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IN THE SUPREME COURT OF FLORIDA

TYRONE K. POWELL,

Petitioner,

vs.

Case No.: SC14-593
LT No.: 1D13-1565

STATE OF FLORIDA,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS TYRONE K. POWELL

On Discretionary Review from a Decision of the District Court of Appeal, First District

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PRELIMINARY STATEMENT

Petitioner, TYRONE K. POWELL, is referred to as "Powell" or "Petitioner." Respondent, STATE OF FLORIDA, is referred to as "Respondent" or "the State."

The record on appeal consists of four volumes, and the briefs and pleadings filed with the First District Court of Appeal. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (RI 3).

All emphasis in quotations in this brief has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an opinion issued by the First District Court of Appeal affirming a judgment of conviction and sentence against Petitioner, TYRONE K. POWELL, for aggravated battery on a person 65 years of age or older. *See Powell v. State*, 2014 Fla. App. Lexis 2660, Case No. 1D13-1565 (Fla. 1st DCA February 26, 2014). Petitioner's prior appellate counsel filed an *Anders* brief concluding that there were no issues of merit to be raised on appeal. *Id*. Based on its own review, the First District found that Powell's sentence was illegal because he was sentenced to two recidivist categories under section 775.084, Fla. Stat. *Id*. at 1*. However, since Powell's trial counsel did not object at sentencing and neither his appellate nor trial counsel filed a motion under Florida Rule of Criminal Procedure 3.800(b)(2) raising the issue, the First District concluded that it lacked jurisdiction to correct the sentencing error. *Id*. Powell now seeks review from this Court.

The relevant facts of this case are that Powell was charged with committing an aggravated battery on August 19, 2012, on Allen Bailey, a person 65 years of age or older. (RI 9). Prior to trial, the State filed notices of its intent to seek enhanced penalties upon conviction against Powell under the Violent Career Felon and Habitual Violent Felon provisions of section 775.084, Florida Statutes, and the

Prison Releasee Reoffender provisions of section 775.082, Florida Statutes. (RI 12-13, 17-18).

A jury trial was held on January 14, 2013 (jury selection) and January 17, 2013. (RII 1-128; III 129-328; IV 329-415). The trial proceedings were conducted in the Circuit Court of Duval County, Judge Brad Stetson, presiding. (RIII 129-328). After hearing all of the competing evidence at trial, the jury rendered a verdict convicting Powell as charged. (RIV 387; RI 20).

At sentencing, the judge evaluated whether he would impose a habitual violent felon offender or violent career felon offender sentence under section 775.084. (RI 128-35). The defense argued that the court should find that it was not necessary for the protection of the community to sentence Powell as a habitual violent felon offender or as a violent career felon offender. (RI 128-29). Defense counsel argued that, after Powell's thirty year PRR sentence is completed, Powell would be 83 years old, and it would not be necessary for the protection of the community for him to remain incarcerated. *Id*. The State argued that based on the victim's injury and the fact that Powell only stopped hitting the victim due to another person's intervention, the Court should impose the enhanced sentences. (RI 132-35).

In imposing the enhanced sentences against Powell, the trial court stated:

> Mr. Powell. I recognize the discretion I do have. It's not easy to figure out how to exercise that discretion because it was a fist fight. And that doesn't sound that bad.
>
> But when you look at how bad Mr. Powell's record is and how violent he is, and then you look at the horrible injuries that this victim suffered, and you realize that the legislature has recognized that folks who are 65 years of age and older are entitled to more protection than those who are younger, then even though both sides have argued the case well, the court feels this is the correct decision.
>
> So at this time, Mr. Powell, I do find that you are a danger to the community. And even though your attorney had argued well on your behalf in mitigation, and the court has certainly listened and weighed his argument -- it was a good argument – but even though the attorney made that argument, in light of your horrible record and the horrible injuries that this victim suffered at your hands, the court is not prepared at this time to find orally or otherwise that you are not a danger to the community.
>
> Therefore, I find that, in fact, you are a danger to the community. And I'm exercising my discretion. And I'm going to sentence you as not only a prison releasee reoffender, but also a habitual violent offender and a violent career criminal. The last two categories in my discretion I'm sentencing you in those ways.

(RI 141-43).

Thus, Powell was found to be a prison releasee reoffender, a violent career felon offender and a habitual violent felon offender. (RI 142,143). Powell was sentenced to life in prison as a Violent Career Felon Offender. (RI 143). Powell was sentenced to life in prison as a Habitual Violent Felon Offender with a fifteen year minimum mandatory (RI 145), and Powell was also sentenced to 30 years minimum mandatory as a prison release reoffender. (RI 145). Powell was orally

assessed costs of $556, plus the surcharge of $150 and $201, and he was assessed a lien of $400 dollars for the assistance of the Public Defender. (RI 146, 148). Powell's written sentence, however, imposed a Public Defender's lien in the amount of $450. (RI 104).

On direct appeal, Powell's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), finding that no issues of merit could be raised on Powell's behalf. The First District Court of Appeal conducted its own review of the record and discovered that Powell's sentence was illegal because he was sentenced to more than one recidivist category under section 775.084, which violates this Court's holding in *Clines v. State*, 912 So. 2d 550 (Fla. 2005). *See Powell*, 2014 Fla. App. Lexis 2660, *1, Case No. 1D13-1565 (Fla. 1st DCA February 26, 2014). However, the First District did not reverse, concluding that under this Court's holding in *Maddox v. State*, 760 So. 2d 89 (Fla. 2000), it lacked jurisdiction to correct the unpreserved sentencing error. *Id*. The court affirmed without prejudice to Powell filing his own pro se post-conviction relief motion. *Id*. Additionally, the First District issued the following certified question:

> NOTWITHSTANDING *MADDOX*, SHOULD AN APPELLATE COURT CORRECT A SENTENCING ERROR IN AN *ANDERS* CASE WHICH WAS NOT PRESERVED PURSUANT TO THE APPLICABLE RULES OF PROCEDURE? IF NOT, WHAT STEPS SHOULD AN APPELLATE COURT FOLLOW TO CARRY OUT THE MANDATES OF *ANDERS* AND *CAUSEY* IN SUCH A CASE?

Id.

Powell's appellate counsel timely filed a notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

This review proceeding comes before the Court on a certified question of great public importance. The First District concluded that, although it discovered a patent sentencing error based on its review of the record in a case in which the appellate counsel filed an *Anders* brief, it lacked the power to correct the error in light of this Court's holding in *Maddox v. State*, 760 So. 2d 89 (Fla. 2000). Thus, the Court left it to the criminal defendant to file a pro se post-conviction relief motion in an effort to have the error corrected. This was error.

In this case, Powell's appellate counsel failed to file a rule 3.800(b)(2) motion on his behalf preserving his patent sentencing error for appellate review. This failure amounted to an ineffective assistance of counsel and resulted in a denial of Powell's opportunity to utilize rule 3.800(b)(2) to preserve his sentencing error. This Court's decision in *Maddox* established that, when a criminal defendant does not have the opportunity to utilize rule 3.800(b)(2) to preserve a sentencing error, the interest of justice and judicial economy authorize a district court to correct a serious, patent sentencing error.

Moreover, even if Powell's sentencing error could not be deemed fundamental error under *Maddox*, the First District erred in placing the burden on

Powell to file a post-conviction relief motion on his own behalf. Powell had a right to the *effective* assistance of counsel. Once the First District determined that Powell's appellate counsel failed to raise a patent sentencing error, it should have placed the burden on appellate counsel to take all necessary steps to preserve the error for appellate review. While the First District undoubtedly concluded that it lacked a procedural mechanism to preserve the error once counsel missed the deadline for filing a rule 3.800(b)(2) motion, this Court should hold that an appellate court is authorized to issue an order granting an appellate counsel leave to file a rule 3.800(b)(2) motion in cases in which an *Anders* brief is filed and the appellate court subsequently determines that a patent sentencing error is present in the record.

As to Powell's sentence, while Powell's sentence would be authorized under the violent career criminal category alone, since the trial court has discretion not to impose any enhanced sentence under section 775.084, Powell would assert that, in the interest of justice and judicial economy, this Court should reverse the sentence and remand for resentencing.

Additionally, Powell asserts that the trial court violated the provisions of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Under section 775.084, a trial court must make a factual finding that the sentencing enhancement is necessary for the protection of the public, or at the

very least, the court must make a factual finding that the Defendant has not proven that the sentencing enhancement is not necessary for the protection of the public. In either case, the trial court is making a factual determination, unrelated to the defendant's prior convictions, that forms the basis of the trial court's enhancement of the defendant's sentence. Under *Blakely*, such findings must be made by a jury.

For these reasons, on remand, this Court should order that, if the State intends to pursue sentencing enhancement under section 775.084, any findings regarding whether the sentencing enhancement is necessary for the protection of the public should be determined by a jury.

STANDARD OF REVIEW

The issue in this case is that, when an appellate court is presented with an *Anders* brief and the court finds a patent sentencing error on its own, does an appellate court retain the constitutional authority to correct the error. This is a question of law subject to *de novo* review. *See generally Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (applying a de novo standard of review to a question regarding the interpretation of constitutional provisions).

Additionally, issues regarding the proper application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), are questions of law subject to *de novo* review. *See Dufour v. State*, 69 So. 3d 235, 246 (Fla. 2011) (applying a *de novo* standard for review to constitutional questions).

ARGUMENT

I. THIS COURT SHOULD HOLD THAT, NOTWITHSTANDING ITS RULING IN *MADDOX V. STATE*, 760 SO. 2D 89 (Fla. 2000), A DISTRICT COURT RETAINS THE POWER TO CORRECT CERTAIN UNPRESERVED SENTENCING ERRORS.

In this case, the First District Court of Appeal issued the following certified question:

> NOTWITHSTANDING *MADDOX*, SHOULD AN APPELLATE COURT CORRECT A SENTENCING ERROR IN AN *ANDERS* CASE WHICH WAS NOT PRESERVED PURSUANT TO THE APPLICABLE RULES OF PROCEDURE? IF NOT, WHAT STEPS SHOULD AN APPELLATE COURT FOLLOW TO CARRY OUT THE MANDATES OF *ANDERS* AND *CAUSEY* IN SUCH A CASE?

Id. In addressing the two questions posed by the First District, this Court must decide whether an appellant court retains its traditional power to correct patent sentencing error, even if unpreserved, when only an *Anders* brief is filed on behalf of the defendant.

Powell asserts that this Court should hold that, when an appellate court is presented with an *Anders* brief and, based on its own review, it discovers a fundamental sentencing error on the face of the record, the court has jurisdiction to correct the error. This Court should further hold that, when an appellate court is presented with an *Anders* brief and, based on its own review, it discovers an sentencing error that does not rise to the level of a fundamental error, it should

issue an order granting the court-appointed appellate counsel leave to file a rule 3.800(b)(2) motion on the defendant's behalf to preserve the error.

A. A History of Florida Law Regarding Appellate Courts' Power to Correct Unpreserved Patent Sentencing Errors

1. Traditionally, Appellate Courts Have Been Authorized to Correct Patent Sentencing Errors

Historically, while Florida courts have recognized the contemporaneous objection requirement for preserving sentencing errors, once a case was properly before it, Florida appellate courts generally corrected sentencing errors appearing on the record, even if the error was not fundamental. *See Taylor v. State*, 601 So. 2d 540, 541(Fla. 1992) ("This Court has held in a long line of guidelines precedent that departure errors apparent on the face of the record do not require a contemporaneous objection in order to be preserved for review."); *see also State v. Whitfield*, 487 So.2d 1045 (Fla. 1986) (holding that a contemporaneous objection is not necessary to preserve the appeal of either an illegal sentence or an unauthorized departure from the sentencing guidelines). The general reasoning for this practice, as explained by this Court, was as follows:

> The contemporaneous objection rule . . . was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to ensure that objections are

> made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984) (citations omitted). Thus, this Court recognized that, in the context of sentencing, the contemporaneous objection rule did not need to be closely followed. Rather, as the Fifth District noted in *Maddox v. State*, 708 So. 2d 617, 621 (Fla. 5th DCA 1998), Florida appellate courts were "accustomed to simply correcting errors when [they] . . . [saw] them in criminal cases, especially in sentencing, because it seem[ed] both right and efficient to do so."

2. <u>The Criminal Appeal Reform Act of 1996</u>

This traditional practice changed with the Florida Legislature's enactment of the "Criminal Appeal Reform Act of 1996" ("the Act"), which became effective on July 1, 1996. *See* Ch. 96-248, § 4, Laws of Fla. The goal of the 1996 enactment of the Criminal Appeal Reform Act was "to ensure that all claims of error are raised and resolved at the first opportunity." §924.051(8), Fla. Stat. Section 924.051, Florida Statutes, provides in part as follows:

> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial

> court or, if not properly preserved, would constitute fundamental error.
>
> (4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.

Florida's Constitution grants Florida citizens the right to appeal final orders and confers upon the appellate courts the jurisdiction to entertain such appeals. *See* Art. V, § 4(b)(1), Fla. Const. ("District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . not directly appealable to the supreme court or a circuit court."); *see also Amendments to the Fla. Rules of Appellate Procedure*, 696 So. 2d 1103, 1104 (Fla. 1996) (recognizing that the constitutional revisions did not change a citizens' right to appeal); *Robbins v. Cipes*, 181 So. 2d 521, 522 (Fla. 1966) ("Appeals to the Supreme Court and the District Courts of Appeal are constitutionally guaranteed rights in this State."). Since sections 924.051(3) and 924.051(4) attempt to limit an appellate court's jurisdiction to hear an issue on appeal, there was a significant question among the courts as to the Legislature's authority to enact such a statute.

The Second District noted this issue in *Bain v. State*, 730 So. 2d 296 (Fla. 2d DCA 1999), when it recognized that it was questionable whether the legislature had discretion to condition, limit, or qualify the constitutional right to appeal when

the constitution had not done so, regardless of the perceived reasonableness of the conditions. *Id*. at 299; *see Sparkman v. State ex rel. Scott*, 58 So. 2d 431, 432 (Fla. 1952) (holding that express or implied provisions of constitution cannot be altered, contracted, or enlarged by legislative enactments).

Moreover, to the extent section 924.051 could be deemed a procedural rule, it violates article V, section 2(a) of the Florida Constitution, which states that the Florida Supreme Court shall adopt all rules for the practice and procedure in Florida courts. *See* Art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought."). The Florida Constitution provides that powers constitutionally bestowed upon the courts may not be exercised by the Legislature. *See* Art. II, § 3, Fla. Const.; *see also State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) ("It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm.").

This Court, in apparent recognition of the questionable validity of section 924.051, issued an emergency opinion in *Amendments to the Fla. Rules of*

Appellate Procedure, 696 So. 2d 1103, 1104 (Fla. 1996). In that opinion, this Court limited section 924.051 and held that, notwithstanding the provisions of the Act, criminal defendants must be allowed to appeal certain issues after entry of a plea. *Id*. at 1105-06. This Court, however, stated that "the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error." *Id*. at 1105. This Court reached this conclusion without expressing any analysis as to why section 924.051 did not constitute an unconstitutional infringement on the right to appeal or this Court's power to control the practice and procedures of the judiciary.

Powell can only assume that this Court, in an effort to show deference to the Legislature and based on its own view that errors should be preserved, decided to accept the statute as its own procedural rule, which is why this Court adopted Florida Rule of Appellate Procedure 9.140(d) (now contained in subsection (e)). *See Amendments to the Fla. Rules of Appellate Procedure*, 696 So. 2d 1103, 1131 (Fla. 1996). The current rule provides:

> **(e) 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).

See Fla. R. App. P. 9.140(e).

