IN THE SUPREME COURT OF FLORIDA

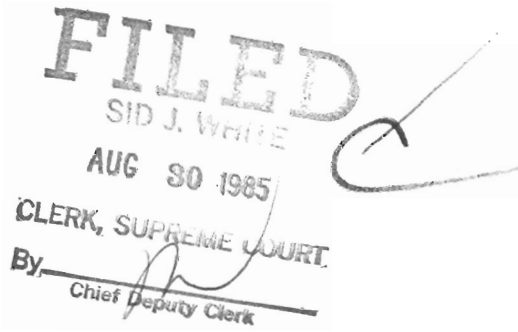
STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,320

WILLIE PEARL WHITFIELD

Respondent.
_____/



REPLY BRIEF OF PETITIONER
ON THE MERITS

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REPLY BRIEF OF PETITIONER
ON THE MERITS

PRELIMINARY STATEMENT

The parties and the record will be referred to as in the State's initial brief.

All emphasis will again be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Fla.R.App.P. 9.210(c) requires that a respondent, in constructing an answer brief, should omit a statement of the case and facts unless she disagrees with that provided by the petitioner in its initial brief, in which case she may substitute a statement in which the areas of disagreement "should be clearly specified." In constructing her statement of the case and facts, the respondent here undertook no such specification. The State therefore relies upon the statement of the case and facts presented in its initial brief, and requests

that this Court disregard those representations in respondent's answer brief which appear either extraneous to or at variance with this statement.

The State would stress that regardless of exactly when defense counsel below physically received the scoresheet containing the erroneous assessment of points for victim injury, he not only failed to contemporaneously object to this proposed assessment when it was orally recited by the trial judge in open court, but indeed stated in response to a direct question from the bench that he had "no" information that any of the point assessments were inaccurate (R 439). Counsel obviously examined the scoresheet before he signed it to certify that it had been "[r]eviewed as to accuracy of point totals" (R 439, 73).

SUMMARY OF ARGUMENTS

Regardless of the reason for defense counsel's failure to object to a putative error at sentencing, the financial and systemic damages caused by this silence, among other factors, require that such should constitute an irredeemable procedural default of the defendant's right to thereafter pursue the alleged error either on direct appeal or collaterally, unless the error has resulted in an illegal sentencing, i.e., one in excess of the maximum authorized by statute.

Although sentencing departures are appealable, scoring errors committed in computing the recommended sentencing range are not. Alternatively, even if scoring error are reviewable, the instant scoring error was demonstrably harmless.

ISSUE I

THIS COURT'S DECISION IN STATE V. RHODEN, 448 So.2d 1013 (FLA. 1984) DOES NOT MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY AND SPECIFICALLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL; RATHER, THIS DECISION MEANS THAT SUCH AN OBJECTION IS UNNECESSARY ONLY WHERE A TRIAL JUDGE HAS FAILED TO MAKE SPECIFIC SENTENCING FINDINGS AS MANDATED BY STATUTE WITHOUT AFFORDING THE DEFENDANT AN OPPORTUNITY TO OBJECT THERETO.

ARGUMENT

Respondent's argument that all alleged sentencing errors must be considered on direct appeal even absent specific contemporaneous objections thereto is based upon serious misunderstandings of the State's positions and the realities of trial court litigation. These four faulty premises shall be stated and then refuted.

* * *

Respondent's Faulty Premises #1: The State is suggesting that trial counsel's failure to object to the scoring error below "was a deliberate act to sandbag the trial court in the hopes of gaining reversal upon appeal" ("Respondent's Brief On The Merits", p. 7).

Facts: The State went out of its way to note its belief that "this scoring error was invited inadvertently rather than deliberately" ("Initial Brief Of Petitioner On The Merits", p. 16). Indeed, the State completely agrees with respondent that "[d]efense counsel's ethics and tactics should not be in question here....[T]his Court (should) focus on only

the effects of (counsel's) failure to object, for whatever reason, to (the) scoring error" ("Respondent's Brief On The Merits", p. 7). Cf Estelle v. Williams, 425 U.S. 501,512, footnote 9 (1975) and Johnson v. Wainwright, 463 So.2d 207, 211, footnote * (Fla. 1985), holding that the question of whether defense counsel's silence was strategic or inadvertent is irrelevant in assessing either whether the defendant is in irredeemable procedural default or counsel was ineffective, respectively, insofar as no defendant is entitled to perfect counsel, see Engle v. Isaac, 456 U.S. 107 (1982) and Jones v. Barnes, 463 U.S. 745 (1983), quoted with approval, Ruffin v. Wainwright, 461 So.2d 109,111 (Fla. 1984). The State will discuss the effects of trial counsel's conceeded imperfection shortly.

