IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 81,100

THOMAS JOSEPH ARNOLD,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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ARGUMENT

ISSUE (CERTIFIED QUESTION)

> DOES THE HOLDING IN EUTSEY V. STATE, 383 SO.2D 219 (FLA. 1980) THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT], "EUTSEY AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

In its initial brief, the State quoted the following portion of the sentencing colloquy with an accompanying footnote:

> PROSECUTOR: Also, there's a stipulation as to the fact that Mr. Arnold has not been pardoned on these cases and that (inaudible).
>
> Footnote: The burden being on appellant to provide the appellate court with a complete record, the State did not seek to obtain a stipulation from counsel to explain what was inaudible to the court reporter, but the most reasonable inference to be drawn was that the prosecutor stated that "the convictions had not been set aside." If that indeed was what the prosecutor said and that was what the defense understood him to say, then Arnold has deliberately misled the First District Court of Appeal in order to obtain a new sentencing hearing.

(PMB. 3)

Arnold responded to this comment, in part, as follows:

> [A]s Mr. Rogers and Ms. Moseley [sic] are well aware, the undersigned was not present at the proceedings in the trial court, and consequently does not know "what the prosecutor said" or "what defense counsel understood him to say."

(RAB. 2)

Opposing Counsel McGinnes misses the point. This is not his brief. This is Thomas Arnold's brief. Arnold is speaking to the court through the words of his counsel, and he is bound by those words. The State understands that Mr. McGinnes was not present at the sentencing hearing, but that does not explain his failure to consult his client, or his client's trial attorney, before writing the brief to determine what happened at trial and whether a good-faith argument could be made on appeal that the prior predicate felonies had been set aside or pardoned. Arnold himself was present at the sentencing hearing, and he knows perfectly well what happened there. If he made a factual representation in the trial court that he later contradicted on appeal, he has perpetrated a fraud on one of two courts. The prohibition against deceiving the court cannot be avoided by using a lawyer as a mouthpiece.

As further justification for his conduct, Arnold asserts that he considered the stipulation of his counsel to be of no significance to the issue of the trial court's statutory obligation to make statutory findings. (RAB. 2) It certainly was significant to the First District which held that Arnold waived his right to challenge the absence of findings on all of those factors to which his counsel had stipulated were satisfied. (Slip Opinion, 2)[1]

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[1] Arnold states that he will refer to the merits brief of the petitioner (State of Florida) as "BS" and proceeds to do so throughout his brief. (RAB. 1) This tactic reflects poor judgment on Arnold's part, for it does nothing to advance his

Arnold advances two arguments in his answer brief to demonstrate that he is entitled to a new sentencing hearing. First, he argues that the harmless error test announced in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. February 4, 1993) cannot be applied in the instant case because the State did not present a harmless error argument to the First District Court of Appeal. Arnold cites no cases to support his argument, and the State notes that section 924.33, Florida Statutes prohibits any reversal unless prejudice is found by the appellate court. Without engaging in a lengthy analysis to demonstrate the fallacies in Arnold's argument, the State will simply point out that Arnold is mistaken on the facts. In its answer brief filed in the First District, the State argued, in pertinent part, the following:

> Alternatively, the trial court's duty in the penalty phase may be viewed as analogous to its duty in the guilt phase. When the trial court fails to instruct on one of the essential elements of the offense charged, no fundamental error occurs if the essential element was not in dispute. Stewart v. State, 420 So. 2d 86 (Fla. 1982). By analogy, when the trial court fails to make a specific statutory finding, no fundamental error occurs if the finding was not in dispute.

(A.B., 6, fn 2).

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position before this court. If Arnold thinks the State's arguments are "BS," he needs to say so and defend his position with legal arguments.

