IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,929

THE STATE OF FLORIDA,

Petitioner,

vs.

CLEVE ANDREW MOBLEY,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the prosecution in the trial court. Respondent was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Petitioner unless otherwise indicated. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

(Limited to the issue before the Court)

The January of 1977, [redacted] were boyfriend and girlfriend. At about 8:30 p.m. or 9:00 p.m. on the evening of January 28th, they went to the beach in Boca Raton. (R 323-325). There they drank some wine and had intercourse. (R 325). As they were dressing, three black males approached [redacted]. (R 326). One of the men pulled a knife and held it on [redacted]. (R 327). The other two men forced [redacted] to the ground and had intercourse with her. The men took turns guarding [redacted] until all three had intercourse with Ms. [redacted]. (R 329-336). The men then told Ms. [redacted] and [redacted] to walk down the beach, and when the couple turned around the men were gone. (R 336).

Respondent was charged by information with committing sexual battery and aggravated assault on January 27, 1977. (R 767). The state filed an amended information adding a statute citation on June 27, 1983. On July 11, and 12, 1983, the trial court heard Respondent's Motion to Dismiss and Motion in Limine. (R 801, 804, 1 - 267). Trial began July 12, 1983. The jury returned verdict of guilty as charged in Count I and II of the information. (R 808). On August 24, 1983, the court sentenced Respondent to serve a life sentence and retained jurisdiction for 12 years which the trial court calculated was one third of Respondent's Life sentence using a mortality table (R 761-2).

The sentence was to run consecutive to a five year sentence imposed in Count II on which the court also retained jurisdiction (R 762).

Notice of Appeal to the Fourth District Court was timely filed August 29, 1983. In an opinion filed March 20, 1985, the Fourth District Court of Appeal decided the retention of jurisdiction was appealable notwithstanding the fact that Respondent had failed to follow the contemporaneous objection rule, and recognized this conclusion necessarily created conflict with the First District Court's decision in Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984). The Fourth District then aligned itself with the Third District decision in Cordero-Pena v. State, 421 So.2d 661 (Fla. 3d DCA 1982), and held that the "attempted retention of jurisdiction over a portion of a life sentence constitutes an illeagal sentence and is error of fundamental proportion." The Fourth affirmed the convictions against Respondent; but vacated retention of jurisdiction over the life sentence; and remanded for restructuring of the sentence to impose an appropriate period of retention over the five-year sentence on Count II.

On April 18, 1985, Petitioner/Appellee timely filed its Notice of Invocation of Discretionary Jurisdiction asserting that the district court is in direct conflict with the First District's Cofield Case. A motion for Stay of Mandate was filed April 1, 1985, and the Fourth District entered its order on April 30, 1985 granting Petitioner's Motion for Stay of Mandate. This Honorable Court accepted jurisdiction dispensing with oral argument, by its Order issued August 19, 1985.

POINTS ON APPEAL

POINT I

WHETHER BY OPERATION OF THE CONTEMPORANEOUS OBJECTION RULE, A DEFENDANT IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF A LIFE SENTENCE WHERE THE TRIAL COURT HAS FULLY COMPLIED WITH ALL THE REQUIREMENTS OF §947.16(3) FLORIDA STATUTES (1983) AND OTHERWISE ANNOUNCES A LEGAL LIFE SENTENCE, AND NO OBJECTION TO SUCH RETENTION IS MADE BY THE DEFENDANT AT THE TIME OF SENTENCING?

POINT II

WHETHER THE TRIAL COURT PROPERLY RETAINED JURISDICTION OVER ONE-THIRD OF THE APPELLANT'S SENTENCE OF "LIFE IMPRISONMENT" PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1981)?

