for possession

It is well-settled that any type of possession of cocaine, including possession with intent to sell, is statutorily dis-qualified from habitual offender sentencing. Brown v. State, 744 So.2d 1184, 1885 (Fla. 2d DCA 1999).

In Gregory v. State, 739 So.2d 100 (Fla. 2d DCA 1999), the Second District held that, under its decision in Denson v. State, 711 So.2d 1225 (Fla. 2d DCA 1998), an habitual offender sentence for an excluded offense was illegal or a "serious, patent sentencing error," which could be corrected on appeal even though there had been no objection in the trial court. The First District Court also has characterized an habitual offender sentence for felony petit theft - another crime sta-tutorily exempt from habitual offender sentencing - as creating an illegal sentence and fundamental error. Nelson v. State, 719 So.2d 1230, 1231 (Fla. 1st DCA 1998)(*gen. div. en banc*).

Maddox approved the First District's decision in Nelson and the Second District's in Denson:

> Because we find that improper habitualization of the defendant contrary to specific statutory requirements is a patent, serious error that has a quantifiable effect on the length of the

> defendant's incarcera-tion, **we find that this type of error should be cor-rected on direct appeal as fundamental.** For these reasons we approve the First District's opinions in McKnight and Nelson and the Second District's opinion in Denson on this issue. (emphasis added)

760 So.2d at 102.

As argued in Issue II, even if after Maddox the rule is that fundamental sentencing errors must or should be raised on a 3.800(b)(2) motion, that point was far from clear before Maddox was decided in May, 2000. Brannon's initial brief was filed in April, 2000 before Maddox was decided. At the time his initial brief was filed, Nelson was controlling caselaw in the First District, and Nelson held this issue could be raised on appeal as fundamental error. Brannon cannot reasonably be held to a rule established after he filed his initial brief.

B. Habitual offender sentence may not be imposed for first time on violation of probation

In Spencer v. State, 739 So.2d 1247 (Fla. 1st DCA 1999), the First District held that imposing an habitual offender sentence for the first time on violation of probation created an illegal sentence, which was fundamental error which could be raised for the first time on appeal. The court said:

> An illegal sentence is fundamental error which can be remedied at any time, including on direct appeal. See Nelson v. State, [supra]. The sentence [Spencer] received upon revocation of community control was illegal because it "patently fail[ed] to comport with statutory or

> constitutional limitations." State v. Mancino, 714 So.2d 429, 433 (Fla. 1998). When a sen-tence has been illegally increased upon resentencing, nothing prevents a reviewing court's correcting the sentence that results. See Hopping v. State, 708 So.2d 263, 265 (Fla. 1998); House v. State, 696 So.2d 515 (Fla. 4th DCA 1997).

739 So.2d at 1248.

So, again, at the time the initial brief was filed in this case, Maddox had not yet been decided, and First District pre-cedents held this issue was fundamental error which could be raised for the first time on appeal, and petitioner was entitled to rely on these cases.

Undersigned counsel is proceeding on the assumption that this court is likely to reach only the procedural issues, and not the substantive sentencing issues. Nevertheless, to be candid with the court, this issue, whether an habitual offender sentence could be imposed on Brannon for the first time on violation of probation, is far more complicated than the cite to Spencer might indicate.

The resolution of this issue requires reconciling what petitioner contends are the essentially irreconcilable differ-ences between this court’s opinions in Marvin Lee King and Geohagen, and the district court opinions in Welling and Aaron Calvin King. Marvin Lee King v. State, 681 So.2d 1136 (Fla. 1996); Geohagen v. State, 639 So.2d 611 (Fla. 1994); Welling v. State, 748 So.2d 314 (Fla. 4th DCA 1999)(*en banc*), review denied, 770 So.2d 163 (Fla. 2000), Aaron Calvin King v. State, 597 So.2d 309 (2d DCA), review

denied, 602 So.2d 942 (Fla. 1992).

At the heart of this issue are two problems. First is the inescapable fact that probation and habitual offender sentences are simply incompatible; they start from completely opposite assumptions. The focus of the habitual offender statute, above all, is the protection of the public. If an enhanced sentence is necessary to protect the public, then probation alone is not appropriate. If probation is appropriate, then an enhanced sentence is not necessary. Combining these disparate ideas leads to the inconsistent results illustrated in these cases.

Second, under the circumstances of the instant case, where the trial court does not impose an habitual offender sentence initially, the sentence imposed must necessarily be character-ized as a guidelines sentence. Geohagen, Marvin Lee King and Welling say so, and Aaron Calvin King at least suggests it. Undersigned counsel suggests Welling is the rational limitation on Aaron Calvin King. Rather than trying to identify probation as habitual or non-habitual, courts should find it to be non-habitual unless, as in Welling, the court imposes a sentence of incarceration which could **only** be authorized by the habitual offender statute, and then suspends it. That approach might reconcile the disparities.

When Brannon was first sentenced, the judge found he qualified as an habitual offender, but did not impose

sentence as an habitual offender. Rather, he placed Brannon on proba-tion with a condition that he serve 18 months in a "jail bed" program. Even assuming Brannon were on notice that the court intended to sentence him as an habitual offender were he to violate probation, he contends that imposing a non-habitual sentence initially precluded the court from imposing an habi-tual offender sentence for the first time on violation of probation, under Marvin Lee King.

V CONCLUSION

Based upon the foregoing analysis, arguments, and authori-ties, petitioner urges the Court to answer the first certified question "yes," and the second question "no." Petitioner requests the Court to quash Harvey and Brannon, vacate his sentence, and remand with directions to resentence him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Trisha E. Meggs, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Johnnie E. Brannon, inmate no. H049195, Jackson Correctional Institution, 5563 10th St., Malone, FL 32445, this _____ day of October, 2001.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER