IN THE SUPREME COURT OF FLORIDA

ROOSEVELT DAILEY,

Petitioner,

v.

CASE NO. 67,381

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Roosevelt Dailey, the criminal defendant and appellant below 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, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "respondent."

References to the two volume record on appeal will be designated "(R:)."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, a conformed copy of the decision under review is attached to this brief as an appendix.

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

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as a reasonably accurate summary of the legal occurrences and the evidence adduced below for purposes of resolving the narrow legal issues presented upon petition for writ of certiorari, see Tillman v. State, ___So.2d___(Fla. 1985), 10 F.L.W. 305, to the extent that this statement is nonargumentative, and subject to the following additions and/or clarifications:

Defense counsel at sentencing did not contemporaneously and specifically object to the proposed assessment of sentencing guideline scoresheet points for legal constraint and moderate victim injury upon petitioner's adjudication for aggravated battery on grounds that there were no factual bases to support such assessments; neither did he object to the denial of credit for time served as a condition of probation on grounds that there was no legal basis for such denial (R 25-27; 38-44). The trial judge tendered the following written reasons for departing from the recommended guideline maximum sentence of six years of incarceration to impose a 12 year sentence:

> The defendant's prior history of criminal activity some of which was not calculated in the computation for the sentencing guidelines establishes a pattern of conduct that renders him a continuing and serious threat to the community. The defendant's poor prior performance as a probationer or parolee persuades the court that he is in need of correctional or rehabilitative treatment which can only be provided by commitment to a penal facility in excess

> of the current sentencing guidelines. Although he is well able to do so, the defendant shows little, if any, inclination to seek out and hold any type of regular or steady employment. In addition, the defendant's conduct at the time of the arrest whereby threats were made to the arresting officer clearly demonstrates the continuing threats to members of our community.

(R 43-44).

On appeal, the First District held that the propriety of the aforementioned point assessments was not presented for appellate review insofar as petitioner's failures to contemporaneously object thereto had resulted in fatal nondevelopment of the record on these issues; however, the court certified the following question to this Court as being of great public importance pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v):

> DOES THE CONTEMPORANEOUS OBJECTION RULE APPLY TO PRECLUDE APPELLATE REVIEW OF AN ALLEGED SENTENCING ERROR UNDER THE GUIDELINES WHERE THE ERROR CLAIMED INVOLVES FACTUAL MATTERS THAT ARE NOT APPARENT OR DETERMINABLE FROM THE RECORD ON APPEAL?

Dailey v. State, 10 F.L.W. 1583,1584; see also Whitfield v. State, ___So.2d___ (Fla. 1st DCA 1985), 10 F.L.W. 1564, review granted sub nom. State v. Whitfield, (Fla. 1985), Case No. 67,320[1] and Bradley v. State, ___So.2d___ (Fla. 2nd DCA 1985),

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[1] The Whitfield court certified the following similar question to this Court as likewise being of great public importance: (Continued on next page)

10 F.L.W. 1544. The First District also held that the refusal to award credit for time served was legally improper, but that the reasons advanced for the sentencing departure were clear and convincing in any event - a judgment which petitioner does not dispute on certiorari.

Footnote 1 Continued

IS THE DECISION IN STATE V. RHODEN, 448 So.2d 1013 (FLA. 1984) TO BE LIMITED TO THOSE SITUATIONS IN WHICH A STATUTE PLACES A MANDATORY DUTY UPON THE TRIAL COURT TO MAKE SPECIFIC FINDINGS OR SHOULD RHODEN BE CONSTRUED TO MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL?

SUMMARY OF ARGUMENTS

This Court should answer the certified question by reconfirming the viability of the contemporaneous objection rule in the noncapital sentencing context, holding that this rule applies to preclude appellate review of alleged sentencing errors regardless of whether the error claimed involves factual matters which are not determinable from the record on appeal or legal matters which are so determinable, unless the trial judge has either failed to make specific sentencing findings as mandated by statute without affording the defendant an opportunity to object thereto, or has imposed a sentence in excess of the maximum authorized by statute. The Florida trial judge should not be an insurer for the actions of trial defense counsel; nor should appellate defense counsel be permitted to flyspeck undeveloped trial records and raise putative errors which were not preserved at trial either because they did not in fact occur or were permitted to occur by trial counsel for strategic purposes.

Regardless of how this Court answers the certified question, it should affirm the unassailable decision of the First District as to the propriety of petitioner's guideline-departure sentence either because the alleged scoring errors were demonstrably harmless, or because sentencing guideline scoresheet errors are not reviewable in any event.

ISSUES PRESENTED ON APPEAL

ISSUE I

THE CONTEMPORANEOUS OBJECTION RULE APPLIES TO PRECLUDE APPELLATE REVIEW OF ALLEGED SENTENCING ERRORS REGARDLESS WHETHER THE ERROR CLAIMED INVOLVES FACTUAL MATTERS WHICH ARE NOT DETERMINABLE FROM THE RECORD ON APPEAL OR LEGAL MATTERS WHICH ARE SO DETERMINABLE, UNLESS THE TRIAL JUDGE HAS EITHER FAILED TO MAKE SPECIFIC SENTENCING FINDINGS AS MANDATED BY STATUTE WITHOUT AFFORDING THE DEFENDANT AN OPPORTUNITY TO OBJECT THERETO, OR HAS IMPOSED A SENTENCE IN EXCESS OF THE MAXIMUM AUTHORIZED BY STATUTE.

ISSUE II

REGARDLESS OF HOW THIS COURT ANSWERS THE CERTIFIED QUESTION, IT SHOULD AFFIRM THE DECISION OF THE FIRST DISTRICT AS TO THE PROPRIETY OF PETITIONER'S GUIDELINE-DEPARTURE SENTENCE EITHER BECAUSE THE ALLEGED SCORING ERRORS WERE DEMONSTRABLY HARMLESS, OR BECAUSE SENTENCING GUIDELINE SCORING ERRORS ARE NOT REVIEWABLE.

ISSUE I

THE CONTEMPORANEOUS OBJECTION RULE APPLIES TO PRECLUDE APPELLATE REVIEW OF ALLEGED SENTENCING ERRORS REGARDLESS WHETHER THE ERROR CLAIMED INVOLVES FACTUAL MATTERS WHICH ARE NOT DETERMINABLE FROM THE RECORD ON APPEAL OR LEGAL MATTERS WHICH ARE SO DETERMINABLE, UNLESS THE TRIAL JUDGE HAS EITHER FAILED TO MAKE SPECIFIC SENTENCING FINDINGS AS MANDATED BY STATUTE WITHOUT AFFORDING THE DEFENDANT AN OPPORTUNITY TO OBJECT THERETO, OR HAS IMPOSED A SENTENCE IN EXCESS OF THE MAXIMUM AUTHORIZED BY STATUTE.

ARGUMENT

Should Florida criminal defendants generally be held strictly liable for the actions of their trial counsel, thus requiring that appellate defense counsel not raise putative errors not preserved below, or should Florida trial judges generally be insurers for the actions of trial defense counsel, thus requiring that appellate defense counsel flyspeck trial records and raise putative errors not preserved below? This case and that of State v. Whitfield, the State submits, will force this Court to answer this critical compound question.

* * *

In earlier times, the Florida courts regularly considered upon appeal issues which litigants had technically failed to preserve. State v. Jones, 204 So.2d 515 (Fla. 1967). But the reason for this liberality vanished with the United States Supreme Court's landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963) that all indigent felony defendants in this

country are constitutionally entitled to the effective assistance of counsel as a matter of right:

> Application of the exception [to the rule requiring a contemporaneous objection in the absence of fundamental error as a prerequisite to appellate review of a putative error] is no longer necessary to protect those charged with crime who may be ignorant of their rights. Their rights are now well guarded by defending counsel. Under these circumstances further 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.

State v. Jones, 204 So.2d 515,519. Faithful to these sentiments, this Court thereafter refused to consider in a variety of contexts alleged errors which had not been accompained by specific contemporaneous objections, see e.g., State v. Smith, 240 So.2d 807 (Fla. 1970), State v. Barber, 301 So.2d 7 (Fla. 1974), Clark v. State, 363 So.2d 331 (Fla. 1978), Castor v. State, 365 So.2d 701 (Fla. 1978), Lucas v. State, 376 So.2d 1149 (Fla. 1979) and State v. Cumbie, 380 So.2d 1031 (Fla. 1980), including alleged errors committed in capital sentencing proceedings, see, e.g., Ford v. Wainwright, 451 So.2d 471 (Fla. 1984) and Rose v. State, 461 So.2d 84 (Fla. 1984).[2]

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[2] These affirmations of the contemporaneous objection rule were frequently accomplained by emphatic declarations such as "the fundamental error [exception shall not be employed as an]

Unfortunately, in a recent line of decisions commencing with State v. Rhoden, 448 So.2d 1013 (Fla. 1984) and including Walker v. State, 462 So.2d 452 (Fla. 1985), State v. Snow, 462 So.2d 455 (Fla. 1985), and State v. Walcott, ___So.2d___(Fla. 1985), 10 F.L.W. 363, this Court has, inconsistently with its aforecited precedents, promulgated an exception to the rule requiring contemporaneous objections in the sentencing context, essentially holding that where a trial judge fails to make specific sentencing findings as mandated by statute, no objection is required to preserve the point for appeal. The State believes that the exception of State v. Rhoden and its progeny should be expressly limited to those situations in which the trial judge has failed to make statutorily required sentencing findings without affording the defendant an opportunity to object thereto -

Footnote 2 Continued

'open sesame' for consideration of alleged trial errors not properly preserved", State v. Smith, 240 So.2d 807,810 (Adkins, J.), quoting Gibson v. State, 194 So.2d 19,20 (Fla. 2nd DCA 1967); "[a]n appellate court *must* confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made", State v. Barber, 301 So.2d 7,9; and "[e]xcept in rare cases of fundamental error,...appellate counsel must be bound by the acts of trial counsel", Castor v. State, 365 So.2d 701,703.

as was the case in State v. Rhoden itself.[3] Such a limitation would be thoroughly consistent with this Court's prior decisions, and thus serve all three interrelated rationales customarily advanced for the rule requiring contemporaneous objections, which the State shall now review and relate to the instant case:

> 1. The contemporaneous objection rule ensures that the trial judge will have the opportunity to either correct a possibly erroneous ruling on the spot or explain his reasons for standing firm, thus permitting full development of the record for appellate court review.

As this Court recently explained in justifying its refusal to review the alleged impropriety of admitting certain evidence:

> If appellant had objected to the evidence on the ground he now relies upon, the trial court could have made a determination of whether there was an adequate reason for excluding the evidence. The court could have

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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), Richardson v. State, ___ So.2d ___ (Fla. 2nd DCA 1985), 10 F.L.W. 1810, 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. 3.800 or 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); Green v. State, 450 So.2d 1275 (Fla. 5th DCA 1984).

> inquired into the question of whether the precise quality or substance of the solution used should be a matter of predicate to the admissibility of the test by reason of its effect on the test's reliability. Because appellant did not raise this issue below, the trial court did not have an opportunity to evaluate and rule on this question. An appellate court is in a weak position to rule on the legal issue of admissibility of scientific evidence when, because of the lack of an objection or motion below, there is no unfolding of the factual basis upon which the legal question turns.

Troedel v. State, 462 So.2d 392,396 (Fla. 1984)(Boyd, C.J.). See also Cardinale v. Louisiana, 394 U.S. 437 (1969); Wainwright v. Sykes, 433 U.S. 72,88 (1977); United States ex.rel. Caruso v. Zelinsky, 689 F.2d 435,441 (3rd Cir. 1982). In other words, "[r]eversible error cannot be predicated upon conjecture." Sullivan v. State, 303 So.2d 632,635 (Fla. 1974), cert. denied, 428 U.S. 911 (1976); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1974), cert. denied, ___U.S.___, 83 L.Ed.2d 205 (1984)(Adkins, J.).

In this case, had defense counsel objected to the now-disputed point assessments, these either would have been corrected by the trial judge or sustained based upon competent evidence submitted by the State, thereby facilitating intelligent rather than blind appellate review of petitioner's complaints if review was even denied necessary.

2. The contemporaneous objection rule ensures that the parties will concentrate their efforts on trial proceedings as the "main event" in the criminal justice process, thereby encouraging an orderly approach to litigation, a just result, finality in litigation, and the consequent conservation of judicial resources and labor.

The United States Supreme Court has decreed that as a matter of policy, "the state trial on the merits [should be] the 'main event'" in the criminal justice process, "rather than a 'tryout on the road'" for subsequent proceedings. Wainwright v. Sykes, 433 U.S. 72,90. The reasons for this policy have been well stated by this Court on several recent occasions:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases....Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Witt v. State, 387 So.2d 922,925 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980). As Mr. Justice Ehrlich wrote for a unanimous Court in State v. Scott, 439 So.2d 219,221 (Fla. 1983) in the course of explaining the desirability of mandating the defendant's presence at a certain Fla.R.Crim.P. 3.850 resentencing proceeding:

> It would be wasteful of the court's time and of the limited resources of the appellate system to deny the sentencing judge the benefit of contemporaneous objections to a sentence and the concomitant opportunity to correct errors at the sentencing hearing.

See also Walker v. State, 462 So.2d 452,454-455, in which

Mr. Justice Shaw, concurring, deplored the waste of societal resources inherent in evaluating unpreserved sentencing errors. See also United States ex.rel. Caruso v. Zelinsky, 689 F.2d 435, 441-442; compare Ethridge v. State, 383 So.2d 778 (Fla. 1st DCA 1978), wherein an assistant public defender caused the expenditure of at least $700.00 of public money to challenge the propriety of a $45.00 restitution assessment which had not been preserved for appellate review.

In this case, had defense counsel objected to the now-disputed point assessments, these would have either been corrected or supported, and their propriety would likely not have been a time and money consuming issue upon direct appeal and certiorari.

3. The contemporaneous objection rule removes the incentive for defense attorneys to permit erroneous rulings in silence as insurance policies against an untoward outcome, and thus promotes the integrity of the legal profession.

In Cruz v. State, 465 So.2d 516,517 (Fla. 1985), cert. denied, ___U.S.___(1985), 37 Crim.L.Rptr. 4098, this Court decried police conduct which it believed would "induce an otherwise innocent individual to commit" a crime. Cf State v. Glosson, 462 So.2d 1082 (Fla. 1985). Along similar lines, the Court had earlier recognized that the judicial promulgation of a rule liberally excusing the requirement of a contemporaneous objection as a prerequisite to appellate review of an alleged error had the unfortunate side effect of inducing:

> defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be "not guilty" it remainded unassailable.
>
> Such procedure is unmindful that an important function of an attorney in a trial is to assist the court.

State v. Jones, 204 So.2d 515,518; see also Wainwright v. Sykes, 433 U.S. 72,89; Francis v. Henderson, 425 U.S. 536,539-541 (1976); Clark v. State, 363 So.2d 331,333; United States ex.rel. Caruso v. Zelinsky, 689 F.2d 435,442; Curry v. Wilson, 405 F.2d 110,113-114 (9th Cir. 1969), cert. denied sub nom. Curry v. Nelson, 397 U.S. 973 (1970); York v. State, 232 So.2d 767 (Fla. 4th DCA 1969); Waiters v. Wainwright, 249 So.2d 734 (Fla. 2nd DCA 1971); Fischer v. State, 429 So.2d 1309, 1313 (Fla. 1st DCA 1983), review denied, 438 So.2d 834 (Fla. 1983) (Joanos, J., dissenting). Any procedure routinely excusing the contemporaneous objection requirement as a prerequisite to appellate review offers trial counsel the Hobson's choice of ethically objecting to a judicial error and thus injuring his client's chances of reversal upon appeal in the event of an unassailable but equally disadvantageous correction, or of unethically remaining silent and thus enhancing his client's chances of reversal. This is unconscionable and should be condemned. Cf Sanborn v. State, ___So.2d___(Fla. 3rd DCA 1985), 10 F.L.W. 1733.

A procedure routinely excusing the contemporaneous objection requirement as a prerequisite to appellate review

also spawns the attendant ill of forcing appellate defense counsel to flyspeck undeveloped trial records and raise putative errors which were not preserved at trial either because they did not in fact occur or were permitted to occur by trial counsel for strategic purposes, contrary to this Court's aforecited admonition that "[e]xcept in rare cases of fundamental error,...appellate counsel must be bound by the acts of trial counsel", Castor v. State, 365 So.2d 701,703. See also Ray v. State, 403 So.2d 956 (Fla. 1981), Moore v. Wainwright, 633 F.2d 406 (5th Cir. 1980), and McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). Examples of such putative unpreserved "errors" which the courts have unforunately accepted to vitiate perfectly valid judgments and/or sentences include the claim that an eligible defendant must personally elect to be sentenced under the guidelines on the record regardless of how strongly the conduct of the parties suggests that such election occurred in fact, Finklea v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1374; and also include the claim that a defendant must personally waive his right to be present at a deposition to prepetuate testimony which is later admitted at trial regardless of counsel's acquiescence to this admission, Brown v. State, ___So.2d___(Fla. 1985), 10 F.L.W. 263.[4] Examples

