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IN THE SUPREME COURT OF FLORIDA

DARREN KEITH DAVIS,

Petitioner,

v. CASE NO. 84,155

THE STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This is a petition for discretionary review pursuant to Article V, Section 3(B)(3), Florida Constitution, based upon a claim that the decision of the First District Court of Appeal expressly and directly conflicts with decisions of this Court or other district courts of appeal.

Throughout this brief the Petitioner, **DARREN KEITH DAVIS**, will be referred to as "the petitioner," or by name, while the Respondent, **THE STATE OF FLORIDA**, will be referred to as "the State." References to the record on appeal and transcripts will be made by the use of the symbols "R" and "T" followed by citation to the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The holding in Smith made the new procedurial rule of Ree retroactively applicable to all direct appeals pending at the time Ree issued in which the issue of contempraneous entry of a written order was raised; it did not extend application of the newly promulgated procedurial rule to postconviction proceedings.

The Ree holding was not a major change in constitutional law which would be retroactively applicable in postconviction proceedings pursuant to Witt v. State.

Rule 3.800(a) does not grant a postconviction remedy based on a delay in entering a written order on the oral pronouncement of a departure sentence. Further, as promulgated by State v. Whitfield, Rule 3.800(a) does not authorize postconviction relief.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT ERR IN HOLDING THAT REE WAS NOT RETROACTIVELY APPLICABLE IN POSTCONVICTION PROCEEDINGS? (Restated).

The dispositive question is whether this Court's decision in Ree v. State, 565 So. 2d 1329 (Fla. 1990), modified, State v. Lyles, 576 So. 2d 706 (Fla. 1991), that a written departure order should be entered on the same day as the oral pronouncement of a departure sentence, may be raised for the first time in a collateral proceeding after the conviction and sentence become final.

In Ree v. State, 14 Fla. L. Weekly 565 (Fla. November 16 1989), the dispositive question was whether a trial court could make multi-cell upward departures from the sentencing guidelines because of a violation of probation. The Court held that it could not, only one cell per violation was permitted. The certified issue, which was now moot, was whether written departure orders had to be contempraneously entered at sentencing hearings where departure sentences were orally imposed. In dicta, this Court held that pursuant to Florida Rule of Criminal Procedure 3.701(b)(6) that they did. Because this constituted a new rule, which was not applicable to the Ree case at hand, the state petitioned for rehearing, urging that it be prospective only. The Court granted rehearing and held that the new procedurial rule "shall only be applied prospectively." 565 So. 2d at 1331. Subsequently, in

State v. Lyles, the Court modified the Ree rule by holding that the written order could be reduced to writing immediately after the hearing and that filing the written order on the next business day was sufficiently contempraneous. In any event, and this was the dispositive point, the Court noted that Lyles had been sentenced on 7 April 1989, which was prior to Ree becoming final on 19 July 1990 and, consequently, Ree was not retroactively applicable to Lyles.

The Court reaffirmed its prospective only application in State v. Williams, 576 So. 2d 281, 283 (Fla. 1991), and explained why this was done and precisely what prospective meant.

> On July 19, 1990, subsequent to the opinion below in the instant case, we issued an amended opinion in Ree on rehearing. We declined to recede from the view that written reasons for departure must be provided at sentencing. However, we announced that this rule would only be applied prospectively. In the absence of such a pronouncement, all cases involving the same issue that were pending on appeal at the time Ree became final would be subject to reversal under the "pipeline" theory. Smith v. State, 496 So. 2d 983 (Fla. 3d DCA 1986). This change was made in recognition of the fact that many trial judges were under the impression prior to Ree that it was permissible to give the reasons for departure orally at sentencing and to provide a written statement containing the same reasons shortly thereafter.

Id.

It should be noted that Williams became final on 28 March 1991. To that point, the Ree rule had not been the dispositive issue in Ree and, because it was prospective only, had not been applied in either Lyles or Williams. Thus, it could be fairly said that this Court was routinely exercising its constitutional authority to prescribe rules of procedure to be prospectively

applied in future sentencing hearings; the new rule had not in actual fact been applied to any party before the Court. It should also be noted that the petitioner here, Davis, had been sentenced on 6 April 1989, prior to the time Ree, Lyles, and Williams issued, and that his direct appeal, in which he challenged only his conviction, not his sentence, was pending in the first district during the time that these three decisions issued. The decision affirming petitioner Davis' conviction was issued on 26 June 1991 and presumably became final on or about 11 July 1991. Davis v. State, 582 So. 2d 695 (Fla. 1st DCA 1991).

There are several important legal conclusions that flow from the above circumstances. First, petitioner Davis did not challenge his sentence and thereby waived the procedurial issue of whether a written departure order should have been entered contempraneously with the oral pronouncement of his sentence. Reed v. State, 640 So. 2d 1094 (Fla. 1994), Muhammad v. State, 603 So. 2d 488 (Fla. 1992). Second, had he raised the Ree issue he would have lost on the merits pursuant to Ree, Lyles, and Williams, the decisional law in effect at the time of his appeal. Lowe v. Price, 437 So. 2d 142 (Fla. 1983); Wheeler v. State, 344 So. 2d 244 (Fla. 1977), cert. denied, 440 U.S. 924, 99 S. Ct. 1254, 59 L. Ed. 2d 478 (1979). Third, because he would have lost on the merits of the Ree issue, the ruling would have become the law of the case. Jacobson v. Humana Medical Plan, 636 So. 2d 120 (Fla. 3d DCA 1994); Gaskins v. State, 502 So. 2d 1344 (Fla. 2d DCA 1987). See, also, Justice Kogan's concurring in result only opinion, Henry v. State, 19 Fla. L. Weekly S651, 652 (Fla. December 15, 1994). Fourth, because Ree,

Lyles, and Williams did not benefit from the Ree rule, petitioner Davis cannot complain of any deprivation of equal protection based on similarly situated defendants not being treated the same. Griffith v. Kentucky, 479 U.S. 314, 323, 93 L. Ed. 2d 649, 658-59, 107 S Ct. 708 (1987). This Court had simply exercised its rulemaking authority to write a prospective only procedurial rule which was not applicable to Ree, Lyles, Williams, or Davis. This prospective only application is the invariable practice of both legislatures and courts enacting or adopting statutes or rules which control conduct of either private or official persons. See Justice Grimes explanation for the Court of the rationale of the Ree rule in State v. Williams and his dissenting opinion in Blair v. State, 598 So. 2d 1068, 1069 (Fla. 1992), on what happens to railroads, or judicial systems, where the trains, or decisions, retroactively run in opposite directions on the same track.[1]

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[1] The Court is constitutionally authorized to adopt rules for the practice and procedure in all courts by article V, section 2(a), Florida Constitution. The Court's usual practice, even when creating a new rule in the context of an appellate case, is to make such rules prospective only, often with a delay period to permit promulgation of the rule throughout the court system. See, Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), where the Court established a similar requirement that written sentencing orders in death cases be prepared prior to sentencing and entered contemporaneously with the oral pronouncement of sentence. The new rule became effective thirty days after Grossman became final. By contrast, the U.S. Supreme Court has no prospective rulemaking authority and may only resolve actual cases and controversies. Its decisions interpret only existing constitutions, statutes, and rules and, thus, are necessarily retroactively applicable to all cases pending on direct review in either state or federal courts which are not yet final. See, discussion in Griffith v. Kentucky, 479 U.S. at 322-23. Retroactive application of decisional law in collateral proceedings to judgments which have become final is an entirely different question. Postconviction retroactivity is limited to such decisional law as Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), which create fundamental changes in constitutional law. See, this Court's

The Court again visited the applicability of Ree the following year in three decisions issued on the same day, 2 April 1992, rehearings denied on 16 June, 9 June, and 17 July 1992, respectively. Smith v. State, 598 So. 2d 1063 (Fla. 1992); Owens v. State, 598 So. 2d 64 (Fla. 1992); Blair v. State, 598 So. 2d 1068 (Fla. 1992). In the lead decision, Smith, Justice Barkett expressed for the Court that it was "troubled by the inconsistency or lack of clarity in various decisions of this Court and others concerning the application of the prospectivity rule in this context" and that the solution to the inconsistency was to reverse the previously announced prospectivity rule of Ree. It was now made retroactively applicable to all cases which were in the direct appeal pipeline as of 19 July 1990 when Ree became final even though the Ree rule had not been in effect at the time of sentencing and this Court had explained its adoption on the principle that it was prospective only and would not create a procedurial morass. The Court's companion decision in Blair, issued on the same day, interpreted Smith as holding that Ree was now applicable to "all cases not yet final where the issue was raised." Blair, 598 So. 2d at 1069 (e.s.). Clearly, whatever may be the flaws of the Smith retroactivity ruling, and the state maintained then and now that these flaws are major, even Smith does not hold or even suggest that the Ree rule should be retroactively

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analysis in Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067, 66 L. Ed. 2d 612, 101 S. Ct. 796 (1980), which is discussed in the following pages of this brief.

applied in collateral proceedings to final judgments and sentences in which the issue was not raised on direct appeal.[2]

Turning now to the instant case, the district court below correctly applied Ree and its modifying progeny to the facts of the case. By its own terms, Ree as subsequently modified and interpreted by Lyles, Williams, and the Smith group of three is only retroactively applicable to cases on direct appeal at the time Ree issued where the issue was raised. Petitioner Davis did not raise the issue of contempraneous entry of a written order on direct appeal and thus waived the issue. There is no provision of law under which he can now raise it in a postconviction proceeding.

Petitioner's argument that Ree is a major change of law which can be raised for the first time in a collateral proceeding is misplaced for other reasons.[3] Regardless of the confusing and

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[2] In connection with the constitutional authority to retrospectively legislate by statute or rule, the state invites the Court's attention to article X, section 9, of the Florida Constitution: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment of any crime previously committed." (e.s.). Rules are analogous to statutes. The state respectfully suggests that there is arguable doubt as to whether this Court can adopt and retroactively apply rules of criminal procedure which affect criminal judgments or sentences which have been previously entered or which set aside a class of punishments that were legally imposed at the time of imposition by the only courts authorized to impose such punishments, the trial courts of the state.

[3] Petitioner's reliance on Nelms v. State, 596 So. 2d 441 (Fla. 1992), is misplaced. The issue in Nelms was whether this Court's subsequent holding that petit jury districts had been unconstitutionally created could be retroactively applied in postconviction proceedings to a petitioner who had not raised the issue at trial or on direct appeal. This Court said no, and this involved a legal error as basic as the jury composition, which does not support petitioner who also did not previously raise the procedural issue he now attempts to raise collaterally.

debilating history surrounding its date of application, the Ree rule was nothing more than a procedurial rule change.[4] Petitioner is asking the Court to treat Ree as if it were a fundamental change in constitutional law. It is not and cannot rationally be treated as such. The seminal Florida decision on the application of decisional case law to collateral proceedings is Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067, 66 L. Ed. 2d 612, 101 S. Ct. 796 (1980). Not one sentence in Witt can be fairly said to support petitioner's argument that Ree is a fundamental change in constitutional law which should be applied to final judgments or sentences challenged in collateral proceedings. The Ree rule was a nonconstitutional rule of procedure which does not meet this Court's criteria for postconviction relief:

> To allow non-constitutional claims as bases for post-conviction relief is to permit a dual system of trial and appeal, the first being tentative and nonconclusive. Our justice system could not accomodate such an expansion; our citizens would never tolerate the deleterious consequences for criminal punishment, deterence and rehabilitation. We reject, therefore, in the context of an alleged change of law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceedings.

Witt, 387 So. 2d at 928-29.

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[4] The word "was" is used advisedly. The Florida Legislature subsequently rejected Ree by substantively modifying the sentencing guidelines statute to provide that a departure sentence shall be supported by a written order or transcription filed within 15 days of the oral pronouncement of sentence. Ch. 93-406, §13, Laws of Florida, codified as section 921.0016(1)(c), Florida Statutes (1993).

The Court's description of evolutionary changes in the law is applicable to Ree.

> In contrast to these jurisprudential upheavals [e.g., Gideon] are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedurial fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Witt, 387 So. 2d at 929-30. Note particularly footnote 22 at 928 where the Court specifically pointed out that Witt involved a death penalty and it went without saying that the Court's holdings were applicable to less severe cases. See, also, State v. Glenn, 558 So. 2d 4 (Fla. 1990), where the Court emphasized Witt as the definitive statement of the law and canvassed various subsequent decisions involving highly significant evolutionary changes in constitutional law which were nevertheless not considered to be fundamental changes in constitutional law retroactively applicable in postconviction proceedings, e.g., State v. Neil, 457 So. 2d 481 (Fla. 1984), restricting use of peremptory challenges based on race.

Finally, petitioner argues that his sentence is illegal and can be raised at anytime. In Whitfield v. State, 471 So. 2d 633 (Fla. 1st DCA 1985), an unobjected to error in computing the sentencing guidelines scoresheet was raised for the first time on appeal. The broad issue was whether certain case law from this

Court had entirely eliminated the contempraneous objection rule from sentencing issues. A question was certified to this Court distinguishing between those situations where a sentencing court fails entirely to make mandatory sentencing findings and situations where merely erroneous sentences are imposed. The question was which, if either, of these two classes of sentencing errors could be raised for the first time on direct appeal without having been objected to below. Justice Shaw, writing for this Court, concluded that sentences which were either illegal or unauthorized departures from the guidelines could be raised for the first time on direct appeal without having been brought to the attention of the sentencing court under this Court's decisional law.[5] However, the Court was clearly dissatisfied with the effect of its decisions creating new appellate issues which should have been easily disposed of in the trial court. Accordingly, the Court went on at some length disavowing the suggestion that the contempraneous objection rule was not useful in sentencing procedures and admonishing counsel of both parties for failing to bring the error to the attention of the trial court and for failing to move the appellate court for relinquishment of jurisdiction in order to present the sentencing error to the sentencing court.

> Our Rhoden dicta that the purpose of the contemporaneous objection rule is not present in the sentencing process does not apply in every case. It is true that sentencing errors can be more easily corrected on appeal than errors in the guilt phase,

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[5] The Florida Legislature has authorized direct appeals from sentences which are either illegal or outside the range recommended by the sentencing guidelines. §§924.06(1)(d) & (e).

> but it is still true that all errors in all phases of the trial should be brought to the attention of the trial judge particularly where there is a factual issue for resolution. [fn 2 at 1046].
>
> * * *
>
> It is clear that all parties contributed by commission or omission to the error and that this error was easily preventable and correctable at the trial court level without recourse to the appellate courts. The state urges that we adopt a policy of sanctioning attorneys responsible for such mishaps as occurred here. Although we do not rule out the imposition of sanctions in appropriate cases, we do not believe that the inattention to detail which characterizes this case rise to the level which would warrant sanctions beyond the critique below.
>
> As we indicated above, the error in preparing the guidelines scoresheet could have been easily corrected had either party moved the trial court to correct the error, coupled with a request to the appellate court to surrender jurisdiction to the trial court for correction of sentence. We emphasize that we place an equal responsibility for correction of such errors on the prosecutor as on the defense counsel. This is particularly true where, as here, the prosecutor as an officer of the court, prepared and submitted the erroneous scoresheet which caused the error. Neither counsel served the trial court well.

State v. Whitfield, 487 So. 2d at 1047.

Although the Court admonished counsel for failing to correct the error at trial or to move the appellate court for relinquishment of jurisdiction, it recognized that there was a jurisdictional gap in Florida law which had impeded the efforts of counsel to correct the error in the trial court. In its statement of the case, the Court acknowledged that defense counsel had simultaneously filed a notice of appeal and a rule 3.800 motion asking the trial court to correct the sentence because of the erroneous computation of the guidelines scoresheet but that the

trial court had summarily denied the motion, "presumably because it no longer had jurisdiction." State v. Whitfield, 487 So. 2d at 1046. See, then Judge Grimes opinion in Wolfson v. State, 437 So. 2d 174 (Fla. 2d DCA 1983), holding that the filing of a notice of appeal divests the trial court of jurisdiction to entertain motions under rule 3.800. Rule 3.800, as it then read, authorized a sentencing court to reduce or modify a legal sentence within sixty days of imposition or within sixty days of an appeal becoming final or being dismissed. The rule did not authorize simultaneous jurisdiction to correct or amend sentences which were on appeal unless jurisdiction was relinquished by the appellate court. Wolfson. Because of this jurisdictional lacuna in the law which had prevented, or at least impeded, correction of the error in Whitfield, this Court created rule 3.800(a) which granted concurrent jurisdiction to sentencing courts for the purpose of correcting such errors while the cases were still on direct appeal in an appellate court.

> In order to facilitate the correction of such errors at the trial court level, we amend rule 3.800(a) to read as follows:
>
> > (a) A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guidelines scoresheet.

State v. Whitfield, 487 So. 2d at 1047.

Petitioner's reliance on State v. Whitfield and rule 3.800(a) for the proposition that the untimely filing of the written sentencing order somehow renders his sentence illegal and that rule

3.800(a) can be used to collaterally challenge a Ree error is misplaced. There is nothing in Whitfield even remotely suggesting that there was a problem with postconviction remedies or that the Court was creating a new postconviction remedy to solve the problem of sentencing issues raised for the first time on appeal.

The State suggests that the purpose and function of rule 3.800(a) have been widely misunderstood, as by petitioner here. This case offers this Court an opportunity to clarify the rule and to thereby make a major reduction in the number of trivial, frivolous, or unnecessary appeals. These unnecessary sentencing appeals have overloaded the appellate system because of the near simultaneous advent of highly technical sentencing proceedings aggravated by a lamentable appellate trend toward addressing more and more issues, particularly sentencing issues, which have not been presented to or ruled on by the trial courts. At a time, 1983/84 and thereafter, when trial courts most needed the attentive assistance of trial counsel in detecting and preventing sentencing errors, the crucial importance of the contempraneous objection rule to both trial and appellate courts was being undermined by dicta that reversals and remands by appellate courts were a simple and effective method of detecting and correcting unobjected to sentencing errors. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985).[6]

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[6] The understandable exasperation over these developments that the late Judge Letts expressed in his concurring opinion to Demons v. State, 577 So. 2d 702, 703 (Fla. 4th DCA 1991), is worth recalling:

The sole purpose and function of rule 3.800(a) can be easily understood if the rule is read in light of its origin in Whitfield and the specific evil it was designed to correct, sentencing issues raised for the first time on direct appeal. In Whitfield, the prosecutor prepared an erroneous scoresheet containing points for victim impact which was accepted without objection. The error was not timely brought to the attention of the sentencing judge but Whitfield's counsel simultaneously filed a notice of appeal and a motion in the trial court to correct the sentencing error.

> I concur because I must. Never mind Williams, we are mandated to do so by our supreme court's decision in Walker v. State, 462 So. 2d 452 (Fla. 1985). [Walker held that failure of the defendant to object to the sentencing court's failure to specifically recite the finding that protection of the public necessitated sentencing as an habitual offender did not bar raising the issue for the first time on appeal because the finding was critical to the statutory scheme and its absence would hamper appellate review of the waived issue. Thereafter, the legislature overruled Walker by deciding that the finding was not critical and deleted it entirely. Ch. 88-131, §6, Laws of Florida.] However, I grow impatient with the ever increasing demands the appellate courts place on already overburdened trial judges. More and more, we require them to justify themselves in minute detail or we will reverse. As I see it, trial judges should not have to carry the burden of proof to establish they were not wrong. To the contrary, it should be the duty of the criminal-appellant to overcome the presumption that the trial court was right. If any sentencing discretion in criminal cases is not long gone, it is certainly soon to go.
>
> It is perfectly obvious, from a study of the record, (the notice to seek enhanced penalty, coupled with perusal of the PSI and the dialogue between the judge and the respective attorneys at the sentencing hearing), that the defendant was enhanced because the court thought the public needed to be protected from a career criminal. In fact, the 'notice of intent to seek enhanced penalties' specifically stated, 'The defendant is a habitual criminal in which protection of the public will best be served by a sentence with enhanced penalties'. If this were a case of first impression, I would affirm it.

However, nothing in rule 3.800 as it then existed granted jurisdiction to correct the untimely raising of such errors and, having been divested of jurisdiction by the notice of appeal, the trial court denied the motion to correct without comment. Wolfson. The appeal continued in the district court where the sentencing issue was raised for the first time, and eventually on to the Florida Supreme Court where it was again addressed. Whitfield was a classic example of how the appellate system is not supposed to work; a simple uncontroverted error which could have been speedily disposed of by a trial judge if properly raised had been permitted by the failure of appellate courts to enforce the contempraneous objection rule to claim the attentions of at least ten appellate judges and their staff and court personnel, and at least two appellate attorneys.[7]

Justice Shaw's critical examination for the Court of the factual circumstances of this costly and unnecessary appeal was primarily concerned with preventing future repititions of such appeals by admonishing the attorneys, on the one hand, but, more significantly, by devising a structural remedy which would permit the parties to raise "such errors" in the trial court during the pendency of the direct appeal.[8] There was no concern or problem

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[7] It is of interest that the legislature promptly amended the sentencing guidelines to make excessive emotional or physical trauma a reason for upward departure even if victim injury was calculated in the guidelines scoresheet. Ch. 87-110, §2, Laws of Florida.

[8] Justice Shaw had previously expressed the concern that he and Justice Adkins felt at the proliferation of unpreserved sentencing issues addressed for the first time on appeal. Walker v. State, 462 So. 2d 452, 454 (Fla. 1985), J. Shaw, concurring in result

with postconviction remedies. There already was a satisfactory postconviction remedy for cognizable sentencing errors and creating a second postconviction remedy could do nothing to reduce the number of sentencing issues raised for the first time on appeal. The effect would, in fact, be redundant, contradictory, anamolous, or all three. It would be redundant because a satisfactory postconviction remedy already existed in rule 3.850; it would be contradictory because the Court had already held that the unraised issues were cognizable on direct appeal and issues cognizable on direct appeal are not cognizable in postconviction proceedings; and, finally, why go to such lengths to grant simultaneous jurisdiction so that "such errors" may be raised in the trial court prior to, or in lieu of, addressing them on direct appeal, if the Court intended that they be raised by postconviction motion after they became final. If the Court was seeking a postconviction

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only. State v. Whitfield is an adoption by the full Court of his view that appellate review of unraised sentencing issues was out of control and at least a partial remedy was required. Justice Adkins dissented, presumably because he would have cut the Gordian knot by simply refusing to address unraised sentencing issues on appeal. That is unquestionably the wisest systemic approach to the problem because it places maximum emphasis on the responsibility of trial counsel and the importance of speedily and efficiently resolving error claims. Moreover, assuming that the "error" does in fact prejudice the criminal, there should be no problem in demonstrating that trial counsel's failure to object fell below the norm. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). Whitfield itself illustrates the point admirably. The only issue raised on appeal was the erroneous inclusion of victim injury points in the scoresheet. Whitfield's counsel noted the error at least as early as the time that the notice of appeal was filed. Except for this issue, there would have been no appeal. The error could have been instantaneously corrected without any appeal and the attentions of two appellate courts had counsel simply filed a rule 3.850 motion in the trial court pointing out that failure to notice a prejudicial scoresheet computation was ineffective assistance of trial counsel in its purest form.

remedy, and considered rule 3.850 inadequate, the obvious solution would have been to amend rule 3.850.

The State again points out the prefatory words at 1047 which reveal and explain the purpose of the new rule 3.800(a): "In order to facilitate the correction of such errors at the trial court level, we amend rule 3.800(a)." (e.s.). "Such errors" were, in context, sentencing errors raised for the first time on direct appeal. All appellate decisions must be read in light of the legal and factual issues presented in the decision. Rule 3.800(a) is a byproduct of a case or controversy which is designed to remedy the problem causing the case or controversy. So understood, it is nothing more than a jurisdictional grant of authority to the trial courts to permit them and the parties to correct obvious sentencing errors during the pendency of the direct appeal without requiring that the sentencing issue(s) be first raised in an appellate court or that jurisdiction be relinquished.

Rule 3.800(a) can be of great value if properly used during the pendency of direct appeals. Florida Rule of Appellate Procedure 9.140, grants a defendant thirty days to file a notice of appeal, fifty days in which to prepare a record and index, and thirty more days in which to prepare the initial brief. These times are routinely extended so that there is a major block of time before appeals are actually briefed during which recently detected sentencing errors can be easily corrected in the trial court. Rule 3.800(a) was created to take advantage of the period of time required to perfect appeals by permitting the parties and the trial

court to address sentencing issues which were not detected at the sentencing hearing. Frequently, such issues involve discrepancies between oral pronouncements at sentencing and the actual sentencing orders which are subsequently issued. They may involve the failure to make adequate findings in sentencing orders. These discrepancies can be easily corrected, or at least addressed, while the appeal is being perfected. Frequently also, these errors may involve factual disputes which, as footnote 2 to Whitfield points out, can be better handled at the trial court level. Indeed, if they are first raised on appeal they may require remand with directions to the trial court, which may in turn lead to still another appeal. Addressing these sentencing issues before a single judge may obviate the need to raise them on appeal or may even result in voluntarily dismissing the appeal when the sentence is the sole issue, as it is so frequently. Whitfield clearly stands for the proposition that it is the professional responsibility of trial counsel of both parties to bring sentencing errors to the attention of the trial court by appropriate objection or motion prior to or during the pendency of the appeal. Raising these errors on direct appeal or in a postconviction motion does not satisfy that professional responsibility.

The state submits that the wisest policy is to strictly enforce the contempraneous objection rule, contrary to State v. Rhoden, by declining to address sentencing errors for the first time on appeal and to require that they either be raised below or that failure to raise them below be raised as a claim of ineffective assistance of trial counsel. See, footnote 8 and accompanying text above.

Nevertheless, even if the contempraneous objection rule is strictly enforced, rule 3.800(a) would still be valuable for the purposes of raising sentencing issues occurring after the sentencing hearings on which there has been no opportunity to object, e.g., failure to enter a mandatory sentencing order, discrepancies between oral pronouncement and written orders formalizing the pronouncement.

It is equally important to understand that rule 3.800(a) is not a postconviction remedy. Its sole purpose, as Whitfield so plainly reveals, was to provide an efficient remedy for addressing sentencing issues in the sentencing court which would otherwise have had to be addressed for the first time on direct appeal in an appellate court or in a postconviction motion. We already had, and have, a comprehensive postconviction remedy, rule 3.850, which, as this Court has repeatedly reiterated, provides a complete and effective remedy for every trial court error which can be properly raised in collateral proceedings. Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963); State v. Bolyea, 520 So. 2d 562 (Fla. 1988); Richardson v. State, 546 So. 2d 1037 (Fla. 1989); State v. District Court of Appeal, First District, 569 So. 2d 439 (Fla. 1990).

The only contributions of rule 3.800(a) to collateral review law have been entirely mischievous: (1) an apparent enticement to avoid the two-year procedurial bar of rule 3.850 by misleadingly phrasing the claim as that contemporary perennial, an "illegal" sentence, (2) a great deal of needless litigation and confusion over the purpose of rule 3.800(a) and how it is supposed to differ from rule 3.850, and (3) total and self-confessed confusion by

appellate judges and lawyers over the meaning of what was once competely clear, that an "illegal" sentence is simply one which is on its face, as rule 3.850 phrases it, "in excess of the maximum authorized by law," or, from the other extreme, a sentence which on its face is below the minimum sentence mandated by the legislature for the convicted offense. A true illegal sentence can be identified using only the orders of conviction and sentence and the sentencing statutes. If the sentence on its face does not exceed the maximum authorized by the statute for the particular conviction it is legal; it may be erroneous, but it is legal and is subject to the contempraneous objection rule.

The decision in Judge v. State, 596 So. 2d 73 (Fla. 2d DCA), rev. denied, 613 So. 2d 5 (Fla. 1992), is representative of these problems. There, Judge Altenbernd writing for a unanimuous en banc court acknowledged the widespread difficulty, if not impossibility, of distinguishing between an illegal sentence and a merely erroneous sentence:

> It might be helpful if lawyers and judges referred to sentencing errors that are correctable only on direct appeal as "erroneous sentences." Likewise, sentencing errors that are correctable only after an evidentiary hearing under rule 3.850 would be "unlawful sentences." This would reserve the term "illegal sentence" for use only under circumstances in which the error must be corrected as a matter of law, even in a rule 3.800 proceeding. We admit, however, that this precision would be difficult, even for this court to obey consistently. It is perhaps enought if lawyers and judges keep in mind that these distinctions do exist for good jurisprudential reasons and may affect the relief available at various stages postconviction.

Judge, 596 So. 2d at 76-77, fn1. See, also, accompanying text.

Judge Altenbernd also made a valiant effort to distinguish between rule 3.800 and 3.850 which the state submits was helpful but in the end either unavailing or, at best, unsatisfactory. Somewhat over simplified, the distinction was that rule 3.800(a) does not involve significant questions of fact or require an evidentiary hearing. That could also be said of many, if not most, rule 3.850 motions which are summarily denied without an evidentiary hearing. The problem is not with Judge Altenbernd's analysis. Rules 3.800(a) and 3.850 cannot be satisfactorily reconciled or distinguished as postconviction remedies for the same reason that a circle cannot be squared, the difference is in kind, not in degree. Rule 3.850, as Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963), makes clear, was specifically created by this Court to be the postconviction remedy for trial court errors which can be properly addressed collaterally. Rule 3.800(a), as Whitfield shows, was conceived for the very narrow purpose of correcting certain sentencing errors in the trial court prior to or during the appeal, not in the postconviction stage when the sentences have become final.

Rule 3.800(a) is a very brief rule of only some twenty-five words which consists entirely of a grant of simultaneous jurisdiction to sentencing courts. In contrast, the complex, self-contained postconviction remedy in rule 3.850 requires thousands of words to set out the procedurial and substantive details of postconviction motions and appeals. Rule 3.850 creates and addresses the right to appeal in some detail. Rule 3.800(a) does not create a right to appeal in either subsection(a) or (b) and

long-standing caselaw has held that the absence of such authorization precludes an appeal from subsection (b). Davenport v. State, 414 So. 2d 640 (Fla. 1st DCA 1982). Rule 3.850 authorizes petitions for rehearing, rule 3.800 does not. Rule 3.850 motions must be under oath, rule 3.800(a) motions do not. These omissions are deliberate for the very good reason that they are not needed in the context of simultaneous jurisdiction during the pendency of an appeal.[9] A rule 3.800(a) motion to correct either an illegal sentence or an unauthorized departure from the sentencing guidelines, if properly filed during the pendency of the direct appeal, addresses issues which are already cognizable, should it be necessary, in the ongoing simultaneous direct appeal. The "right" to appeal from a sentencing court order denying or granting a rule 3.800(a) motion is encompassed within the statutory right to a direct appeal already authorized by the legislature in section 924.06(1)(d) & (e) for the defendant and section 924.07(1)(e) & (i) for the state.

The history and origin of rule 3.800(a) show that it is not a postconviction remedy for the correction of trial court errors. This conclusion is confirmed by the plain terms and history of rule

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[9] Inexplicably, despite the absence of any statute or rule authorizing appeals from postconviction rule 3.800(a) motions, rule 9.140(g) has been recently amended to encompass appeals from summary denial of rule 3.800(a) motions. This is the only reference, so far as undersigned can determine, to a rule 3.800(a) appeal in Florida Rules of Appellate or Criminal Procedure and there are no references to appeals from nonsummary denials of rule 3.800(a) motions. Apparently, appeals from rule 3.800(a) motions have become so common, even though there is no authority for such appeals, that appellate lawyers and courts have come to uncritically accept them and inadvertently amended rule 9.140(g) to address an unauthorized appeal.

3.850 and by this Courts's repeated holdings that it is a complete and efficacious remedy for all trial court errors cognizable in postconviction proceedings.

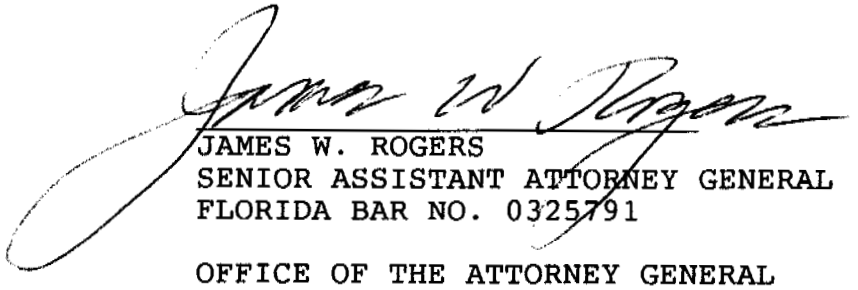
For the above reasons, the state urges the Court to affirm the decision below and to issue an opinion which makes clear that Ree was not a major change in constitutional law which could be addressed in postconviction proceedings, and, further, that the sole authorized use of rule 3.800(a) is during the pendency of a direct appeal as shown above. It is not a postconviction remedy for the correction of sentencing errors.

CONCLUSION

The district court should be affirmed for the reasons shown herein.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



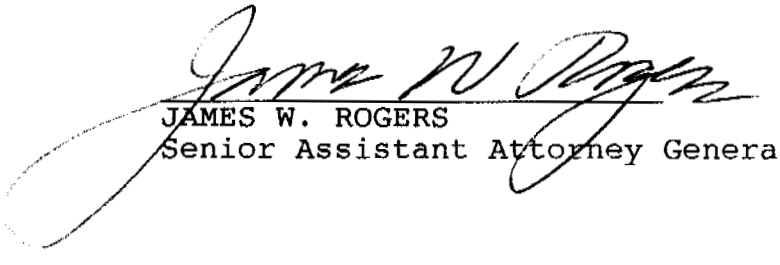
JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to **MR. LEO A. THOMAS**, Esquire, Levin, Middlebrooks, Mabie, Thomas, Mayes, and Mitchell, P.A., 226 South Palafox Street, Pensacola, Florida 32501, this 21th day of December, 1994.



JAMES W. ROGERS
Senior Assistant Attorney General