In order to ensure that defendants had the opportunity to raise sentencing errors, this Court adopted rule 3.800(b) authorizing the filing of a motion to correct a sentencing error within ten days after rendition of the sentence. *See Amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374 (Fla. 1996). Soon thereafter, this Court recognized that ten days was not sufficient time, and thus, in *Amendments to the Fla. Rules of Appellate Procedure*, 696 So. 2d 1103, 1104 (Fla. 1996), this Court expanded the time to thirty (30) days. 696 So. 2d at 1105. The purpose of these rule changes was to allow defendants a mechanism to "preserve" for appeal sentencing errors if no contemporaneous objection occurred at the sentencing hearing.

3. Continuing Issues Regarding Sentencing Errors After This Court's 1996 Rule Amendments

After this Court' rule amendments in 1996, the district courts of appeal began to question whether they continued to have jurisdiction to correct patent unpreserved sentencing errors on appeal. As this Court observed in *Amendment to Fla. Rules of Crim. Procedure 3.111(e) & 3.800*, 761 So. 2d 1015 (Fla. 1999):

> Unfortunately, the[] statutory and rule changes did not have their intended effect of conserving the judicial resources of the appellate courts, while at the same time providing for sentencing errors to be addressed at their earliest opportunity in the trial courts.
>
> The Act has opened an entirely new debate in the appellate courts as to what constitutes fundamental sentencing error on appeal and whether any unpreserved sentencing error, no matter how

> egregious, can be considered on appeal. The Fifth District has broadly stated that no unpreserved sentencing error will be considered fundamental or correctable on direct appeal. In contrast, the First, Second, Third, and Fourth Districts continue to recognize that errors in sentencing can constitute "fundamental error" that can be raised on direct appeal despite the lack of preservation.
>
> . . .
>
> In reaching its conclusion that no sentencing error should be considered fundamental, the Fifth District rhetorically asked "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?" Unfortunately, however, as the CARA Committee discovered, the reality is that rule 3.800(b) as it is currently written has fallen far short of the goal of providing a "failsafe" method for defendants to seek to have sentencing errors corrected in the trial court and thereby preserve them for appellate review. The plethora of appellate cases addressing the issue of whether unpreserved sentencing error may be presented on appeal demonstrates that despite the availability of the present rule 3.800(b), many sentencing errors have gone unnoticed and uncorrected by trial counsel, the prosecutor, and the trial court. There are multiple reasons why rule 3.800(b) has failed to provide a "failsafe" method to detect, correct and preserve sentencing errors.

Id. at 1016-18.

In an attempt to provide a more fail-safe procedure, in 1999, this Court amended rule 3.800(b) to expand the time for filing a motion to correct a sentencing error. The amended rule allowed appellate or trial counsel to file a 3.800(b) motion up until the time the defendant's counsel files his or her first appellate brief. 761 So. 2d at 1018. Since appellate counsel would have the opportunity to fully review the record and the defendant's sentencing order, this Court reasoned the amendment would provide the needed "failsafe" mechanism

that would allow defendants the opportunity to preserve all sentencing errors for appellate review. *See Amendment to Fla. Rules of Crim. Procedure 3.111(e) & 3.800*, 761 So. 2d 1015, 1019 (Fla.1999).

A year after adopting the new amendment to rule 3.800(b), this Court addressed the conflict among the district courts regarding their power to correct patent unpreserved sentencing errors. In *Maddox v. State*, 760 So. 2d 89, 110 (Fla. 2000), this Court held that, for those defendants who did not have the benefit of the recently promulgated amendment to rule 3.800(b), the appellate courts should continue to correct unpreserved sentencing errors that constitute fundamental error. However, for those defendants who have available the procedural mechanism of the amended rule 3.800(b), appellate counsel must first raise the issue in the trial court prior to filing the first appellate brief in order for the issue to be preserved for appellate review. *Id*. at 98, 110.

This case raises a new issue regarding unpreserved sentencing errors. If an appellate counsel filed an *Anders* brief on behalf of a defendant, counsel obviously did not discover any reversible sentencing error. However, if the appellate court, after its own review, discovers a patent sentencing error, can the court correct that error. Powell asserts that the district courts must retain the power to correct such errors. This conclusion is guided by the U.S. Supreme Court's holding in *Anders* and the cases following that decision.

B. The Requirements of *Anders* and *Causey* in Context of Sentencing Errors

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court determined that, when a State grants a right to direct appeal, every criminal defendant is entitled to representation of counsel under the Sixth and Fourteenth amendments of the United States Constitution. *See also Penson v. Ohio*, 488 U.S. 75, 79 (1988). Issues arose, however, when appellate counsel, after reviewing the record, determined that there were no issues of merit to be raised on appeal. If the counsel failed to file an appellate brief raising a reversible error on behalf of the defendant, there was a question as to whether the defendant actually obtained the assistance of counsel.

In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court addressed this issue. In *Anders*, the appointed appellate counsel filed a no-merit letter to the appellate court on behalf of the defendant due to counsel's conclusion that there were no issues of merit to be raised on appeal. The Supreme Court rejected this procedure, stating:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposes to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court

> and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished [to] the indigent and time allowed [for] him to raise any points that he chooses; the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) *it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal*.
>
> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate.