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[4] See also Harris v. State, 438 So.2d 787 (Fla. 1983), wherein this Court intimated that Fla.R.Crim.P. 3.260 required

(Continued on next page)

of such putative unpreserved "errors" which the courts have wisely rejected to affirm valid judgments and/or sentences include the claim that a defendant must personally be advised by the trial judge on the record that her election to be sentenced under the guidelines for offenses occurring prior to their effective date will result in an ineligibility for parole which she would otherwise enjoy, regardless of her failure to allege that she was not actually informed of such ineligibility by her counsel, Jones v. State, 459 So.2d 1151 (Fla. 1st DCA 1984), review denied, ___So.2d___(Fla. 1985), Case No. 66,411; and also include the claim that a defendant must personally waive his right to be present during the trial examination of a defense witness, regardless of counsel's active encouragement of such absension, Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). These latter decisions reflect an astute appreciation of Judge Schwartz' eloquent admonition in Salcedo v. Asociacion Cubana Inc., 368 So.2d 1337,1339 (Fla. 3rd DCA 1979) that "the courts (should) not allow the practice of the 'Catch-22' or 'gotcha' school of litigation to succeed."

Footnote 4 Continued

that a defendant's waiver of the right to jury instructions upon lesser included offenses must be made personally, and Tucker v. State, 459 So.2d 306 (Fla. 1984), wherein this Court similarly intimated that counsel's evidently uncorroborated request for jury instructions on lesser included offenses for which the statutes of limitations had run was ineffective to secure these instructions in waiver of the defendant's entitlement to this defense.

In this case, had defense counsel objected to the putative scoring errors, the First District and this Court would not have been asked to promulgate a rule which would have the effect of encouraging trial counsel to remain silent as to possibly sustainable point assessments, in order that subsequent counsel might fish the appellate waters for a reversal unhindered by a forbidding fully developed record.

In conformity with the foregoing principles and its aforecited procedents, this Court should expressly limit its decision in State v. Rhoden and its progeny to mean only that a defendant need not specifically and contemporaneously object to alleged sentencing errors of either "fact" or "law" to preserve such issues for appeal only where a trial judge has either failed to make specific sentencing findings as mandated by statute without affording the defendant an opportunity to object thereto, or has imposed sentences in excess of the maximums authorized by statute. Such limitations would preclude appellate review over the instant nonstatutory alleged scoring errors to which defense counsel below failed to object when presented with the opportunity, and which did not result in a sentence beyond parameters, see §§784.045 and 775.082(3)(c), Fla.Stat.[5]

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[5] Such limitations should also have precluded review over petitioner's appellate claim that he should have been granted

Although the State believes counsel's failure to object was inadvertent rather than deliberate, the system damages resulting therefrom - the denial of notice to the trial judge that his rulings were subject to challenge, the nondevelopment of the record, the consequent disorderliness of subsequent proceedings, and the attendant waste of societal resources - remain the same. These considerations compel the enforcement of the contemporaneous objection rule in this case.

The same basic considerations compel the enforcement of the contemporaneous objection rule in all other sentencing proceedings, some of which have become so complicated that they move closely resemble full-blown trials than the simple sentencing proceedings of days gone by. The pages of the "Florida Law Weekly" are literally littered with dozens of district court decisions laxly interpreting State v. Rhoden to justify appellate review over all manner of sentencing errors, unwittingly refashioning the role of the Florida trial judge from unbiased umpire to defense defender, that of trial defense

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Footnote 5 Continued

credit for time served as a condition of probation, insofar as the trial judge's denial of same was not followed by a specific contemporaneous objection.

counsel from active advocate to passive prevaricator, and that of appellate defense counsel from claim continuer to fearless flyspecker. Enough is enough! Cf Wainwright v. Sykes and Engle v. Isaac, 456 U.S. 107 (1982), 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 unitl the last minute to unravel the whole proceeding.