SUMMARY OF ARGUMENT

POINT I

Section 947.16(3), Florida Statutes (1983), requires the trial court to notify the defendant of the court's intention to retain jurisdiction over the defendant for one-third of the imposed sentence. In addition, the trial court judge must state with individual particularity the justification for the retention of jurisdiction. One of the purposes of the statute is to give the defendant an opportunity to respond to the reasons stated for retention. Therefore, when the trial court fully complies with the mandatory requirements of §947.16(3), and the defendant fails to object to the retention at the time retention is announced by the trial court judge, the defendant is thereafter precluded from appealing the validity vel non of retention by operation of the contemporaneous objection rule.

POINT II

In the instant case, the trial court, by using mortality tables, determined Respondent's expected life span to be 36 years, and retained jurisdiction over 12 years or one-third of the sentence imposed. The trial court's practice in the instant case demonstrates a life sentence is amenable to computation. Since a life sentence is amenable to computation and life sentence is the maximum penalty for many of the enumerated offenses in §947.16(3), retention of jurisdiction was contemplated by the Legislature to apply to a life sentence.

ARGUMENT

POINT I

BY OPERATION OF THE CONTEMPORANEOUS OBJECTION RULE, A DEFENDANT IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF A LIFE SENTENCE WHERE THE TRIAL COURT HAS FULLY COMPLIED WITH ALL THE REQUIREMENTS OF §947.16(3) FLORIDA STATUTES (1983) AND OTHERWISE ANNOUNCES A LEGAL LIFE SENTENCE, AND NO OBJECTION TO SUCH RETENTION IS MADE BY THE DEFENDANT AT THE TIME OF SENTENCING.

Section 947.16(3) Florida Statutes (1983) provides in pertinent part:

> [I]n any case of a person convicted of . . . aggravated assault, . . . sexual battery, or any felony involving the use of a . . . deadly weapon, at the time of sentencing the judge may enter an order retaining jurisdiction over the offender for review of a commission release order. This jurisdiction of the trial court judge is limited to the first one-third of the maximum sentence imposed. . . . When any person is convicted of two or more felonies and consecutive sentences are imposed, then the jurisdiction of the trial court judge as provided herein applies to one-third of the total consecutive sentences imposed.

On August 24, 1983, when the Respondent appeared before the Honorable Richard B. Burk for sentencing, the record shows the trial court began by reminding Respondent of the charges he was found guilty of by the jury (R757-758), and went on to inform Respondent of the four basic matters the trial court

must consider with regard to imposing any sentence (R 758-759).

At R 759 the trial court stated:

> I have read your record . . . it is not a good record. I'm not certain that there is much real hope for rehabilitation with regard to you . . .

Continuing, the trial court sentenced Respondent as follows:

> Punishment is a definite need with regard to this matter, as well as incarceration to avoid this type of activity ever occurring again in the future by you or by the other two people who have also been found guilty of this matter.
>
> It is for those reasons that the sentence I'm going to pronounce will include also a retention of jurisdiction of this matter with regard to any probable probation or parole that you may have pursuant to Florida's Statute 947.16.
>
> The Standard Mortality Table with regard to these matters in Court indicates that an individual who is 33 years old - or you just turned 33 this month, that your expected life is 36 years. That's a Mortality Table that is a best guestimate or estimate by someone. I don't know how long you will live. I'm going to retain jurisdiction over your sentence at least to consider whatever the Probation and Parole Department does for one-third of the sentence. If I have to say I'm going to retain

it for one-third of the 36 years, that would be at least 12 years with regard to the sexual battery matter.

With regard to the aggravated assault, one-third of five would be something more than one year.

With regard to the sexual battery, I am going to sentence you to life imprisonment in the Department of Correction of the State of Florida as punishment for what you have done and in a hope that you would be kept off the streets for something like this cannot be done by you ever again.

With regard to the aggravated assault charge, I'm going to sentence you to the maximum you can receive with regard to that matter which is five years in the Department of Correction as punishment and as a deterrent . . .

* * *

With regard to the aggravated assault, that was, as far as I'm concerned, the first sentence that you will receive. The sentence with regard to the sexual battery will be consecutive to that or after you have completed your sentence with regard to the aggravated assault. Then the sexual battery sentence will be imposed.

* * *

Is there anything further that needs to be discussed with regard to Mr. Mobley's case at this time by the State?

MS. BROOME [Prosecutor]: No, sir.

MR. BONFIGLIO [Defense Counsel]: Yes, sir, I have discussed with the public defender's office the representation of Mr. Mobley. They don't think they are going to have a conflict of interest in the case, so they said that they

would take the case on for the purposes of an appeal.

THE COURT: All right, sir. As soon as those matters are addressed, I will sign whatever papers are necessary with regard to the appeal papers. . . .

MR. BONFIGLIO: I intend to file the notice of appeal to make sure in the shuffle nothing gets lost, as far as time is concerned, but then I'll file the substitution.

THE COURT: Okay. Thank you. Nothing further with regard to this matter?

MR. BONFIGLIO: Thank you.

MS. BROOME: Thank you.

(Whereupon, the proceedings in the above-styled cause were concluded.)

(R 761-765)

It is clear from these excerpts that the trial court fully complied with the requirements of §947.16(3) by informing Respondent the trial court was retaining jurisdiction over a definite period of time (12 years) of Respondent's life sentence, and stating the justification with individual particularity. It is also clear that although Respondent was given the opportunity, no objection to the retention was raised at the sentencing hearing, or in the Motion for New Trial (R 813-814).

In the recent case, of Robinson v. State, 458 So.2d 1132 (Fla. 4th DCA 1984), the Fourth District stated:

> We have previously suggested on two occasions that one purpose of the statute is to give the defendant an opportunity to respond to the reasons stated for retention. Stafford v. State, 440 So.2d 55 (Fla. 4th DCA 1983) and Thornton v. State, (Fla. 4th DCA, Case No. 82-1208, opinion filed April 13, 1983) [8 F.L.W. 1043], rev'd on other grounds on reh'g, 442 So.2d 1104 (Fla. 4th DCA 1983).
>
> * * *
>
> The statute contemplates a statement on the record of the reasons justifying retention of jurisdiction . . . which would permit defendant to respond and make appropriate objections in order to preserve any error for appellate review. Id. at 1134.

Petitioner submits that the trial courts' failure to comply with the requirements of the Statute in Robinson v. State, supra; State v. Brumley, 471 So.2d 1282 (Fla. 1985); and State v. Walcott, 10 F.L.W. 363 (Fla. Case No. 66,391, July 3, 1985) is the distinguishing factor between the above three cases and the cases of Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984) and the instant case. The Fifth District in Brumley v. State, 455 So.2d 1096 (Fla. 5th DCA 1984) and this Court in State v. Brumley, supra, held the trial court erred by retaining jurisdiction over one-half of the defendant's sentence rather than one-third of each sentence since the sentence was entered subsequent to the 1983 amendment of §947.16(3) which reduced the maximum retained jurisdiction period to one-third of the sentence.

In State v. Walcott, 10 F.L.W. 363 (Fla. Case No. 66,391, July 3, 1985) this Court in upholding the Fifth District's opinion to vacate the retention of jurisdiction found:

> Section 947,16(3), Florida Statutes (1983), permits the retention of jurisdiction in sentences for certain enumerated offenses which do not include the offense for which respondent was convicted, Consequently, there was no statutory basis for the retention of jurisdiction under the statute.
> Id. 10 F.L.W. 363.

Unlike Robinson v. State, supra, Walcott, supra, and Brumley, supra, which dealt with the failure to comply with a mandatory requirement of the statute, the case at bar is factually similar to Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984), where the First District held:

> The record discloses that neither Cofield nor his court-appointed attorney objected when the trial court declined to follow the state's recommendation that it impose the death penalty in this case, but instead, inflicted two life sentences, retaining jurisdiction over one-half of each. Nor was any objection made when the court gratuitously pronounced Section 947.16(3), Florida Statutes (Supp.1982) to be procedural, therefore allowing for retroactive application. When, in prior cases, the retroactive application of that same statute has been challenged, this court has held:
>
> > Ex post facto application of the retention statute is not fundamental error and objection must be made at the trial level to preserve the issue for appellate review.