386 U.S. at 744-45 (footnote omitted and emphasis added).

This Court addressed the implication of *Anders* in *State v. Causey*, 503 So. 2d 321, 322 (Fla. 1987). In that case, the defendant, Brenda Causey, was convicted of arson after her boyfriend's rented house burned. Following the conviction, her court-appointed counsel filed a brief pursuant to *Anders v. California*, stating that she could not make any good faith arguments to support reversible error. *Id*. at 322. Causey did not file a pro se brief within the allotted time period, and the state filed its *Anders* answer brief. Upon its own review of the record, the First District found reversible error in the trial court's refusal to allow

Causey's counsel to impeach the state's main witness during cross-examination. Without requesting the submission of briefs from the parties on that issue, the district court reversed the conviction and remanded the case to the circuit court. The State sought review of the First District's decision to correct the error without allowing supplemental briefing.

This Court examined the issue and first recognized that, under *Anders*, a district court is required to conduct a review of the entire record whenever presented with an *Anders*' brief in order to "discover any errors apparent on the face of the record." *Id*. at 322. This Court, however, reversed the First District's ruling, holding that the First District erred in correcting the error without affording either party the opportunity to brief the issue. This Court stated that "[e]xcept in extreme or extraordinary circumstances, the district court should request that briefs be submitted on the issues raised by the court before the court renders its opinion." *Id*. at 323.

In *In re Anders Briefs*,581 So. 2d 149, 151(Fla.1991), this Court held that the *Anders* procedures apply even when an appellate counsel is able to find some relatively minor sentencing issues in "no merit" briefs. This Court described the *Anders*' procedure as follows:

> The procedure established in *Anders* and its progeny requires an indigent's appellate counsel to "master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. . . . Only after such an evaluation has

> led counsel to the conclusion that the appeal is 'wholly frivolous' is counsel justified in making a motion to withdraw." That motion, however, must be accompanied by an appellate brief referring to every arguable legal point in the record that might support an appeal.
>
> Upon counsel's submission of the motion to withdraw accompanied by an Anders brief, the indigent must be given the opportunity to file a pro se brief. The appellate court then assumes the responsibility of conducting a full and independent review of the record to discover any arguable issues apparent on the face of the record. If the appellate court finds that the record supports any arguable claims, the court must afford the indigent the right to appointed counsel, and it must give the state an opportunity to file a brief on the arguable claims. However, the appellate court is to conduct its full and independent review even if the indigent elects not to file a pro se brief. *Only if the appellate court finds no arguable issue for appeal may the court grant counsel's motion to withdraw and proceed to consider the appeal on its merits without the assistance of defense counsel*.

Id. at 151 (emphasis added).

C. The Holding In *Anders*, *Causey* and *Maddox* Mandate That Appellate Courts Must Retain The Power to Correct Fundamental Sentencing Errors

The United States Supreme Court's decision in *Anders* and this Court's decisions adopting that ruling, all reflect the basic principle that a criminal defendant has the right to the assistance of counsel on direct appeal, and to the extent the appellate counsel fails to raise an issue on appeal, the courts have a constitutional obligation to review the record and ensure that no issues of merit exist before ruling on the appeal. If an issue of merit does exist, the appellate court must direct the court-appointed counsel to brief the issue. *See Anders v.*

California, 386 U.S. 738, 744 (1967) (noting that, if the court finds any legal point arguable on its merits, it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal).

In light of this controlling precedent, Powell would assert that, when an appellate court discovers a patent unpreserved sentencing error, it has the power, and in fact the duty, to correct that error if it constitutes fundamental error. This view of the law is supported by this Court's own decision in *Maddox*.

Indeed, in *Maddox*, notwithstanding the provisions of section 924.051, this Court allowed district courts to continue to correct serious, patent sentencing errors, even if not preserved, during the window period between the enactment of section 924.051 and this Court's last amendment to rule 3.800(b)(2). *See Maddox*, 760 So. 2d 89, 98, 110. This Court reasoned that the interest of justice required that appellate courts be allowed to correct fundamental sentencing errors because the prior procedural mechanism that this Court had adopted to allow defendants to preserve sentencing issues fell "far short of the goal of providing a 'failsafe' method for defendants to seek to having sentencing errors corrected in the trial court and thereby preserve them for appellate review." *Id*. at 97. This failure of rule 3.800(b) was the basis for this Court's decision not to give literal effect to rule 9.140(d). *Id*. In short, when a defendant is denied the opportunity to preserve a

sentencing error under the procedural rules, this Court recognized appellate courts' inherent power to correct certain sentencing errors in the interests of justice.

This is the same situation here. When Powell's counsel failed to file a rule 3.800(b) motion to preserve the patent sentencing error that the First District discovered, counsel failed to render effective assistance of counsel and Powell was denied his procedural mechanism to preserve the sentencing error. Thus, in the interests of justice, this Court should recognize the appellate courts' power to correct such an error, if it constitutes a fundamental error.

As this Court stated in *Maddox*, "[n]either the interests of justice nor judicial economy will be served by preventing the appellate courts from correcting as fundamental error those serious, patent sentencing errors that have been brought to the courts' attention through the issues raised on appeal." 760 So. 2d at 110. **Indeed, what would be the purpose of requiring a district court to review the entire record for error in *Anders* cases, if the district court did not have the concomitant power to correct the error or otherwise protect the defendant's right to the assistance of counsel on direct appeal**. This Court's decision in *Maddox* recognized that this Court, and not the legislature, determines the scope of appellate procedure and rules. Thus, there is no impediment to this Court allowing district courts to continue to exercise their traditional power to correct serious, patent sentencing errors.