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

* * *

The State's proposed limitation of State v. Rhoden would, if accepted by this Court, obviously have the general effect of holding Florida criminal defendants strictly liable for the actions of their trial counsel, and of precluding

appellate defense counsel from raising unpreserved errors.[6] "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). Should the Court disagree with the State's proposed limitation of State v. Rhoden and thus essentially hold that Florida trial judges are generally insurers for the actions of defense counsel, and consequently that appellate defense counsel may freely raise any unpreserved putative error which strikes their fancy, the State would respectfully suggest that the Court 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, trial counsel's failure to so object should be cause for some form of meaningful sanctioning, cf Fla.R.App.P. 9.410. As this

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In such an eventuality, the Court must thereafter be vigilant in refusing to permit every unpreserved error to be effectively litigated collaterally under the guise of incompetency of trial counsel, as such a procedure would destroy the meaning of the contemporaneous objection rule. See Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), Jones v. Jago, 701 F.2d 45 (6th Cir. 1983), cert. denied, ___U.S.___, 78 L.Ed.2d 2551 (1983), and Anderson v. State, ___So.2d___(Fla. 3rd DCA 1985), 10 F.L.W. 975. Ineffectiveness of counsel must be established by the totality of the circumstances rather than by one isolated act or omission, see Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674 (1984) and Johnson v. Wainwright.

Court explained in State v. Meyer, 430 So.2d 440,443 (Fla. 1983):

> All attorneys, whether state-supplied or privately retained, are under the professional duty not to neglect any legal matters entrusted to them. Fla.Bar Code Prof.Resp., D.R. 6-101(a)(3). Lack of knowledge of or compliance with prescribed rules of practice and procedure is a dereliction of professional responsibility not easily excused, which may subject the negligent attorney to liability for damages to the client as well as disciplinary proceedings before The Florida Bar.

Cf United States v. Hasting, ___U.S.___, 76 L.Ed.2d 96 (1983) and State v. Murray, 443 So.2d 955 (Fla. 1984). As the United States Supreme Court recently stated:

> [A] State may certainly enforce vital procedural rule by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction.

Evitts v. Lucey, ___U.S.___, 83 L.Ed.2d 821,832 (1985).

ISSUE II

REGARDLESS OF HOW THIS COURT ANSWERS THE CERTIFIED QUESTION, IT SHOULD AFFIRM THE DECISION OF THE FIRST DISTRICT AS TO THE PROPRIETY OF PETITIONER'S GUIDE-LINE-DEPARTURE SENTENCE EITHER BECAUSE THE ALLEGED SCORING ERRORS WERE DEMONSTRABLY HARMLESS, OR BECAUSE SENTENCING GUIDELINE SCORING ERRORS ARE NOT REVIEWABLE.

ARGUMENT

This Court is obliged to answer the aforediscussed certified question vesting it with jurisdiction over this cause. See State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). However, regardless of how this Court answers this question,[7] its decision on this point will have the status of an advisory opinion, see State v. Kinner, 398 So.2d 1360 (Fla. 1981), insofar as the decision of the First District as to the propriety of petitioner's guideline-departure sentence must be affirmed either because these scoring errors were harmless, or because guideline scoring errors are not reviewable in any event. These positions will be developed sequentially.

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[7] The State notes that this Court recently answered a certified question adversely to a petitioner and then proceeded to afford him relief upon alternative grounds. Williams v. State, ___So.2d___ (Fla. 1985), 10 F.L.W. 351.

The right to appeal a departure from the maximum sentence recommended under the guideline is authorized by §921.001(5) and 924.06(1)(e), Fla.Stat. and Fla.R.App.P. 9.140(b)(1)(E).[8] But the reasons advanced for the departure petitioner suffered, including his unscoreable prior record, were so clear and convincing that the First District rejected his appeal thereof - a judgment petitioner prudently does not dispute here, see Weems v. State, ___So.2d___(Fla. 1985), 10 F.L.W. 268, although he would have been within his rights to have done so, Tillman v. State. Due to the undeniable propriety of petitioner's 12 year sentence, the State would submit that the possibility that it might have been imposed as a departure from a slightly lower recommended maximum sentence but for erroneous point assessments would be harmless error even presuming scoring errors were reviewable. Compare Hart v. State, 464 So.2d 592 (Fla. 2nd DCA 1985);

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[8] These provisions reads as follows:

> 921.001 Sentencing Commission....
> (5) Sentences imposed by trial court judges must be in all cases within any relevant minimum and maximum sentence limitations provided by statute and must conform to all other statutory provisions. The failure of a trial court to impose a sentence within the sentencing guidelines shall be subject to appellate review pursuant to chapter 924.
>
> 924.06 Appeal by defendant.--
> (1) A defendant may appeal from....
> (e) A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001.
>
> Rule 9.140. Appeal Proceedings in Criminal cases....
> (b) Appeal by Defendant.
> (1) *Appeals Permitted*. A defendant may appeal...
> (E) A sentence when required or permitted by general law.

cf McClain v. State, 356 So.2d 1256 (Fla. 2nd DCA 1978). As the United States Supreme Court recently stated:

> [W]hen courts fashion rules whose violations mandate automatic reversals, they retreat from their responsibilities, becoming instead impregnable citadels of technicality.

United States v. Hasting, 76 L.Ed.2d 96,106 (attribution omitted); see also Williams v. State, 468 So.2d 335 (Fla. 1st DCA 1985). In other words, a remand for resentencing here would be a useless act, and axiomatically courts are not required to perform useless acts. See State v. Strasser, 445 So.2d 322 (Fla. 1983), Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982), review denied, 418 So.2d 1278 (Fla. 1982), and Burney v. State, 402 So.2d 38 (Fla. 2nd DCA 1981).

Moreover, scoring errors are not reviewable. The aforecited authorities authorizing appellate review of sentencing departures contain no comparable authorization for appellate review of scoring errors committed in computing the maximum recommended sentences, and the State would submit that the lack of such authorization precludes such review. Petitioner will doubtless complain that scoring errors are reviewable under the theory that they may result in de facto departures. However, this theory constitutes an interpretation of the applicable statutes and rule, contrary to the axiom that "[w]here the[ir] language is unambiguous, [they] must be accorded the[ir] plain and ordinary meaning." Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). Unless the right to appeal a sentence is plainly authorized by statute, none exists.

See Banks v. State, 342 So.2d 469 (Fla. 1976), Brown v. State, 13 So.2d 458 (Fla. 1943), and Weatherington v. State, 262 So.2d 724 (Fla. 3rd DCA 1972), cert. denied, 267 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973), affirming the pre-guideline tradition that the alleged severity of a sentence within statutory parameters was not appealable; cf Parker v. State, 214 So.2d 632 (Fla. 2nd DCA 1978), Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978), Bertone v. State, 388 So.2d 347 (Fla. 1st DCA 1980), and Butler v. State, 343 So.2d 93 (Fla. 3rd DCA 1977), collectively standing for the proposition that unless a sentence is illegal as in excess of statutory maximum, a trial court's denial of a criminal defendant's Fla.R.Crim.P. 3.800(b) motion to correct sentence is not appealable. As noted, petitioner's sentence for aggravated battery was not in excess of that which could have lawfully been imposed by statute.

Of course, petitioner has a remedy available to him to challenge the "erroneous" point assessments, that of filing a 3.800 motion with the trial court following the conclusion of this proceeding. Although the denial of a properly filed 3.800 motion by the trial judge would not be reviewable as explained, petitioner and this Court should not presume that the judge would act dishonorably if presented with meritorious claims. As the Fifth District recently explained in rejecting the stock defense contention that every time a trial judge advances one invalid reason for a sentencing departure the sentence imposed must be reversed and the cause

remanded for resentencing (hopefully by a different judge) regardless of how many valid reasons for the departure were simultaneously advanced:

> We assume the trial judge understood his sentencing discretion and understood that the mere existence of "clear and convincing reasons" for departing from the sentencing guidelines never requires the imposition of a departure sentence and that the trial judge believed that a sentence departing from the guidelines should be imposed in this case if legally possible. Accordingly, a departure sentence can be upheld on appeal if it is supported by any valid ("clear and convincing") reason without the necessity of a remand in every case. This assumption in the trial judge's continuing belief in the propriety of a departure sentence is especially safe in view of the trial court's great discretion under Florida Rule of Criminal Procedure 3.800(b) to reduce or modify even a legal sentence imposed by it within sixty days after receipt of an appellate mandate affirming the sentence on appeal.

Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984), review granted (Fla. 1985), Case No. 66,137.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that the decision of the First District below should be AFFIRMED, except that the trial court's denial of credit for time served should be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on the Merits has been forwarded to P. Douglas Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, on this 9th day of August, 1985.

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