IN THE SUPREME COURT OF FLORIDA

JOHNNY E. BRANNON, :

Petitioner, :

v. : CASE NO. SC01-1538

THE STATE OF FLORIDA, :

Respondent, :

----------/

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I 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 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)?

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?

It is difficult to treat these two interrelated issues discretely in the reply brief, so petitioner has combined them.

To summarize petitioner's argument, is it fair under due process to apply a rule announced in Maddox to an appellant whose initial brief was filed before Maddox was decided?

Maddox v. State, 760 So.2d 89 (Fla. 2000). Petitioner contends the answer is no. Assuming arguendo that Maddox sets out a rule that even fundamental sentencing errors must be raised first in the trial court, and a motion under Rule 3.800(b)(2), Florida Rules of Criminal Procedure, must be filed before the initial brief is filed, that rule cannot apply to an appellant, like petitioner Brannon, whose initial brief was filed before Maddox was decided.

Assuming arguendo that Maddox receded from longstanding precedent regarding fundamental error - which it did not do expressly, so could only have done sub silentio - petitioner had no notice the court would create such a rule **after** the time in which he could have complied with it. Thus, such a rule cannot fairly be applied to petitioner.

At the time the initial brief in this case was filed in the district court, neither Rule 3.800(b) itself nor any case had applied the rule to fundamental sentencing errors of a type long held to be raisable on appeal, so petitioner was not on notice that the rule abrogated longstanding caselaw.

Petitioner would point out that the state's answer brief is silent on the due process fair notice argument made in his initial brief. That is, if Maddox truly intended to abolish the doctrine of fundamental sentencing error - despite the legislative will that such error exists - such abolition could not constitutionally occur until after Maddox was decided. To apply such a rule to a case in which the initial brief was

filed before Maddox was decided violates the fair notice aspect of the due process clause. See Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001); Bouie v. City Of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). Petitioner contends the state's failure to address this issue is a tacit admission of its validity. Thus, at a minimum, the court should hold that Maddox applies prospectively only to cases where the notice of appeal was filed after May 11, 2000.

Before proceeding, petitioner wishes to clarify that, while it may mean something else in a different context, "fundamental sentencing error" in this case means an error which can be raised on direct appeal, even though not objected to or otherwise preserved in the trial court. The ability to raise an issue on appeal which has not been preserved is the whole definition of fundamental error in this context.

The state argues that the First District Court's first certified question misunderstands this court's decision in Maddox and that Maddox did not eliminate or change the concept of fundamental sentencing error (State's Brief (SB), p.6). Rather, according to the state, "it simply provided a fail safe remedy under which all sentencing errors had to be first raised in the trial court" (SB-7). So, according to the state, fundamental sentencing error which can be raised for the first time on appeal and need not be raised in the trial court still exists, but first, it must be raised in the trial court. This is circular, illogical, contradictory reasoning. If fundamen-

tal error exists after Maddox, it can be raised for the first time on appeal and need not be raised first in the trial court.

Moreover, fundamental error, embodied in section 924.051, Florida Statutes, is a legislative prerogative which this court may not ignore. Indeed, this court's constitutional authority to regulate "practice and procedure" does not allow it to abrogate or modify substantive law. State v. Garcia, 229 So.2d 236 (Fla. 1969); Julian v. Lee, 473 So.2d 736 (Fla. 5th DCA 19885). Again, the state is silent on petitioner's argument on the proper construction of the statute.

Further, besides the fact that, under the state constitutional separation of powers, the court is not empowered to eliminate the doctrine of fundamental error, to do so would raise serious issues under the due process clause. The concept of fundamental error is equated with a denial of due process. "For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." Castor v. State, 365 So.2d 701, 704, n.7 (Fla. 1978), citing State v. Smith, 240 So.2d 807 (Fla. 1970). Petitioner contends that neither this court nor the legislature can lawfully, consistent with due process, eliminate the concept of fundamental error, sentencing or otherwise.

Petitioner further notes that retention of the concept of fundamental sentencing error in post-Maddox appeal would not open the floodgates to fundamental sentencing error claims. If

there is the slightest question of whether a sentencing error is fundamental, the prudent course of action is to raise it in the trial court via Rule 3.800(b). However, where the error is clearly within the "patent and serious" fundamental error test of Maddox, it is proper to raise the issue for the first time on appeal, and it is equally just and proper for the court to order such errors corrected.

Petitioner contends that certain sentencing errors are so fundamental that they must be addressed on appeal, even if not raised in the trial court. Such errors would include 1) sentences based on a facially unconstitutional statute, such as the Heggs issue in Harvey, a companion case to this one; 2) sentences not authorized a) by statute, such as the habitual offender sentence for possession of cocaine imposed on Brannon; or b) by caselaw, such as the habitual offender sentence imposed on Brannon for the first time on violation of probation. Heggs v. State, 759 So.2d 620 (Fla. 2000); Harvey v. State, 786 So.2d 28 (Fla. 1st DCA 2001), review granted, 797 So.2d 585 (Fla. 2001).

The first of Brannon's issues - the habitual offender sentence for possession - clearly violates the applicable statute, rendering the sentence illegal, so it must be reversed on appeal. The **principle** involved in the second issue is clearcut, but the factual circumstances under which an habitual offender may not be imposed for the first time on violation of probation are less clearcut, given inconsistent caselaw on the

issue. Had that issue been presented to the trial court, it almost certainly would have resulted in appeal by whichever party lost.

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 due process. 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 the rule was amended.

ISSUE III - THE SENTENCING ERRORS

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN IMPOSING AN HABITUAL OFFENDER FOR THE FIRST TIME ON VIOLATION OF PROBATION, AND IN IMPOSING AN HABITUAL OFFENDER SENTENCE FOR POSSESSION OF COCAINE.

A. No habitual offender sentence for possession

In making no substantive argument on this issue, the state tacitly concedes the merits, but argues the error need not be corrected because it does not affect the length of sentence Brannon must serve, the state necessarily assuming the concurrent sentence will be affirmed.

This Court has held to the contrary:

> The State also argues that Leonard has suffered no prejudice from the erroneous imposition of this illegal sentence because it is to be served concurrently with other sentences that are unchallenged. However, the fact that the illegal sentence is to be served concurrently with another sentence does not mean that it should remain uncorrected.

Leonard v. State, 760 So.2d 114, 116 n.4 (Fla. 2000).

An habitual offender sentence for possession is illegal; it must be reversed.

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

In his initial brief, petitioner tried to balance the perceived need to make some demonstration that the sentencing errors were fundamental as the foundation for the procedural questions, with the fact that the First District expressly declined to reach the merits and the certified questions pertain to procedure, not the merits. This is further complicated by petitioner's belief that the substantive issue requires the

court to reconcile two contradictory cases from this court. While the district court may be willing to attempt this reconciliation, it appears inevitable that this court will eventually have to address the question.

In any event, petitioner will reply to the state's argument, but with the caveat that this issue has not been fully briefed in this court. If this court decided to reach the merits, then petitioner would request supplemental briefing.

April 8, 1999, Brannon pleaded guilty to possession with intent to sell and sale of cocaine (R 82), and was placed on 4 years drug offender probation, with a condition that he serve 18 months in a "jailbed program," with credit for time served of 215 days (R 43-46). On the state's motion, the court adjudged him to be an habitual offender (R 45). His presumptive guidelines range was 53.4 to 89 months prison (4.45 to 7.4 years) (R 47-50). He signed a written offer of plea, which included "agree that the state can seek habitual offender status" (R 39).

When Brannon later admitted violating probation, the trial court sentenced him to 15 years as an habitual offender (R 64-70). His presumptive guidelines range was 57.9 to 96.5 months (4.825 to 8.04 years)(R 72-73).