Arnold did not preserve for appeal the issue he raised in the First District. Therefore, the proper analysis was whether fundamental error had occurred. The State argued that no error had occurred, but, alternatively, if error had occurred, it was not fundamental. Subsequent to publication of the First District's opinion, Rucker was decided. This court disagreed with the State's position for technical reasons but substantively agreed that the findings were purely ministerial and that their absence was not harmful.

Second, Arnold argues that reversible error occurred in his case even under the Rucker harmless error test. Arnold states, "trial counsel in effect conceded that [I] did meet the criteria of the habitual felony offender statute," and the trial court "did note that it was stipulated that [I] qualifie[d] statutorily." (RAB. 5) Notwithstanding the stipulation of counsel to which the trial court took notice, Arnold contends that reversible error occurred because the trial court did not refer "to the totality of the evidence" or "to the standard of proof" required to habitualize him. (Id.)

Arnold misses the point of this court's decision in Rucker. The trial court's failure to make specific statutory findings on each of the objective factors is harmless if it is clear from the record that the factors are either present or were not contested. Defense counsel's stipulation to such qualification is all that is needed to support the trial court's general finding. This court stated in Rucker:

> This ruling is not inconsistent with **Walker**, wherein we stated that findings under section 775.084 are a "mandatory statutory duty":
>
> > We hold that the findings required by section 775.084 are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review process would be difficult, if not impossible.
>
> 462 So. 2d at 454. The finding in issue in **Walker** concerned an earlier version of the habitual offender statute, which had provided:
>
> > [775.084](3) In a separate proceeding, the court shall determine if it is necessary for the protection of the public to sentence the defendant to an extended term as provided in subsection (4) and if the defendant is an habitual felony offender....
>
> §775.084(3), Fla. Stat. (1981). Because of the subjective nature of this "public protection" requirement, any failure to make an express finding would have frustrated meaningful appellate review. Unlike the "public protection" finding, however, which has since been deleted from the statute, the requirement in issue here--that the prior convictions have not been pardoned or set aside--is a ministerial determination involving no subjective analysis.

Id., at S94 (e.s.)

The statutory findings currently in the habitual offender statute are all objective in nature--(1) specific number of prior felony convictions, (2) committed within a specific time period, (3) which are still valid, and (4) for which the defendant has never been pardoned. A general finding by the trial court that the defendant qualifies for habitual sentencing; and which is not

challenged in the trial court, does not frustrate appellate review.

There is no mandatory requirement in non-capital cases for appellate courts to review all findings and confirm that all non-capital sentences have been legally imposed. If there were, then all convicted criminals would be required to automatically appeal, as capital criminals do. §921.141(4), Fla. Stat.

Respondent reads the following paragraph in Rucker much too narrowly:

> In the present case, the State introduced certified copies of Rucker's prior convictions, both of which occurred within the requisite period of time. Rucker conceded the validity of the convictions and the trial court expressly found that Rucker met the definition of habitual felony offender by a preponderance of the evidence. Because this evidence was unrebutted and Rucker does not now assert that his prior convictions were pardoned or set aside, any failure to make more specific findings was harmless. Were we to remand for resentencing, the result would be mere legal churning.

Id. (e.s.) It appears that the Fourth District has also read Rucker much too narrowly. See Robinson v. State, 18 Fla. L. Weekly D510 (Fla. 4th DCA February 17, 1993).

Where no unresolved claims of error are made in the trial court and the criminal appellant does not make a good faith assertion on appeal that the predicate felonies are invalid, it would be "mere legal churning" to remand for resentencing. In this connection, two points should be noted. First, there is an unfortunate and growing tendency to dismiss the importance of the

contemporaneous objection rule in the sentencing process in the belief that remand and resentencing is a low cost procedure. Resentencing is a critical stage of a criminal prosecution requiring the presence of court personnel, the trial judge, counsel, and, of course, the convicted criminal. Fla. R. Crim. P. 3.180, 3.700, 3.720, and 3.721. Normally, as here, resentencing will also require transporting the criminal from state prison to the trial court, which is not inconsequential, particularly when multiplied by hundreds and thousands. Second, this Court explicitly disavowed certain language in State v. Rhoden, 448 So. 2d 1013 (Fla. 1984) suggesting that the contemporaneous objection rule did not apply to sentencing, admonished trial and appellate counsel for failure to preserve sentencing errors at trial and for raising them for the first time on appeal, and created an entirely new rule, 3.800(a), for the express purpose of raising and correcting illegal sentencing in the trial court, not on appeal. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986). This Court should reiterate Whitfield and return to the historical rule, which serves the judicial process so well, that unpreserved errors, with rare exceptions, cannot be raised for the first time on appeal.

The instant case demonstrates the critical need to return to a system of honoring the contemporaneous objection rule and to the ethical principle that no member of The Florida Bar will argue an issue unless it is based on a good-faith belief, after consulting with his client and trial counsel, that the client has

suffered prejudice from the alleged error, which prejudice will be corrected by reversal and remand. The frivolous appeal of a case, such as here, hurts everyone involved. It gives the criminal false hope, it wastes everyone else's valuable time and energy, and it costs taxpayers unnecessary money (Public Defender's Office just moved to withdraw from fifty-one cases in First District), and, generally, it fosters abuse of the system. No paying client would ever pursue an appeal under the circumstances of this case.

Justice Scalia recently commented on the remedy for abusive appeals of "sentencing errors" in his testimony before the House Appropriations Subcommittee on Supreme Court Funding:

> REP. JAMES MORAN, D. VA.: I'd like to know how many of these cases get turned down because if there, if it's unlikely the sentence is going to get changed then there is going to be less incentive to appeal it, and do we have any figures on that? If we don't, maybe we could put it in the record because the word's going to get out if the frivolous appeals are being, about 90% of them are being, rejected, maybe 100%. Then eventually that may not be as much of an increase in case load. And I just wanted to see if you have a quick reaction now or if we could get some figures.
>
> JUSTICE KENNEDY: Well, of course, the criminal appeal is usually cost-free if the defendant is indigent. And we'll certainly get some figures to see if we can throw some light on the question you ask as to the specific numbers.
>
> JUSTICE SCALIA: Yes, my, my, I think you may be optimistic about the rationality of the pro se criminal defendant.

REP. MORGAN: Just got to keep appealing because he's got nothing to lose.

JUSTICE SCALIA: Nothing to lose.

REP. MORAN: And so that figure is going to continue to increase.

JUSTICE SCALIA: I think that's the problem. There really is nothing to lose. It doesn't cost anything and even if you lose, you've maybe stuck your thumb in the eye of the system. I don't know, there's a --

REP. MORAN: There's, so somehow there has to be some disincentive, some cost to make frivolous appeals if it's not likely that it's going to be reversed. But it nevertheless has to take up your time to review everyone of them.

JUSTICE SCALIA: Yeah, the, you know, what has generally protected the courts from frivolous cases, and a lot of people do not realize how essential the practicing attorney is to our system of justice. We call attorneys "Officers of the Court" and we don't understand what that means. They are a great asset to the system of justice because they screen out the frivolous cases. If they bring a frivolous case, you can discipline the attorney but you, there is nothing you can do to the pro se applicant for bringing a frivolous case. So we're without any protection against that kind of appeal.

REP. MORAN: Thank you very much. Thank you, Mr. Chairman.

"America and the Courts," C-Span, 20 February 1993.

As it did in its initial brief, the State urges this Court to make clear to members of The Florida Bar that it is unprofessional and unethical to argue issues to an appellate court when there is no basis for a good-faith belief that prejudice has occurred. The initial burden for preventing legal

churning, as was recognized by Justice Scalia, rests on the legal conscience of appellate counsel.

CONCLUSION

Based on the foregoing discussion, the First District's decision should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 8th day of March, 1993.

Carolyn J. Mosley
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