The scope of the "serious, patent sentencing errors," i.e. fundamental sentencing errors, that can be corrected by the appellate courts, notwithstanding the failure to preserve the issue, was thoroughly addressed by this Court in *Maddox*. 760 So. 2d 99-110. This Court recognized that district courts could continue to correct as fundamental error, sentences that: (1) result in sentences that exceed the statutory maximum, (2) improperly habitualize a defendant; (3) otherwise, impact the length of a defendant's incarceration; (4) deviate from the oral pronouncements of sentence and result in an increased length of incarceration; and (5) fail to comply with the statutory requirements for departure sentences. *Id*. This Court conducted an exhaustive analysis of what unpreserved sentencing errors remain correctable by the appellate courts, and Powell will not argue that this Court should change its holding in *Maddox* in that regard. Rather, Powell merely asserts that this Court should allow appellate courts to continue to correct serious, patent sentencing errors that those courts discover in cases in which an *Anders* brief is filed.

Powell assumes that this Court set a window period in *Maddox* based on its concern that, if this Court allowed district courts to correct serious, patent sentencing errors indefinitely, there was a risk appellate and trial counsel, rather than avail themselves of the mechanism afforded by rule 3.800(b), would instead

simply raise the issue on appeal. However, when dealing with an *Anders* brief, this danger is not present.

When appellate counsel files an *Anders* brief, counsel is asserting that he or she is unable to identity any error, sentencing or otherwise, for reversal. Thus, appellate counsel's failure to file a rule 3.800(b) motion is not due to laziness or a belief that it would be easier to let the district court correct the error. Rather, appellate counsel simply failed to identify the issue in the first instance. Thus, there is no danger that adopting a procedure allowing district courts to correct serious, patent sentencing errors in *Anders* cases is going to encourage more *Anders* brief filings. An appellate counsel's duty to act as an advocate on behalf of the defendant will ensure that situations like this will be limited to those rare occasions when appellate counsel fails to identify a sentencing error of merit, counsel files an *Anders* brief, and the court itself later discovers a sentencing error. The same policy concern at issue in *Maddox* is not present here.

For the foregoing reasons, this Court should hold that, notwithstanding the provisions of section 924.051 and Florida Rule of Appellate Procedure 9.140(e), appellate courts retain the power to correct serious, patent sentencing errors in cases in which an *Anders* brief is filed and appellate counsel failed to preserve the sentencing error for appellate review.

D. Cases Not Dealing with Serious, Patent Sentencing Errors

In *Maddox*, this Court outlined that, in order for an appellate court to correct a sentencing error on direct appeal, the error must be both patent and serious. 760 So. 2d at 99. The question now becomes what is the proper procedure for preserving sentencing errors when an *Anders* brief is filed, but the sentencing error is either not patent from the record or is not "fundamental error" under this Court's decision in *Maddox*.

When this Court decided not to invalidate section 924.051 and instead adopted rule 9.140(d) and its further amendments to 3.800(b), this Court did so under two guiding principles. First, this Court recognized that a criminal defendant has a right to appellate counsel. *See Amendments to the Fla. Rules of Appellate Procedure*, 696 So. 2d 1103, 1104 (Fla. 1996). Second, the Court recognized that the appellate counsel has an obligation to preserve all sentencing errors by filing a 3.800(b)(2) motion, if necessary. *See Maddox*, 760 So. 2d at 94-95, 97-98.

In short, this Court recognized that requiring defendants to file pro se post-conviction relief motions to raise sentencing errors violates the Florida constitution. As this Court stated in *Maddox*, a "potential problem with requiring defendants to correct unpreserved sentencing errors through post-conviction motions is that defendants in noncapital cases will not necessarily be afforded counsel during collateral proceedings." *Maddox*, 760 So. 2d at 98; *see also Russo*

v. Akers, 724 So. 2d 1151, 1152-53 (Fla. 1998) (stating that there is no absolute right to counsel in a post-conviction proceeding). Thus, as Judge Altenbernd expressed in his dissent in *Bain*, to the extent that collateral relief replaces direct appeal as the means for correcting sentencing errors, a defendant may be constitutionally entitled to counsel on post-conviction claims. *See Bain*, 730 So. 2d at 309 (Altenbernd, J., dissenting).

In order to avoid this constitutional quandary, this Court amended rule 3.800(b) in order to provide a mechanism for appellate counsel to fulfill their duty to preserve all sentencing errors. *Maddox*, 760 So. 2d at 94 ("We anticipate that the amendments to rule 3.800() recently promulgated by this Court . . . should eliminate the problem of unpreserved sentencing errors . . . ."). However, in cases in which appellate counsel filed an *Anders* brief and the appellate court later discovers a potential sentencing error in the record, appellate counsel has failed in his or her duty to provide effective assistance of counsel for the defendant. Since this failure has been discovered while the defendant's appeal is still pending, it is incumbent on the court-appointed counsel to correct his or her own ineffectiveness by filing a 3.800(b) motion to preserve the issue for appellate review.

The obvious issue is how is court-appointed counsel able to accomplish this goal when rule 3.800(b) provides that the time to file a motion under the rule expires when the defendant files his or her first brief. *See* Fla. R. Crim. P.