Respondent probably acquired her defensive and mistaken notion that the State was accusing trial counsel of unethical conduct from the State's passing suggestion in its initial brief that if this Court should unwisely decline to enforce the contemporaneous objection rule in sentencing proceedings, it might alternatively:

> promote the effective functioning of the Florida criminal justice system by also holding prospectively that, where an error is fundamental enough for an appellate court to predicate a reversal thereupon even absent a specific contemporaneous objection, counsel's failure to so object should be cause for some form of meaningful sanctioning.

("Initial Brief Of Petitioner On The Merits", pp. 16-17).

In so arguing, the State relied heavily upon State v. Meyer, 430 So.2d 440 (Fla. 1983) and Evitts v. Lucey, ___U.S.___, 83 L.Ed.2d 821 (1985), wherein the courts chastized and rescued counsel for oversights which would have essentially deprived their clients of their rights to appeal, a right waivable only by the defendant personally. Certainly not all oversights by defense counsel are of such a pervasive quality, and the State would regard this Court's adoption of the foregoing quid pro quo, in lieu of enforcement of the contemporaneous objection rule, as a major setback. See Engle v. Isaac, 456 U.S. 107,127. The State's true interest here is in protecting the integrity and finality of its judgments and hence conserving public money, not in causing the penalization of unavoidably imperfect lawyers in order to permit defendants to endlessly consume troves of public money in the quixotic pursuit of their private visions of perfect justice. See Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 967 (1980); Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac.

Respondent's Faulty Premise #2: "An objection (to the scoring error below) would have been futile" because the judge would have left this error uncorrected, as evidenced by his summary denial of respondent's Fla.R.Crim.P. 3.800 motion for correction of sentence; thus, no objection was required to preserve the error for appeal ("Respondent's Brief On The Merits", p. 9).

Facts: As the State noted in its initial brief, the judge below probably denied respondent's motion to correct sentence "upon the legally correct ground that (he) had no jurisdiction to hear the motion due to the pendancy of

respondent's appeal, see State ex.rel. Faircloth v. District Court of Appeal, Third District, 187 So.2d 890 (Fla. 1966)" ("Initial Brief Of Petitioner On The Merits", p. 20). Respondent's uncomplimentary castigation of the trial judge flies in the face of this Court's pronouncement in Lucas v. State, 376 So.2d 1149,1152 (Fla. 1979) that it "will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law." Moreover, the alleged futility of presenting an objection to a trial court does not constitute cause for higher court review of a putative error. Engle v. Isaac, 456 U.S. 107,130.

If we were to presume, as respondent would have us do, that trial judges will obstinately refuse to heed properly argued contemporaneous objections, then objections could not be required to preserve points for appellate review in any context. To shift the ultimate responsibility for oversights from defendants and their counsel onto trial judges would be to fundamentally alter the adversary nature of our system of justice. This the United States Supreme Court has refused to do. Wainwright v. Sykes; Estelle v. Williams, 425 U.S. 501, 512. No, "[t]he acts of an attorney on behalf of a client will be binding on the client", State v. Abrams, 350 So.2d 1104,1105 (Fla. 4th DCA 1977); see Wainwright v. Sykes, 433 U.S. 72,91, footnote 14. And an attorney's failure to contemporaneously object to a putative scoring error must be binding upon his client regardless of whether the trial judge has a so-called

"mandatory duty" to "approve all scoresheets for accuracy" under Fla.R.Crim.P. 3.701(d)(1) and rule on challenges to their accuracy if asked, and regardless of whether the scoring error is "legal", as here, or "factual", as in Dailey v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1583, on motion for rehearing denied, 10 F.L.W. 1584, review granted (Fla. 1985), Case No. 67,381. In either case counsel's silence essentially results in the evil of an undeveloped appellate record; here by depriving the trial judge of his alternative prerogative to impose the sentence ultimately imposed via a readily-sustainable sentencing departure. The fact that the unobjected-to putative error in Lucas v. State was one of "law" rather than "fact" did not deter this Court from enforcing the specific contemporaneous objection requirement in that case, and should not do so here.

