IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT EARL BRUMBLEY,

Respondent.

CASE NO. 66,023

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Circuit Court of Marion County, Florida, and the Appellant in the Fifth District Court of Appeal. Petitioner was the Prosecution in the Circuit Court and Appellee in the District Court. In this brief, Petitioner will be referred to as "Petitioner" or "the State," and Respondent will be referred to as he appears before this Honorable Court.

ARGUMENT

A DEFENDANT SHOULD NOT BE PRECLUDED FROM CHALLENGING ON DIRECT APPEAL A TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-HALF OF A SENTENCE WHERE NO OBJECTION IS MADE AT THE TIME OF SENTENCING.

> When the reason for a rule disappears, so should the rule. At least the rule should not apply when the reason for it is absent.

Mancini v. State, 273 So. 2d 371 (Fla. 1973).

On Page 8 of its brief, Petitioner speaks disparagingly of the "ease of remedy" doctrine that the State perceives has been promulgated by Rhoden v. State, 448 So. 2d 1013 (Fla. 1984). The question in this case, certified by two District Courts of Appeal to be of great public importance, is whether the lack of a contemporaneous objection will preclude an appellate court from correcting a trial court's unauthorized retention of jurisdiction over one-half of a defendant's sentence. Cofield v. State, 453 So. 2d 409 (Fla. 1st DCA 1984); Brumley v. State, No. 83-1124 (Fla. 5th DCA September 13, 1984)[9 FLW 1945]; Walcott v. State, No. 83-1083 (Fla. 5th DCA November 15, 1984)[9 FLW 2428]. Stated otherwise, is there any purpose to be served by strict adherence, in what amounts to clerical sentencing matters, to a rule devised for trial situations? There is no reason, Respondent would urge, to apply the contemporaneous objection rule to the instant case, unless for the sake of observing tradition, but in an inappropriate situation.

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So. 2d 701, at 703 (Fla. 1978). (Emphasis supplied.)

This Honorable Court, in State v. Jones, 204 So. 2d 515 (Fla. 1967), announced that it would enforce the contemporaneous objection requirement against indigent defendants because they, since Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), were afforded assistance of counsel. If the Court's reason for not excepting indigent accused from the rule was valid in 1967, then it is an even stronger argument in 1984 to consider the "ease of remedy" as well as the "cost of nicety":

> . . . [F]urther application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."

Id., 204 So. 2d at 519. (Emphasis supplied.)

Since the contemporaneous objection rule was born of "practical necessity" in Castor, and of consideration of public expense in Jones, and because the issue in this case has been certified to be of great public importance, it is clearly proper to consider the public expenditure that would be necessitated by imposing the contemporaneous objection requirement

on sentencing errors of this easily remediable type.

If this Honorable Court accepts Petitioner's position, then the proper course of action in a case such as this would be for an appellate court to dismiss any appeal where improper retention of jurisdiction was the only issue on appeal, and refuse to decide the issue in any case in which it arises, if there was no objection in the trial court. The defendant would then be able to file a motion to correct his sentence in the trial court. Rule 3.850, F.R.Crim.P. If the motion is denied, the defendant may then appeal from the denial. A new record on appeal, possibly including court reporter transcripts, would then be prepared and transmitted, in triplicate, by the Clerk of the Circuit Court. Rule 9.200, F.R.App.P.; §924.17, Fla. Stat. The proper procedure having then been observed, as Petitioner argues it should, the appellate court could then permit itself to review the issue previously avoided when the case was styled "direct appeal." No knowledge would be gained and nothing would be changed, except more time would have elapsed and many dollars of public funds would have been spent.

On the other hand, if the District Court decision in this case is affirmed, then the next step in this and similar cases would be for the District Court to remand the case to the trial court with directions that an amended sentence be typed by the trial judge's secretary, signed by the judge, filed with the Clerk, and transmitted by copy to the Department of Corrections.

There is no comparison, in terms of public expense, between the two procedures and there is no reason, in terms of common sense, to choose the former. The only reason for applying the contemporaneous objection rule to the instant situation is the precedent cited by Petitioner but established under vastly different conditions. All of those cases cited by Petitioner

on Page 5 of its Brief, for the proposition that there can be no direct review of any error not objected to in the trial court, are cases wherein the error occurred during a trial proceeding. Even those cases involving "sentencing errors" were capital cases wherein the proceedings were being had before a trial jury, resulting in a subsequent verdict at public expense not present in this case. §§40.24, 40.26, 921.141(1), Fla. Stat. (1983).

Although Rhoden v. State, supra, involved a different sentencing error than here, its reasoning that the purpose for the contemporaneous objection rule is not present in the sentencing process should apply in this case. In Rhoden, as here, there were no proceedings subsequent to the sentencing error which might have been necessitated or affected by counsel's failure to object.

In this particular case, it should be noted that at the time of Respondent's sentencing, July 18, 1983, Hayes v. State, 448 So. 2d 94 (Fla. 2d DCA 1984), the Fifth District Court's authority for remanding this sentencing to the trial court, had not yet been decided. Although it would have been possible for defense counsel to question the application of a revised statute to Respondent's sentencing, and pose an objection such as was found to be acceptable for jurisdictional purposes in Williams v. State, 414 So. 2d 509 (Fla. 1982), there should be no necessity to retrace ponderous appellate steps either by establishing ineffectiveness of counsel or by filing a Rule 3.850 motion, just to achieve the same position this case was in when the District Court remanded it.

The District Court was correct in following Hayes. Retention of one-half jurisdiction over a sentence was authorized at the time of the

offenses for which Respondent was sentenced; but by the time of his sentencing, the Legislature had apparently decided that judicial control over the executive function of parole should be limited to one-third of the sentence. §§947.02, 947.16(3), Fla. Stat. (1983). Sentencing under the revised statute would not be an ex post facto application of a law, because it would not be disadvantageous to the defendant, and it would carry out the Legislature's intervening expression of intent.

Petitioner asks that this Honorable Court recede from Rhoden, supra, whose language it deems "overbroad," and cites Williams v. State, 414 So. 2d 509 (Fla. 1982), as holding that a contemporaneous objection is necessary in a case such as this. Respondent would argue that the principle in Rhoden—that the fact that some sentencing errors may be corrected by simple remand obviates the necessity for a contemporaneous objection—is sound. It is also very much in the public interest. This Honorable Court should recede instead from its apparent application of the contemporaneous objection requirement in Williams, to whatever extent that is necessary, and affirm the Fifth District Court of Appeal.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Brynn Newton

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery; and by mail to Mr. Robert Earl Brumley, P. O. Box 221, Raiford, Florida 32083, this 26th day of November, 1984.

Brynn Newton

ATTORNEY