Both parties agree that the heart of this issue is whether a court's finding that the defendant is an habitual offender, followed by sentencing him not to prison but to probation only, constitutes an habitual offender sentence, such that a true

habitual offender sentence can be imposed upon violation of probation. The state argues that probation in such a case is an habitual offender sentence, but petitioner argues that a sentence of probation only is a waiver of habitual offender sentencing. This is particularly true as this court has held that a court's finding that a defendant **qualifies** as an habitual offender is a ministerial, not discretionary, act, but the decision whether to impose an habitual offender sentence, even though the defendant qualifies, is discretionary. Marvin Lee King v. State, 681 So.2d 1136 (Fla. 1996).

The state relies on this court's decision in McKnight v. State, 616 So.2d 31 (Fla. 1993), for the proposition that a court is permitted to find a defendant to be an habitual offender but then place him on probation (SB-14).

These are the pertinent facts surrounding McKnight: In Aaron Calvin King v. State, 597 So.2d 309 (Fla. 2d DCA), review denied, 602 So.2d 942 (Fla. 1992), the Second District held the trial judge could find a defendant to be an habitual offender, but place him on probation. If the defendant violated probation, the court could then impose an habitual offender sentence. In McKnight, this court "adopted the rationale" of Aaron Calvin King.[1]

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[1]At the time the reply brief was filed in the district court, Westlaw reported 71 cases that cite Aaron King. Undersigned counsel was unable to review them all. Even a brief review will show, however, that although he was not the only judge who imposed probation on habitual offenders, a very large number of the cases citing King involved sentences imposed by a single judge, the late Harry Lee Coe.

Then, as previously discussed, in Marvin Lee King, this court held that, where the defendant is found to be an habitual offender, but is given a split sentence of a guidelines prison term followed by probation, he **cannot** be sentenced as an habitual offender if he violates probation. The court said this was a guidelines sentence followed by habitual offender probation, and this was not allowed. Footnote 8 specifically limits Aaron Calvin King's holding.

This court then decided Geohagen v. State, 639 So.2d 611 (Fla. 1994). In Geohagen, the trial court found the defendant to be an habitual offender but placed him on 5 years probation, a downward departure. The state appealed, claiming the sentence was illegal; the First District reversed, based on McKnight. This court reversed the district court, holding the sentence was not illegal, but if an habitual offender sentence is not imposed, then the trial court "must adhere" to the sentencing guidelines, therefor the court should have entered an order stating reasons for downward departure. See also State v. Rinkins, 646 So.2d 727, 729 (Fla. 1994)("by virtue of imposing a more lenient sentence than that recommended by the sentencing guidelines, the judge 'has necessarily determined that a habitual offender sentence is not necessary,'" quoting Geohagen, 639 So.2d at 612).

So, if it is a downward departure, then it must be a guidelines sentence. And if it is a guidelines sentence, then Marvin Lee King precludes the judge from imposing an habitual

offender sentence on violation of probation. Or, is it a guidelines sentence for needing a departure order under Geohagen, but a non-guidelines sentence for purposes of allowing an habitual offender sentence on violation of probation, under Aaron Calvin King?

The state argues the trial court did more than find that Brannon qualified as an habitual offender, it sentenced him as an habitual offender. Well, it found him to be an habitual offender but then sentenced him to probation (SB-16). Petitioner contends that probation is not an habitual offender sentence, thus he could not validly be sentenced as an habitual offender on violation of probation.

The state cites Welling v. State, 748 So.2d 314 (Fla. 4th DCA 1999)(*en banc*), review denied, 770 So.2d 163 (Fla. 2000), in support of its argument (SB-16), but Welling supports Brannon's claim, not the state's. Welling turns on two factors not present here:

> In 1993, [Welling] was convicted of burglary of a dwelling and pronounced a habitual felony offender by the trial court. He was then given a sentence of [30] years, **a period authorized only by the habitual offender statute**, but the court suspended the sentence with a condition of 12 to 14 months in a drug farm. In 1994, the trial court revoked. . .probation and sentenced [Welling], as a habitual offender, to 30 years. (emphasis added)

Id.