3.800(b)(2). Powell would assert that the easiest solution to this problem is for this Court to adopt the view that the "first brief" for purposes of rule 3.800(b) is the first brief asserting a basis for reversal on the merits filed by a court-appointed counsel. Since an *Anders* brief by definition does not argue any errors that warrant reversal and a defendant filing a pro se brief in an *Anders* case has been deprived of the assistance of counsel, such briefs could be ignored for purposes of rule 3.800(b)(2) while the defendant's appeal is still pending.

Once notified by the appellate court that a sentencing error appears to be present in the record, appellate counsel should examine whether the sentencing error is a serious, patent sentencing error. If it is, appellate counsel should brief the issue and request that the district court correct the unpreserved sentencing error, as discussed in the prior section. If the sentencing error does not rise to the level of fundamental error, but still constitutes prejudicial error, the appellate counsel should be granted leave to file a rule 3.800(b)(2) motion to raise the issue in the trial court. This provides a simple procedural mechanism to address the discrete issues raised in this appeal.

This Court could also simply grant the district courts the power to issue orders granting court-appointed counsel leave to file 3.800(b)(2) motions at any time while the appeal is pending. Such a pronouncement would ensure that all

defendants have the ability to preserve a sentencing error, if one is discovered while the defendant's direct appeal remains pending.

If this Court rejects these suggestions, Powell would leave it up to this Court to devise a better solution to effectuate the preservation of non-fundamental sentencing errors. However, in any case, it is incumbent that this Court place the burden on the court-appointed appellate counsel to preserve the sentencing error.

In sum, if a sentencing error that appears on, or is suggested by, the record is a matter that a competent appellate or trial counsel would discover and raise on direct appeal, then any procedure that places the burden on the defendant to file his or her own pro se post-conviction motion to raise the issue, essentially deprives the defendant of his right to effective assistance of counsel. This Court implicitly recognized this fact when it amended rule 3.800(b)(2) to allow court-appointed appellate counsel additional time to discover potential sentencing errors, and this Court should revise rule 3.800(b) or adopt the procedural mechanisms Powell has proposed to ensure that sentencing errors are preserved for appellate review by the court-appointed counsel.

II. THIS COURT SHOULD REVERSE POWELL'S SENTENCE UNDER THE AUTHORITY OF *CLINES V. STATE*, 912 SO. 2D 550 (Fla. 2005).

Powell has addressed the issue of how this Court should resolve the certified question at issue here. Powell will now address the specific relief that he requests.

As the First District recognized, Powell was improperly sentence to multiple recidivist categories under section 775.084, Florida Statutes, for a single crime. *See Powell v. State*, 2014 Fla. App. Lexis 2660, Case No. 1D13-1565 (Fla. 1st DCA February 26, 2014). Thus, the sentence violated this Court's holding in *Clines v. State*, 912 So. 2d 550 (Fla. 2005), in which this Court held that section 775.084 "does not permit a court to sentence a defendant under multiple categories for a single crime." *Id*. at 553. In *Clines*, this Court quashed the First District's opinion affirming the sentence and remanded the case to the trial court for resentencing. *Id*. at 560.

While Powell's sentence would be authorized under the violent career criminal category alone, since the trial court has discretion not to impose any enhanced sentence under section 775.084, Powell would assert that, in the interest of justice and judicial economy, this Court should remand this case to the trial court for resentencing.

III. POWELL'S SENTENCE VIOLATED THE MANDATES OF *APPRENDI V. NEW JERSEY* AND *BLAKELY V. WASHINGTON* BECAUSE THE TRIAL COURT MADE FACTUAL FINDINGS THAT SUPPORTED THE ENHANCEMENT OF POWELL'S SENTENCE[1]

[1] Although this issue was not raised in the district court, once this Court has obtained jurisdiction over a case, this Court has discretion to review other issues. *See State v. Hubbard*, 751 So. 2d 552, 565 n. 30 (Fla. 1999).

In this case, Powell was sentenced as a prison releasee reoffender, a violent career felon offender, and a habitual violent felon offender. (RI 142,143). As discussed in the prior section, Powell's sentence must be vacated because he was improperly sentenced under two recidivist categories under section 775.084. Powell, however, asserts that his sentence was illegal for the additional reason that it violated the United States Supreme Court's rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

In *Apprendi*, the defendant was charged with numerous offenses stemming from his act of firing a gun into the home of an African-American. 530 U.S. at 469. Apprendi entered into a plea agreement in which he agreed to plead guilty to three of the twenty-three counts charged. *See id.* at 469-70. Each of the counts carried a sentence of between 5 and 10 years in prison. As part of the plea bargain, the prosecution reserved the right to seek an enhanced sentence on the basis that the crime was committed with a biased purpose. Such an enhancement would have doubled the sentence otherwise imposed for each of the crimes. Apprendi, in turn, reserved the right to challenge the bias crime enhancement, claiming it violated the federal Constitution. *Id.* at 470.

The trial judge accepted Apprendi's plea. The trial judge found "by a preponderance of the evidence" that Apprendi's crime was motivated by the race of the victims. *Id.* at 471. He sentenced Apprendi to 12 years in prison—2 years

above the maximum sentence authorized for the weapons charge apart from the hate-crime enhancement. *Id.*

The Supreme Court addressed whether the Sixth Amendment of the United States Constitution required that a jury make the determination that Apprendi's actions had been a hate crime. The Supreme Court ruled that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Court stated, "The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497.

