IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,379

JOSEPH FREDERICK CAPUZZO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF

MITCHELL T. McRAE, P.A.
One Boca Place, Suite 405-East
2255 Glades Road
Boca Raton, Florida 33431
(407)241-6600

Attorney for Petitioner

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INTRODUCTION

In its brief on the merits, respondent raises two arguments; one, that this Court is without jurisdiction, and two, that presence at sentencing may be waived. An alternative harmless error argument is asserted as well wherein it is argued that no prejudice results since a mandatory minimum sentence was at issue herein and presumably efforts at mitigation of the sentence would have been futile.

ARGUMENT

Petitioner has previously responded to respondent's contention that this Court is without jurisdiction through arguments and authorities presented in his response to respondent's motion to dismiss for lack of jurisdiction served November 4, 1991. That response is incorporated by reference herein and the Court is respectfully referred thereto in this context.

With respect to respondent's substantive arguments, same are misplaced. Petitioner does not suggest that the trial court should or could have obtained an affidavit from petitioner or otherwise obtained an express waiver of petitioner's right to be present at sentencing prior to imposing sentence. Rather, petitioner asserts that presence at felony sentencing is a fundamental right which cannot be waived except where the defendant has expressly waived his right to be present either by sworn affidavit or in open court for the record. One can readily imagine circumstances under which an express waiver would be legitimate such as where the defendant was hospitalized and chose to expressly waive his presence at

sentencing. If appropriate safeguards are imposed under such extraordinary circumstances and the state and the defendant each agree to waive their respective compelling interests, then such an express waiver should be recognized.

However, nothing like this exists in this case. The trial court truly did not know at the time he imposed sentence what exactly happened to the defendant to cause his flight. It could have been sheer panic, he could have been kidnapped, or a variety of other reasons one could speculate about. The trial court made certain findings of fact about the defendant's voluntary flight and those factual findings are not challenged by petitioner. However, the enunciation of a rule permitting felony sentencing in absentia creates circumstances under which persons adjudged guilty are committed to a prison sentence without allocution or the opportunity to present evidence in mitigation, and places trial judges in a position to make factual findings regarding the alleged voluntariness of the defendant's absence in the face of limited information when in fact there is no need to do so. Florida Rule of Criminal Procedure 3.720 provides for the ability of the trial judge to issue an arrest warrant to bring the fugitive before the court for sentencing. Similarly, the compelling state interests underscoring the personal presence of the defendant at sentencing are advanced as well by following such a procedure.

Respondent's final argument is that petitioner was not prejudiced by his absence at sentencing because he received a mandatory minimum sentence. In other words, the respondent seeks

to reduce the sentence hearing to a meaningless formality. Respondent ignores the fact that petitioner and the state entered into a plea agreement which contained a requirement of substantial assistance by petitioner. The "flip-side" of that agreement was the respondent's agreement to provide certain sentence reductions if such assistance was provided, including the recommendation of a guideline sentence if successful assistance was provided.

Petitioner was not convicted of a crime carrying a mandatory sentence following a jury verdict in which case the respondent's "harmless-error" argument might carry more weight. Petitioner had an absolute right of allocution and to present evidence in mitigation of his sentence, and that right applies in the instant case despite respondent's contention that his presence at sentencing was meaningless because he faced a mandatory sentence. Finally, in this case the trial court entered its judgment of guilt in absentia on November 7, 1988 following entry of the plea agreement July 13, 1988. Accordingly, respondent's interpretation of Florida Rule of Criminal Procedure 3.180(b) as limiting application of Rule 3.180(a) to proceedings which occur prior to verdict is misdirected since, on one hand, the adjudication of guilt here arose from a guilty plea as opposed to a jury verdict, and, on the other hand, the judgment of guilt was rendered in absentia contemporaneously with the rendition of sentence, in absentia.

CONCLUSION

This Court should reverse the Fifth District's denial of

Petitioner's motion to vacate his sentence imposed in absentia.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to Belle B. Turner, Esquire, Office of the Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida 32114 this 15th day of November, 1991.

MITCHELL T. McRAE, P.A.
One Boca Place - Suite 405-East
2255 Glades Road
Boca Raton, Florida 33431
(407)241-6600

By: _____
Mitchell T. McRae, Esq.
Florida Bar No.: 441759