> Fredericks v. State, 440 So.2d 433, 434 (Fla. 1st DCA 1983). See also Brown v. State, 428 So.2d 369 (Fla. 5th DCA 1983); Mobley v. State, 447 So.2d 328 (Fla. 2d DCA, February 24, 1984). Likewise, where retention of jurisdiction over a portion of a life sentence has been challenged, but no objection to such retention was made before the trial court, the issue has been held to be not preserved for appellate review. Gaskins v. State, 415 So.2d 132 (Fla. 5th DCA 1982). We therefore conclude that Cofield's failure to make any objection to the court's retention of jurisdiction over one-half of his consecutive life sentences precludes him from challenging such retention by direct appeal.
> [Footnote omitted.]
> Id. at 409-410.

The First District Court recognized this Court's decision in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), and distinguished it as follows:

> In reaching this decision, we are not unaware of the recent Florida Supreme Court decision of State v. Rhoden, 448 So.2d 1013 (Fla., 1984) where, in dicta, it was stated that "[t]he purpose for the contemporaneous objection rule is not present in the sentencing process" as it is at trial. Id. at 1016. We decline, however, to adopt the broad interpretation of that decision advanced by appellant which would, in effect, eliminate the need for a contemporaneous objection to alleged sentencing errors in all cases. Rather, we find that decision to be limited to situations where the trial court, in sentencing a defendant, fails to comply with a mandatory duty imposed

> upon him by statute. For example, the trial judge in Rhoden failed to set out, in writing, his reasons for sentencing a juvenile as an adult as required by Section 39.111, Florida Statutes (1981). Id. at 410.

And held that since the trial court "fully complied with the requisites of section 947.15 (sic) by stating, with particularity, his justifications for retention of jurisdiction," Rhoden does not apply to the circumstances of this case; a contemporaneous objection was required, none appearing in the record, the appeal was "sua sponte DISMISSED without prejudice to Appellant's right to raise the issue ... pursuant to Fla.R.Crim.P. 3.850." Id. at 410.

In the instant case, in its Opinion of March 20, 1985 (Exhibit I), the Fourth District stated:

> The first issue is whether failure to object to the sentences waives appealability or whether sentencing errors of this type are fundamental. The Florida Supreme Court in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), and in State v. Snow, 10 F.L.W. 40 (Fla. Jan. 10, 1985), ennunciated the rule that a trial court's failure to follow a mandatory statutory duty imposed upon sentencing procedures renders inoperable the bar to appellate review ordinarily consequent upon failure to follow the contemporaneous objection rule. That aspect of retention of jurisdiction involved in the Snow case, however, was the mandatory statutory duty to state with particularity the justification for retention rather than, as here, the validity vel non of retention over a life sentence. The First District Court of Appeal distinguished Rhoden on this basis but certified

> the question. Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984). The Fifth District Court of Appeal felt that this was a distinction without a difference, applied Rhoden, and also certified the question. Brumley v. State, 455 So.2d 1096 (Fla. 5th DCA 1984). Slip Opinion pp. 1-2.

The Fourth then acknowledged conflict with the "first district's Cofield case" and clearly declined to align itself with Brumley, supra, when it stated "we do not necessarily agree with the fifth district's Brumley case that our result is mandated by Rhoden and Snow."

Petitioner asserts, as it is clear from the record, that in the instant case the trial requirements of the Statute, (the procedural default and deciding factor in Brumley and Walcott), therefore, the issue here is "the validity vel non of retention over a life sentence." Both the First District and the Fourth District have held this to be an important distinction. Cofield, supra, Robinson v. State, supra, and Mobley v. State, 10 F.L.W. 741 (Fla. 4th DCA 1985). When the defendant's failure to object to the retention of jurisdiction over the sentence imposed involves the trial court's failure either to announce his intention to retain jurisdiction or failure to state with particularity the justification for retention, the defendant does not waive his right to direct appeal. State v. Walcott, supra, and State v. Brumley, supra.

However, where the challenge is as to the validity vel non of retention over a life sentence, a defendant's failure to make any objection to the court's retention of jursidiction over one-third of his life sentence precludes his challenging

such retention by direct appeal. This is so because since the court has complied with the statutory requirements, a contemporaneous objection would permit the judge to understand the issue raised and the adverse party to have notice of the alleged defect, in order that the trial court may consider the issue and correct itself or specifically state its response for the overruling of the objection. When, as here, the trial court complied with the statutory requirements, failure to object at sentencing should preclude the defendant from challenging the trial court's retention of jurisdiction.

Although the Fifth District in Brumley, supra, at 1097 relied on this Court's decision in State v. Rhoden, 448 So.2d 1013 (Fla. 1983) to support the position that failure to object does not preclude the defendant from challenging the trial court's retention of jurisdiction, and stated:

> [T]he Florida Supreme Court in State v. Rhoden, 448 So. 2d 1013, (Fla. 1984), held that the purpose for which the contemporaneous objection rule exists is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

This Honorable Court in answering the certified question in Brumley chose to not rely in Rhoden, but instead relied on State v. Snow, 462 So.2d 455 (Fla. 1985)* and held:

> The instant case is controlled by State v. Snow, . . . wherein we held that where the trial court fails to follow the mandatory requirements of the sentencing statute, a defendant may not be precluded from raising this point on appeal because he failed to object in the trial court. Brumley, supra, at 1282.

This Court's opinion in Brumley by its language expressly limited Snow and Brumley to the case where "the trial court fails to follow the mandatory requirements of the sentencing statute." This Court's Brumley opinion disavowed the Fifth District's contention that according to Rhoden "the contemporaneous objection rule . . . is not present in the sentencing process . . ." Petitioner will further assert that this Court's opinion in Brumley and acceptance of jurisdiction in the instant case confirm that the contemporaneous objection rule applies at sentencing where the trial court complies with the statutory requirements, and thus the defendant is precluded from challenging the validity vel non of retention over a life sentence, when no objection was heard from the defense at the time of sentencing.

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* This Court in Snow at 456 cited with approval the First District's decision in Cofield v. State, and limited its decision in Snow to the cases, unlike here, where "the trial court fails to follow the mandatory requirements of [§947.16(3)(a)]" at 457.

POINT II

THE TRIAL COURT PROPERLY RETAINED JURISDICTION OVER ONE-THIRD OF THE APPELLANT'S SENTENCE OF "LIFE IMPRISONMENT" PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1981).

The Fourth District Court in its opinion of March 20, 1985, in the instant case (Exhibit I, page 2) stated:

> The second issue is whether retention of jurisdiction over a life sentence is appropriate. As stated by the Third District Court of Appeal in a case apparently not involving failure to make a contemporaneous objection, "where a court imposes a life sentence, Section 947.16(3) [retention of jurisdiction] is inoperable . . . and the defendant's entitlement to parole consideration is solely controlled by the separate statutory requirement that he be required to serve no less than twenty-five years before becoming eligible for parole." Cordero-Pena v. State, 421 So.2d 661, (Fla. 3d DCA 1982). See also Brown v. State, 460 So.2d 988 (Fla. 4th DCA 1984); Kosek v. State, 448 So.2d 57 (Fla. 5th DCA 1984). We agree with this rationale and therefore hold that attempted retention of jurisdiction over a portion of a life sentence constitutes an illegal sentence and is error of fundamental proportion.

Petitioner will point out that Respondent in the instant case was convicted of sexual battery pursuant to § 794.011(3) (R 808, 809, 815). Sexual battery under § 794.011 (3) is a felony life punishable "by a term of imprisonment for life or a term of years not less than 30" when the life felony (as in the case sub judice) is committed prior to October 1,

1983. See §775.082(3)(a) Florida Statutes (1983). Therefore, unlike the defendant in Cordero-Pena v. State, 421 So.2d 661 (Fla. 3d DCA 1982), Respondent's entitlement to parole consideration is not controlled by §775.082(1), which deals only with capital offenses, and requires the defendant "to serve no less than 25 years before becoming eligible for parole."

Petitioner submits that § 947.16(3) Florida Statutes 1983 providing for retention of jurisdiction by the trial court over parole releases is applicable to all convictions of any enumerated offenses without regard to whether the sentence imposed is for a specific term or for life. See Judge Cowart's concurring opinion in Gaskin v. State, 415 So.2d 131 (Fla. 5th DCA 1982). Petitioner, further asserts that if the Legislature had intended to limit the authority of a trial court to retain jurisdiction over a life imprisonment term, it would have placed such a limitation in the statute. Section 947.16(3) was originally passed by the Legislature and became effective on June 19, 1978. Prior to the passage of § 947.16(3), this Court in Alvarez v. State, 358 So.2d 10 (Fla. 1978) had held that a life sentence was not impermissibly indefinite. Thus, the Legislature was aware that a permissible maximum sentence for many of the enumerated offenses under § 947.16(3) was life imprisonment. It is the function of the legislature, not the courts to define criminal offenses and to prescribe maximum punishments to be imposed upon those found guilty of them. See Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.

2d 275 (1981); Rummel v. State, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382 (1980). Had the Florida Legislature intended to proscribe the applicability of § 947.16(3) to sentences lawfully imposed in accordance with the pronouncements of Alvarez v. State, supra, the Legislature would have done so. Additionally, Petitioner points out that although § 947.16(3) has been amended in 1982 first to substitute "an initial parole interview" for "parole" in the first sentence, and second to substitute "half" for "third" in the second, third, and fourth sentences - See Laws 1982, c. 82-171, §9; and again in 1983 to allow retention over one-third of the sentence as opposed to one-half - See Laws 1983, c. 83-131 §9; the Legislature has not seen the need to proscribe § 947.16(3)'s application when dealing with a life sentence.

In the instant case, the trial court has permissibly sentenced Respondent to the maximum period provided by law. The trial court deciding it would be necessary and prudent to retain jurisdiction over Respondent's life sentence, fully complied with the mandatory requirements of § 947.16(3). Using the Standard Mortality Tables (R 761) the trial court determined that since Respondent was 33 years old at sentencing, the tables projecting an expected life of 36 years, he could retain jurisdiction for 12 years or one-third of Respondent's "expected" life sentence.

The problem the District Courts around the State have seen with retention over a life sentence is that "a life

span is immeasurable" Cordero-Pena, supra, at 661, thereby the conclusion that:

> [W]here a life sentence is imposed, Section 947.16(3) . . . is inopposite. Since a life span is immeasurable, no calculation of the length of time jurisdiction can be retained can be made.

Woodson v. State, 439 So.2d 976, 977 (Fla. 3d DCA 1983). See also, Brown v. State, 460 So.2d 988, 989 (Fla. 4th DCA 1984); Kosek v. State, 448 So.2d 57, 58 (Fla. 5th DCA 1984); Willis v. State, 447 So.2d 283 (Fla. 2d DCA 1983); Rodriguez v. State, 424 So.2d 892 (Fla. 3d DCA 1982).

Petitioner would submit that one third of a life sentence is amenable to computation as the trial court in the instant case demonstrated. Petitioner acknowledges that in Alvarez v. State, 358 So.2d 10, 12 (Fla. 1978), the Florida Supreme Court held that mortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the Legislature, but submits that Alvarez' limitation should be applied to the situation in which an individual's life expectancy should be used to mark the longest term which a particular defendant should serve, not the shortest. Appellee asserts that insurance actuarial tables can be reasonably used to determine a defendant's life expectancy, for the sole purpose of determining the length of a trial court's retention of jurisdiction under Section 947.16(3), Florida Statutes. See, e.g. Alvarez v. State, 358 So.2d at 13 (Boyd, J., concurring in part, dissenting in part).

Under the facts of the case at bar by using the mortality tables, the trial court established a definite term of years for retention of jurisdiction. In Watson v. State, 437 So.2d 702, 705 (Fla. 4th DCA 1983), the Fourth District in dicta stated:

> When a defendant is sentenced to life or a term of years in excess of any reasonable life expectancy, we believe some evidence, such as mortality tables, must be presented to establish a reasonable basis for the trial court's determination as to the period of time for which jurisdiction may be retained.

In Watson, though, the defendant had been sentenced to 99 years in prison, not a life sentence. The Fourth District felt that 99 years would exceed greatly the life expectancy of a 28 year old person, and therefore held that "33 years is not the practical equivalent of one-third of life." Id. at 705. Therefore the Fourth affirmed the conviction but vacated the provision for retention and remanded to give the state and the trial court an opportunity to present evidence, such as mortality tables, to establish a reasonable basis for the period of time of retention of jurisdiction. On review by this Honorable Court in State v. Watson, 453 So.2d 810 (Fla. 1984), the issue of the mortality tables was not reached in view of the fact that the defendant Watson was sentenced to 99 years - a definite term of years, as opposed to a life sentence - and this Court in

Harmon v. State, 438 So.2d 369 (Fla. 1983) had previously held that a term of years is not an indefinite term of years, and therefore the trial court could retain jurisdiction over 33 years or one-third of a 99 year term. In Harmon, at 371, this Court made the point very clear when it held that retention of jurisdiction over 200 years of a 600-years term of imprisonment was perfectly lawful, reasoning:

> Thus a court may impose consecutive terms of definite imprisonment even though each term itself may exceed that particular defendant's life expectancy. The fact that one-third of the combined total of the consecutive terms of imprisonment may exceed a particular defendant's life expectancy does not render the terms in excess of the statutory maximum of life imprisonment. A person who commits several first-degree felonies each punishable by life imprisonment has no ground for complaint about a sentence which may and probably will result in his spending the rest of his life in prison. Id. at 370,371.

It is important to note that the trial court in the instant case desired to retain jurisdiction over Respondent's life sentence, and the trial court was entitled to pursuant to § 947.16(3). The argument that one third of a life sentence is not amenable to computation and therefore retention here must be reversed may be appealing on its surface, but it totally fails to address § 944.30, Florida Statutes (1983) which provides

that life sentences may be commuted to a specific term of years if certain conditions are met. The entire statute reads as follows:

> 944.30 Life prisoners; commutation to term for years. - - Any prisoner who is sentenced to life imprisonment, who has actually served 10 years and has sustained no charge of misconduct and has a good institutional record, shall be recommended by the department for a reasonable commutation of his sentence, and if the same be granted, commuting the life sentence to a term for years, then such prisoner shall have the benefit of the ordinary commutation, as if the original sentence was for a term for years, unless it shall be otherwise ordered by the Board of Pardons.

It is important to note that there is a mandatory duty placed upon the Department of Corrections to notify the Board of Pardons (now the Cabinet sitting in clemency cases) whenever a life-sentenced inmate has completed 10 years of his sentences with a clean prison record. This notification is automatic, and the Department of Corrections is left without any discretion not to initiate proceedings to have life sentences commuted to a term of years.

Thus, there is very real possibility that someone with a life sentence will have his term commuted to a term of years if his prison conduct is good. However, if this argument is accepted, then the trial court will not be able to retain jurisdiction over one-third of the life sentence because at the time the sentence is commuted, it will be too late for the trial judge to enter an order retaining jurisdiction.

The situation would be especially egregious if the following hypothetical is considered. Under the new sentencing guidelines, § 921.001(8), Fla. Stat., makes it abundantly clear that someone who receives a life sentence cannot be paroled - - such persons can be released only by "an executive order granting clemency. The provisions of chapter 947 shall not be applied to such person." (Emphasis added) On the other hand, someone convicted of a capital felony (ostensibly a more serious crime than the life felony) would be eligible for parole after 25 years if the argument is accepted. Surely, this would be an absurd result, which is contrary to the well settled rule of statutory construction that statutes are not to be construed to reach absurd results. Dorsey v. State, 402 So.2d 1178 (Fla. 1981). That principle, coupled with another well known rule of statutory construction, i.e., courts should construe statutes to give effect to all of their provisions, Cilento v. State, 377 So.2d 663 (Fla. 1979), leads to an almost inescapable conclusion that a trial court must be able to retain jurisdiction over someone who commits a life felony, and carrying the argument to its conclusion surely the Legislature intended that trial courts could retain jurisdiction over defendants who committed life felonies.

In summary, it is the Petitioner's contention that Cordero-Pena should not control a situation like in the instant case, because if a trial court does not retain jurisdiction of a life sentence at the time it is imposed, it will be too late

to attempt to retain jurisdiction once the life sentence is commuted to a term of years pursuant to § 944.30. Therefore, since sexual battery is a crime for which retention of jurisdiction is statutorily proper, and is punishable by life imprisonment, or a term of years, and the trial court specified a definite mumber of years for the retention of jurisdiction, this Honorable Court can distinguish Cordero-Pena, and approve the trial court's use of mortality tables. Contrary to the Fourth District's Opinion, the sentence was legal and in compliance with §§ 794.011(3), 775.082(3)(a) and 947.16(3); therefore, the trial court did not commit fundamental error. Accordingly the State urges the Court to affirm Respondent's sentence as stated by the trial court.

Finally, the Fourth District in its opinion in the instant case (Exhibit 1, page 2) stated:

> We also point out that it was our error to retain jurisdiction over one-third of each of appellant's consecutive sentences.

Petitioner acknowledges that § 947.16(3) in its last sentence provides:

> When any person is convicted of two or more felonies and consecutive sentences are imposed, then the jurisdiction of the trial court judge as provided herein applies to one-third of the total consecutive sentences imposed.

The trial court sentenced, Respondent as follows:

> I'm going to retain it [jurisdiction] for one-third of the 36 years, . . . 12 years with regard to the sexual battery matter.
>
> With regard to the aggravated assault, one-third of five would be something more than a year. (R 762)

The Fourth District then decided to remand to the trial court for "restructuring of the sentence to impose an appropriate period of retention over the five-year sentence on Count II."

This Court has already determined that §947.16(3), providing the trial court's authority to retain jurisdiction, is constitutional. See Borden v. State, 402 So.2d 1176 (Fla. 1981); Harmon v. State, supra, 438 So.2d at 370. But should this Court now decide that the trial court should not have used the mortality tables to arrive at the one-third definite period, Petitioner respectfully requests that this Court remand the instant case back to the trial court for its determination whether to resentence Respondent to a life sentence without retaining jurisdiction, or to a term of years so it can retain jurisdiction over one-third of such term of years. See, e.g., Villery v. Parole and Probation Commission, 396 So.2d 1107, 1112 (Fla. 1981); Pizzaro v. State, 403 So.2d 1364 (Fla. 4th DCA 1981); Durham v. State, 304 So.2d 146, 148 (Fla. 3d DCA 1974).

CONCLUSION

Based on the facts and foregoing argument, Petitioner urges this Honorable Court to reverse the Fourth District's Opinion of March 20, 1985, and to affirm Respondent's conviction and sentences as determined by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to JEFFREY ANDERSON, Assistant Public Defender, Counsel for Respondent, 224 Datura Street, 13th Floor, West Palm Beach, Florida, 33401, this 9th day of September, 1985.

Georgina Jimenez-Orosa
OF COUNSEL