Four years after its *Apprendi* decision, the Supreme Court heard *Blakely v. Washington*, 542 U.S. 296 (2004). In *Blakely*, the defendant pled guilty to second-degree kidnapping. *Id.* at 298. At the plea hearing, Blakely admitted the facts necessary to support the charges but no others. Under Washington law, second-degree kidnapping was a class B felony, punishable by a maximum sentence of 10 years in prison. *Id.* at 299. However, under Washington's mandatory sentencing guidelines, the judge was required to sentence Blakely to no less than 49 and no more than 53 months in prison, unless he had "substantial and compelling" reasons to impose a sentence outside that range. *Id.* at 299-300.

The trial judge sentenced Blakely to 90 months, finding that Blakely had acted with "deliberate cruelty." Blakely appealed, arguing that this unexpected additional fact-finding on the judge's part violated his Sixth Amendment right under *Apprendi* to have the jury determine beyond a reasonable doubt all the facts legally necessary to his sentence. *Id.* at 301. The Washington Court of Appeals rejected his claim, and the Washington Supreme Court declined to review it. Blakely then asked the U.S. Supreme Court to review the case, and it agreed to do so.

The Supreme Court concluded that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303. Since Blakely's sentence exceeded the presumptive sentence and there was no jury finding supporting the enhancement factor, the Supreme Court ruled that Blakely's sentence violated his Sixth Amendment right to a jury trial. *Id.* at 303-04.

Powell recognizes that there have been Florida cases that have addressed the application of *Blakely* to section 775.084. Those cases have held that the imposition of a sentence under 775.084 does not violate *Blakely* or *Apprendi* because the sentencing enhancements are based solely on prior convictions. *See, e.g., Tillman v. State*, 900 So. 2d 633 (Fla. 2d DCA 2005); *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005); *Grant v. State*, 815 So. 2d 667, 668 n.3 (Fla. 2d

DCA 2002); *Matthews v. State*, 891 So. 2d 596 (Fla. 3d DCA 2004); *Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004); *McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004); *Fyler v. State*, 852 So. 2d 442 (Fla. 5th DCA 2003); *Jones v. State*, 791 So. 2d 580 (Fla. 1st DCA 2001); *Saldo v. State*, 789 So. 2d 1150 (Fla. 3d DCA 2001); *Dennis v. State*, 784 So. 2d 551 (Fla. 4th DCA 2001); *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001).

Powell asserts that the above cases miss a critical issue. Section 775.084(3)(a), Florida Statutes, provides:

> For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section *unless the court finds that such sentence is not necessary for the protection of the public*.

Likewise, section 775.084(3)(c), Florida Statutes, provides:

> For an offense committed on or after October 1, 1995, if the state attorney pursues a violent career criminal sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a violent career criminal, subject to imprisonment pursuant to this section *unless the court finds that such sentence is not necessary for the protection of the public*.

Thus, under section 775.084, a trial court must make a factual finding that the sentencing enhancement is necessary for the protection of the public, or at the very

least, the court must make a factual finding that the Defendant has not proven that the sentencing enhancement is not necessary for the protection of the public. In either case, the trial court is making a factual determination, unrelated to the defendant's prior convictions, that forms the basis of the trial court's enhancement of the defendant's sentence.

Indeed, in this case, the trial court made an express factual finding that Powell was a danger to the community. (RI 142) ("Therefore, I find that, in fact, you are a danger to the community."). In short, regardless of whether the trial court imposes the enhanced sentence because it finds that the sentence is necessary for the protection of the public or because it finds that it cannot conclude that the enhanced sentence is not necessary for the protection of the public, the effect is the same. The trial court is making factual findings, unrelated to prior convictions, that form the basis of its decision to impose an enhanced sentence. This is not permissible in light of *Blakely*.

For these reasons, on remand, this Court should order that, if the State intends to pursue sentencing enhancement under section 775.084, any findings regarding whether the sentencing enhancement is necessary for the protection of the public should be determined by a jury.

IV. THE TRIAL COURT'S WRITTEN SENTENCE DIFFERS FROM THE ORAL PRONOUNCEMENT REGARDING COSTS

The trial court orally pronounced a Public Defender lien of $400. The actual written order imposed a Public Defender lien of $450. To the extent the actual written order imposing costs did not conform to the oral pronouncements, this court should grant Powell's counsel leave to file a rule 3.800(b)(2) motion to raise this issue below. To save time, Powell would also assert that this Court should consider simply remanding this case and ordering the trial court to amend the order imposing the costs to conform to the oral pronouncement. *See R.A.V. v. State*, 22 So. 3d 140 (Fla. 1st DCA 2009) (remanding *Anders* case with instructions to correct assessment of $20 in costs).

CONCLUSION

For the foregoing reasons, this Court should reverse the First District's decision and remand with instructions that the First District issue an order requiring briefing from the parties on the sentencing error it discovered (and any other sentencing error of which appellate counsel has now become aware), and if after briefing, it concludes that a patent fundamental sentencing error has occurred, the First District should reverse Powell's sentence and remand his case for resentencing. If the First District determines that the sentencing errors are not fundamental or are not sufficiently clear from the record to correct, it should issue an order granting Powell's court-appointed appellate counsel leave to file a rule 3.800(b)(2) motion on Powell's behalf to preserve the issue for appellate review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Email on this 9th day of October, 2014, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

/s/ Henry G. Gyden
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