Respondent's Faulty Premise #3: Trial counsel's failure to object to the scoring error below was not "unduly waste(ful of the judiciary's) time and limited resources" because this error can be remedied by a "simple remand to the sentencing judge" ("Respondent's Brief On The Merits", p. 9).

Facts: Counsel's failure to object has already caused great judicial inconvenience and the attendant expenditure of thousands of dollars of public money, and may ultimately cause further judicial inconvenience and the attendant expenditure of thousands of dollars more.

A bold assessment, but one the State can back up.

Given this Court's presumption that trial judges will correct erroneous rulings upon proper objections thereto by defense counsel, Lucas v. State, the judge below would have

had two theoretical choices available to deal with the erroenous point assessment had counsel so objected. For reasons which were advanced in the State's initial brief, the State believes that the record strongly suggests the judge would have deleted the offending point assessment and then imposed an identical sentence for reasons which are so compelling that no appeal thereof would have been contemplated (see "Initial Brief Of Petitioner On The Merits", pp. 21-22). See Anders v. California, 386 U.S. 738 (1967); Reed v. State, 378 So.2d 899 (Fla. 1st DCA 1980). Alternatively, the judge could hypothetically have corrected the erroneous point assessment and then imposed a sentence within the guidelines, in which case, again, no appeal could have legally been taken. In either eventuality, the system would have been spared expenditures and inconveniences for the following items:

> a) Preparation of an appellate record by circuit court personnel, at a cost of at least $700.00, see Ethridge v. State, 383 So.2d 778 (Fla. 1st DCA 1978).
>
> b) Drafting of a total of six appellate and certiorari briefs by assistants to the Public Defender and the Attorney General, and typing thereof by their secretaries;
>
> c) Processing of these briefs by clerks, aides and judges of the district court and this Court, plus typing of opinions by their secretaries.

If the State obtains a stay of the First District's mandate ordering respondent resentenced from the trial court pending the outcome of the instant proceeding, see Nelson v.

State, 414 So.2d 505 (Fla. 1982), cf Jollie v. State, 405 So.2d 418 (Fla. 1981), AND this Court thereafter reverses the First District and orders the sentence originally imposed reinstated, the misallocation of judicial time and the consequent hemorrhaging of the public treasury caused by trial counsel's failure to object will cease. If, however, the State cannot gain a stay and/or this Court unwisely affirms the First District, the attendant so-called "simple remand" for resentencing will result in some or all of the following additional inconveniences and expenditures:

> d) Transportation of respondent from prison to the hearing, see Daniels v. State, ___So.2d___(Fla. 4th DCA 1985), 10 F.L.W. 1230, upon motion for rehearing and/or clarification denied, 10 F.L.W. 1793;
>
> e) Work of reappointed defense counsel, see Fla.R.Crim.P. 3.111(b), the prosecutor, the judge, and courtroom personnel.

And then, of course, if the judge commits a second unobjected-to error in resentencing respondent to her original term, the aforedescribed appellate merry-go-round starts over.

Can this really be a wise, utilitarian, and lawful use of the finite tax money generously contributed to the criminal justice system by the citizens of Florida? The State v. Rhoden, 448 So.2d 1013,1016 (Fla. 1984) dicta upon which respondent relies, that "[t]he purpose of 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" is, most respectfully, nothing more

than a myth, as the foregoing analysis clearly demonstrates. This Court should now recognize as much. See Walker v. State, 462 So.2d 452,454-455 (Fla. 1985), Shaw, J., concurring. The pages of the "Florida Law Weekly" are, as respondent unwisely notes, literally littered with dozens of district court decisions laxly interpreting State v. Rhoden to justify appellate review over all manner of unpreserved sentencing errors, unwittingly refashioning the role of the Florida trial judge from unbiased umpire to defense defender, that the trial defense counsel from active advocate to passive prevaricator, and that of appellate defense counsel from claim continuer to fearless flyspecker. Enough is enough! "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Bozza v. United States, 330 U.S. 160,166-167 (1947); cf Wainwright v. Sykes and Engle v. Isaac, limiting Fay v. Noia, 372 U.S. 391 (1963), which liberally excused procedural defaults in the federal habeas corpus context. As this Court recently stated in rejecting a defendant's tardy claim that the trial court which convicted him was without jurisdiction to proceed against him in the first place:

> There is good reason for requiring defendants to register their objections with the trial court. A defendant should not be allowed to subject himself to a court's jurisdiction and defend his case in hope of an acquittal and then, if convicted, challenge the court's jurisdiction on the basis of a defect that could have been easily remedied if it had been brought to the court's attention earlier. Neither the common law nor our statutes

> favor allowing a defendant to use the resources of the court and then wait until the last minute to unravel the whole proceeding.

State v. King, 426 So.2d 12,15 (Fla. 1982)(Boyd, J.).

Respondent's Faulty Premise #4: The State is arguing that a trial defense counsel's failure to contemporaneously object to a sentencing error should preclude relief therefrom even if the error results in an "illegal" sentence ("Brief Of Respondent On The Merits", pp. 11; 15).

Facts: The State went out of its way to disown the position attributed to it by this Court in State v. Rhoden, 448 So.2d 1013,1016, that "if no objection was made at the time of sentencing, the defendant could not appeal (or otherwise attack an) illegal sentence...(resulting in) a term of years longer than the legislature mandated." Specifically, the State wrote:

> If the judge has imposed a sentence in excess of the maximum authorized by statute, whether or not the defendant has objected thereto, the defendant has a remedy either by direct appeal, see §924.06(1)(d) and Fla.R.App.P. 9.140(b)(1)(D), Williams v. State, 280 So.2d 518 (Fla. 3rd DCA 1973), and Cleveland v. State, 287 So.2d 347 (Fla. 3rd DCA 1973), or preferably, in order to give the trial judge the opportunity to rectify his own error, by a Fla.R.Crim.P. 3.850 motion to correct illegal sentence, which the defendant may appeal in the event of its denial, see Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978).

("Initial Brief Of Petitioner On The Merits", p. 11, footnote 2).

Respondent evidently embraces the notion that any sentencing error which results in "the excess caging of a human being", as the Fourth District melodramatically put it, should be cognizable even absent a contemporaneous objection

either upon direct appeal, Pettis v. State, 448 So.2d 565,566 (Fla. 4th DCA 1984), or collaterally, Chaplin v. State, ___So.2d ___(Fla. 1st DCA 1985), 10 F.L.W. 1936, review pending (Fla. 1985), Case No. 67,492, Thomas v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1429, on motion for rehearing denied, 10 F.L.W. 1809, review granted (Fla. 1985), Case No. 67,423, and Stacey v. v. State, 461 So.2d 1000 (Fla. 1st DCA 1984), review granted (Fla. 1985), Case No. 66,447. In other words, respondent believes that all sentencing errors are fundamental. But if this were the law, this Court would obviously not only not enforce the contemporaneous objection rule in capital sentencing context, see e.g. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984) and Rose v. State, 461 So.2d 84 (Fla. 1984), but would indeed not enforce the contemporaneous objection rule regarding alleged errors committed in the trial context, see e.g. Parker v. State, 456 So.2d 436 (Fla. 1984), where counsel's ill-advised acquiescence to the erroneous admission of incriminating evidence may conceivably result in an acquittable defendant being jailed or executed. The State would therefore suggest that this Court clarify that there are three types of sentences, attended by the following variables:

> a) "Correct sentences" are those which are prescribed in a procedurally perfect fashion and for terms not in excess of the maximum authorized by statute. These sentences are not appealable directly and are not subject to collateraly challenge, see Robinson v. State, 373 So.2d 898 (Fla. 1979).
>
> b) "Permissible sentences" are those which are prescribed in a procedurally imperfect fashion but for

terms not in excess of the maximum authorized by statute. These sentences should be appealable directly only where accompanied by a specific contemporaneous objection, see Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984), explained, State v. Snow, 462 So.2d 455 (Fla. 1985), but see State v. Walcott, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 363, and should not be subject to collateral challenge, see Fla.R.Crim.P. 3.850 as amended in 1984)[1], Skinner v. State, 366 So.2d 486 (Fla. 3rd DCA 1979); Wahl v. State, 460 So.2d 579 (Fla. 2nd DCA 1984); see generally Spinkellink v. State, 350 So.2d 85 (Fla. 1977), cert. denied, 434 U.S. 960 (1977).[2]

c) "Illegal sentences" are those which, regardless of whether they were prescribed in a procedurally perfect fashion, are for terms in excess of the maximum authorized by statute. As noted, these sentences may be appealable directly, see Williams v. State and Cleveland v. State, see also Richardson v. State, ___ So.2d ___ (Fla. 2nd DCA 1985), 10 F.L.W. 1810, or challenged collaterally, see Kelly v. State, and Green v. State, 450 So.2d 1275 (Fla. 5th DCA 1984), regardless of whether they were accompanied by a contemporaneous objection.

1

Fla.R.Crim.P. 3.850 now reads, in pertinent part:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

2

The State would accordingly distance itself from its passing statement in its initial brief that respondent could challenge the erroneous point assessment via a nonappealable Fla.R.Crim.P. 3.800(b) motion to mitigate a legal sentence ("Initial Brief Of Petitioner On The Merits", p. 20-21). The trial judge should not consider the procedurally defaulted claim regarding the point assessment as grounds for granting any such motion.

ISSUE II

REGARDLESS OF HOW THIS COURT ANSWERS THE CERTIFIED QUESTION, IT SHOULD REVERSE THE DECISION OF THE FIRST DISTRICT AND REINSTATE THE SENTENCE IMPOSED EITHER BECAUSE SENTENCING GUIDELINE SCORING ERRORS ARE NOT REVIEWABLE, OR BECAUSE THIS SCORING ERROR WAS HARMLESS.

ARGUMENT

Respondent's argument that scoring errors are reviewable is based upon the following serious misunderstanding of the law:

Respondent's Faulty Premise #5: The Legislature, in authorizing the right to appeal a departure from the maximum sentence recommended under the guidelines, §§921.001(5) and 924.06(1)(e), Fla.Stat., and this Court, in effecting this right, Fla.R.App.P. 9.140(B)(1)(E), further intended to authorize de novo appellate review of the predicate scoresheets for putative errors ("Respondent's Brief On The Merits", pp. 14-15, 17).

Facts: The meaning of statutes and court rules should be ascertained by construing their plain language while not ascribing an absurd intent to either the Legislature or this Court. Compare Ferguson v. State, 377 So.2d 709 (Fla. 1979); Smith v. Ryan, 39 So.2d 281 (Fla. 1949); Winter v. Playa del Sol, Inc., 353 So.2d 598 (Fla. 4th DCA 1977), and Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). The Legislature and this Court authorized only the right to appeal sentencing departures, and did not absurdly authorize the vastly broader right to the demonstrably wasteful and frequently blind de novo appellate review of the predicate scoresheets for putative errors. See generally Dailey v. State. Indeed, this Court in promulgating

the sentencing guidelines explicitly found that public resources are "finite", Fla.R.Crim.P. 3.701(b)(7).

* * *

As noted, respondent's contention that trial counsel's failure to object to the putative scoring error should be excused on grounds of the alleged futility of such action is both factually and legally uncompelling. In the ultimate sense, however, respondent is correct that a contemporaneous objection to the instant scoring error would have been futile. As the State noted in its initial brief, the record below strongly suggests (R 442-443) that after the judge had corrected the error he would simply have departed to impose the same 30 month sentence (see "Initial Brief Of Petitioner On The Merits", pp. 21-22). Thus the instant scoring error was demonstrably harmless, §924.33, Fla.Stat. The First District's refused to apply a harmless error analysis here is, in and of itself, grounds for reversal. Brooks v. State, ___So.2d___(Fla. 1985), Case No. 66,137.

CONCLUSION

WHEREFORE Petitioner, the State of Florida again respectfully submits that the decision of the First District must be REVERSED and this cause remanded with directions that the sentence originally imposed be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits has been forwarded to Ms. Paula S. Saunders, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32301, on this 30th day of August, 1985.

John W. Tiedemann
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