Welling was given a suspended sentence; Brannon was not; more importantly, Welling's suspended sentence - 30 years - was authorized **only** by the habitual offender statute; Brannon's

sentence was not. This was a crucial distinction for the Second District. In comparison, Brannon was initially placed solely on probation, with no suspended sentence. When he violated, he was sentenced to 15 years in prison, which is the **non-habitual** statutory maximum authorized for his second-degree felony convictions. In other words, Brannon's sentence was not one authorized only by the habitual offender statute.

In Welling, the Second District went en banc in order to recede from its previous decision in State v. Kennedy, 698 So.2d 349 (Fla. 4th DCA 1997). The court began by acknowledging a weakness in its previous opinion:

> It is apparent from our opinion in Kennedy that we equated suspending the habitual offender sentence in Kennedy with the imposition of the guideline sentence in [Marvin Lee] King. We reasoned that in each case the trial court had necessarily concluded that an enhanced sentence was not necessary in order to protect the public.

748 So.2d at 315. The court distinguished Geohagen:

> As authority in Kennedy we cited Geohagen, [supra]. Geohagen is, however, distinguishable from Kennedy. In Geohagen the trial court found defendant qualified as a habitual offender, but sentenced the defendant to only five years on probation, a downward departure from the guidelines permitted range of [2-1/2 to 5-1/2] years incarceration. On the other hand, in Kennedy, as in the present case, the number of years contained in the sentence would have been authorized only by the habitual offender statute. (footnote omitted)

Id. The court explained the salient differences thus:

> The common thread running through [Marvin Lee] King, Geohagen, and Simon is that the trial courts found the defendants. . .qualified to be habitual offenders, but the courts never imposed habitual offender sentences. Instead, the courts sentenced the defendants for a number of years which were within the

> guidelines permitted range. According to King, when the trial court declares the defendant to be a habitual offender, but imposes a sentence for a period of years which is within the guidelines, only a guideline sentence can be imposed if the defendant violates probation. In Kennedy and the present case, the trial courts declared the defendants to be habitual offenders and imposed longer than guidelines sentences authorized only by the habitual offender statute. Although there was at one time confusion as to whether trial courts could suspend habitual offender sentences, that was resolved in McKnight, [supra], in which the court held that a "trial judge has the discretion to place a habitual felony offender on probation."

Id. Although McKnight may have involved an initial sentence of probation only, neither this court's nor the district court's opinion give enough detail to know. McKnight v. State, 595 So.2d 1059 (Fla. 2d DCA 1992). However, it was crucial to the decision in Welling that a 30-year sentence, albeit suspended, was authorized only by the habitual offender statute. Because Brannon received a sentence of probation only initially, and upon violation of probation, the non-habitual maximum sentence, Welling does not apply to him, even if its rationale is eventually upheld.

Undersigned wishes to be clear that petitioner seeks a broader ruling, asking this court to recede from any holding that there is such a thing as habitual offender probation. That is, when a defendant is designated/found to be an "habitual offender," but the court places the person on a guidelines sentence or less, including a sentence of probation only, as occurred here, or a suspended sentence where the portion imposed is less than the guidelines, as in Welling, that is a

guidelines sentence, not an habitual offender sentence, and in fact waives habitual offender sentence in the event of a violation of probation.[2] This court's opinion in Geohagen supports this approach.

A favorable decision on this issue is not likely to open any resentencing floodgates, because since the introduction of the Criminal Punishment Code in October, 1998, trial courts have been permitted to impose the statutory maximum sentences, consecutive, without guidelines or justification. While the statutory maximum sentences are only half as long as the possible habitual offender sentences, the ready availability of this midway point between a guidelines sentence and the maximum habitual offender sentence is likely to substantially limit claims like Brannon's in the future.

Petitioner asks this court either to find the sentencing errors to be fundamental, or to remand for the district court to rule on the merits of the sentencing errors.

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[2]This is somewhat of a revision of the argument made in the initial brief, because counsel has reconsidered the viability of Welling and now argues for a broader rule, but Brannon's case remains distinguishable from Welling no matter how the court might rule on the broader question.

II CONCLUSION

Based upon the foregoing analysis, arguments, and authorities, 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 mailed to Trisha E. Meggs, Assistant Attorney General, 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 9 day of January, 2002.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER