IN THE SUPREME COURT OF FLORIDA

RICO CARGLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 92,031

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4612

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Rico Cargle, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. For example, "I 45" would designate page 45 of volume I. Volume I's pages 23-52 are under separate cover, but they are nevertheless part of volume I. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State does not dispute Cargle's's statement of the case and facts, except it adds or clarifies the following.

Concerning **Issue I**, Cargle discusses (at IB 2) his trial and subsequent sentencing. The State adds some salient facts.

Evidence adduced at trial showed that, at about 2:00-2:30 AM (II 20), Cargle knocked on the door of a motel room occupied by Joe Marshall, Jr., Joe Marshall, III (his son), and Terry Mosher (II 18, 37). The Marshalls and Mosher were traveling to Albany,

Georgia. (II 17, 38) Cargle awakened the Marshalls (II 31, 40) and at gunpoint entered their motel room (II 20-23). Cargle repeatedly demanded money, pistol-whipped Joe Marshall, Jr., pistol-whipped Joe Marshall, III, shot Joe Marshall, III, and attempted to shoot him again. (II 20-28, 40-44) When Cargle's gun failed to fire again, he ran away. (I 26)

At the conclusion of Cargle's trial, the trial court ordered a presentence investigation (PSI) and a predisposition report (PDR). (II 141)

The PDR recommended that Cargle "be sentenced as an adult. He meets criteria to be sentenced as an adult, meeting six criteria out of six." (I 31) The PDR detailed the presence of each of the six criteria:

1. The offenses were serious, requiring adult sentencing for the protection of the public (I 28);
2. The offenses were "committed in a premeditated, willful manner, with a display of aggression and violence involving a firearm" (I 28-29);
3. The offenses "were against persons with permanent disfigurement reported" (I 29);
4. Although Cargle "does not fully understand how serious the offenses are nor the seriousness of the consequences," Cargle is sophisticated and mature due to his 17-year-old age and his prior experiences on community control and while incarcerated (I 29);
5. Record and previous history of the child (I 29-30), which included

- 17 disciplinary problems in 8th grade (I 35-36),
- 23 disciplinary problems in 9th grade (I 34-35)
- 30 disciplinary problems in 10th grade (I 32-34), and
- Over 22 juvenile referrals (I 37);

6. No indication in Cargle's record of a likelihood of reasonable rehabilitation or otherwise protection of the public (I 30).

The PSI summarized Cargle's prior juvenile record:

Juvenile Probation and Aftercare: Active 2 Completed 2
Revoked 5 None ___

Juvenile Delinquency Adjudications Withheld 6
Adjudications 4 Commitments 4 None __

(I 45)

On July 1, 1996, at Cargle's sentencing hearing, the trial court stated that it reviewed and considered Cargle's PSI and intended to "depart upward from the guidelines" (I 58-59). Defense counsel stated that the PDR indicated that Cargle met the criteria to be sentenced as an adult. Defense counsel argued that a departure sentence was inappropriate and that a guideline or youthful offender sentence should be ordered. (I 59)

At this juncture, the trial court inquired of the prosecutor as to the level of the felonies in this case, to which the prosecutor responded:

> The aggravated battery with a firearm would qualify as a first degree felony, your Honor, punishable by up to thirty years in state prison. The attempted robbery with a firearm would only be a second degree felony punishable up to fifteen years state prison. There is a minimum mandatory, I

> believe, with the semi-automatic weapon or automatic weapon of eight years to give him.

(I 59-60) Defense counsel took issue with the eight-year minimum, contending that "the minimum mandatory is for a firearm" (I 60). The prosecutor then agreed that the three-year minimum for a firearm applied rather than the eight-year minimum for a qualifying semiautomatic firearm. (I 60)

The trial court also agreed with defense counsel that the three-year minimum applies rather than the eight-year minimum. (I 60-61)

The trial court ruled that a departure sentence was appropriate and reasoned, after reiterating its review of the PSI:

> A review of his record would indicate that there's been an escalating pattern of criminal behavior on the part of the defendant who is now eighteen years of age as he stands before this court sentencing, having turned eighteen some three days ago. The court acknowledges that he was a juvenile at the time the offense was committed, but that he has, even at this young age, began his criminal career for which he was caught at the age of thirteen. He has three prior burglaries. The offense for which he is now convicted was his second armed burglary, the first being at the age of thirteen years. He's never been gainfully employed, was expelled from school, completed only the ninth grade or participated in the ninth grade, in addition to the fact there were two persons who were injured as a result of this criminal activity. Joe Lee Marshall, Jr. who was actually the father of the one who was shot was struck on the head by Mr. Cargle and received an injury to his forehead after being struck with a handgun. Joe Lee Marshall, III was shot deliberately, intentionally, and in the presence of his father and another person in the left hip. He still suffers extreme pain, discomfort, and some disability associated with that. The court finds that one aggravating factor was that the victim was physically attacked by the defendant in the presence of a family member and, in fact, on two occasions as

> I have previously alluded to. The father was struck in the head in the presence of the son. The son was deliberately and intentionally shot in the hip in the presence of the father. Also the court is of the opinion that this was a violent act that is especially atrocious and cruel in the manner in which it was committed; and thirdly, that the offense was committed -- constituted a substantial risk of death or great bodily harm to many persons, three in number, which were occupants of the motel room. The court cannot think of many things in life that would be more traumatic than to have your home invaded and this was a temporary home, the motel room, in the middle of the night by an armed bandit, and then to see your own son shot and to be helpless to do anything to prevent the shooting, that I can just see the anguish of the father as his son was shot and then to further aggravate the circumstances, the defendant, without any remorse at all, raised the pistol to head or chest level, pointed it at a range of three to five feet to the son and pulled the trigger, and only by the intervention of the Good Lord or someone else, did the weapon misfire. Otherwise, he'd be standing here to be sentenced for the offense of first degree murder. This act was committed in the presence of the father and I can just see the concern and how he's going to continue to deal with that as he proceeds through life.

(I 61-63) The trial court stated that for the above quoted reasons a guideline sentence was inappropriate and imposed a sentence of fifteen years for the attempted robbery and thirty years for the Aggravated Battery. (I 63) Other than apparently beginning to correct the trial court regarding the identity of Count 1, defense counsel made no further comment. (See I 63-64)

Cargle's sentencing guidelines calculated to a maximum of 156.2 months (13 years) prison. (I 79)

The trial court's written Judgment and Sentence (I 66-75) sentenced Cargle to the "Department of Corrections" (I 69). The trial court entered a written order of reasons for its guidelines departure. (I 76-77)

On July 3, 1996, Cargle filed his Notice of appeal using the name "Rico L. Cargle" (I 53), and he listed under "Judicial Acts to be Reviewed" only the departure sentence and the jury verdict (I 57).

The State also notes some additional facts in support of its opposition to **Issue II**.

Cargle mentions (IB 2) the charging document. The State clarifies and adds that the information indicated that the Aggravated Battery was "a first degree felony" (I 2). The information alleged that Cargle committed a battery

> and in the commission of said battery did intentionally or knowingly cause great bodily harm, permanent disability or permanent disfigurement to Joe Marshall, III and in the commission of said crime did carry and possess a firearm, to wit: Pistol, in violation of Sections 784.045(1)(a), 775.087(1), and 775.087(2), Florida Statutes, ...

(I 2)

The trial court (I 78-80. See I 63-64, 72), State Attorney's Office (I 2, 60), Dept. of Juvenile Justice's PDR (I 26), and the Florida Dept. of Corrections' PSI (I 39) referenced the Aggravated Battery as a First Degree Felony.

After the jury instructions, the trial court asked defense counsel if he had "[a]ny objection as to the form or contents of the instructions ...?" (I 135) Defense counsel responded, "No, your honor." (I 136)

During deliberations, the jury asked the trial court two questions, including:

> Does selection of highest or first option indicate guilty as charged in Count I?

(II 136) The trial court answered the question affirmatively (II 137-38). The jury then returned a verdicts on both counts on the highest offenses available (See II 139, I 21-22), and, when polled, expressed no hesitation or reservation regarding the verdict (See II 140).

Defense counsel did not object to the 30-year sentence for the Aggravated Battery (I 63-64).

SUMMARY OF ARGUMENT

ISSUE I.

Cargle argues that the DCA erred in holding that Section 924.051's preservation requirements apply to his claim that the trial court failed to render a written order for sentencing him as an adult. He is incorrect.

The circuit-court proceedings were adult in nature. Their nature afforded Cargle the right to a jury trial and concomitantly imposed upon him the Section 924.051 obligation of providing the trial court the opportunity to correct any purported error prior to an appeal. The nature of this as adult proceeding armed Cargle with the Rule-3.800(b), Fla. R. Cr. P., ability to bring his appellate claim to the trial court's attention, unlike juvenile proceedings. Thus, the nature of the proceedings, by providing adult rights, adult obligations, and adult opportunities, control. In short, this was an adult proceeding, rendering T.M.B.'s juvenile-proceeding holding inapplicable.

The facts of this case illustrate the controlling nature of the proceedings. Here, Cargle enjoyed the benefit of a jury trial, unavailable in juvenile proceedings. Indeed, everyone, including Cargle himself, has treated this case as adult in nature, which Cargle set in motion by committing a crime of "adult" magnitude, pistol-whipping an man and his son and shooting the son. Moreover, defense counsel, while opposing an eight-year minimum period of adult prison, argued **for** the three-year minimum mandatory applicable to adults, not juveniles.

Here, defense counsel did more than simply fail to object. He affirmatively agreed that Cargle can be sentenced as an adult.

Here, instead of bringing his complaint to the trial court's attention through a timely 3.800(b) motion, Cargle filed a notice of appeal two days after his sentencing.

The State respectfully submits that this case quintessentially illustrates the appropriate application of Section 924.051's preservation requirements.

ISSUE II.

While Issue II is couched in terms of an illegal sentence, upon further analysis, it essentially complains that the trial court erroneously instructed the jury on Aggravated Battery and that the information did not specify a subsection of the Aggravated Battery statute.

By not bringing unpreserved Issue II to the attention of either the trial court or the DCA, Cargle has attempted to by-pass the fundamental nature of Florida's system of appellate

review. Given the nature of his crime, the charging document explicitly designating Aggravated Battery as a First Degree Felony, and the details of that charge supporting first-degree classification, Cargle merits no special treatment.

Everyone below, including defense counsel, correctly understood that the firearm in the Aggravated Battery count did not charge as an element "[u]ses a deadly weapon," thereby rendering it proper to reclassify Aggravated Battery due to the firearm.

At best for Cargle, any technical problem was non-prejudicial and harmless.

ARGUMENT

ISSUE I

DO SECTION 924.051'S PRESERVATION REQUIREMENTS APPLY TO THE ADULT CIRCUIT COURT PROCEEDINGS OF A JUVENILE LAWFULLY CHARGED AS AN ADULT? (Restated)

Cargle claims that Section 924.051's preservation requirements[1] do not apply to him because at the time of the

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[1] Section 924.051 provides, in pertinent part:

(1) As used in this section:

***

(b) "Preserved" means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.

(2) The right to direct appeal and the provisions for collateral review created in this chapter may only

crime he was a juvenile. He is incorrect because his case was properly charged and processed as adult in nature, giving him rights and obligations attendant to an adult proceeding, including the right and Section 924.051-obligation to bring his claim to the attention of the trial court through a Rule 3.800(b), Fla. R. Cr. P., motion. Instead of exercising that right and obligation, Cargle filed a notice of appeal two days after his sentencing.

A. The nature of the proceedings control the applicability of Section 924.051's preservation requirements.

> be implemented in strict accordance with the terms and conditions of this section.
>
> (3) An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.
>
> ***
>
> (8) It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.
>
> (9) Funds, resources, or employees of this state or its political subdivisions may not be used, directly or indirectly, in appellate or collateral proceedings unless the use is constitutionally or statutorily mandated.

The legislature intended for the obligations of Section 924.051 to apply to Cargle's **adult** proceedings, including his appeal, and the facts of this case illustrate why the preservation requirements of Section 924.051 should apply to juveniles lawfully charged as adults, thereby resulting in **adult proceedings**.

Cargle embarked on the path towards adult treatment in the criminal justice system when he engaged in numerous prior criminal acts. (I 37 & 45: over 22 delinquency referrals, including four commitments. See also I 32-36: 70 school disciplinary reports)

At about age 17, Cargle continued on that path when he committed the "adult-sized" crimes here. At about 2:30 AM (II 20), Cargle invaded the motel room occupied by Joe Marshall, Jr., Joe Marshall, III (his son), and Terry Mosher (II 18, 37). The Marshalls and Mosher were traveling to Albany, Georgia. (II 17, 38) Cargle awakened the Marshalls (II 31, 40) and entered their motel room at gunpoint (II 20-23). Cargle repeatedly demanded money, pistol-whipped Joe Marshall, Jr., pistol-whipped Joe Marshall, III, shot Joe Marshall, III, and attempted to shoot him again. (II 20-28, 40-44) These were the events underlying the information filed below.

Cargle was lawfully charged by information, not delinquency petition, as an **adult** with Attempted Armed Robbery with a Firearm (Count 1) and Aggravated Battery with a Firearm (Count 2) (I 1-2). Compare Fla. R. Juv. P. 8.030 (juvenile proceedings require petition) with Fla. R. Cr. P. 3.140(a) (adult felony

proceedings require indictment or information). See §39.052(3)(a)5a,b, Fla. Stat. (informations authorized for qualifying juveniles).[2]

The law and all of the parties, including defense counsel, have treated Cargle as an adult, as his case was processed through adult circuit court, not juvenile circuit court. For example, Cargle

- filed two Motions to Continue pursuant to **adult** Rule 3.190(g), Fla. R. Cr. P. (I 8, 11) rather than juvenile Rule 8.100(d), Fla. R. Juv. P.;
- filed a Notice of Alibi pursuant to **adult** Rule 3.200, Fla. R. Cr. P. (I 15), rather than juvenile Rule 8.065, Fla. R. Juv. P.;
- had the right to, and was subject to, **adult** rather than juvenile speedy trial provisions, See State v. Wesley, 522 So.2d 1007, 1007 (Fla. 2d DCA 1988) ("juvenile speedy trial rule is inapplicable to a child against whom an information has been properly filed"); Bell v. State, 479 So.2d 308, 309 (Fla. 2d DCA 1985) ("There is nothing in the statute or court rules that indicates the time limitations relating to juvenile proceedings were intended to apply to adult court proceedings initiated by information or indictment"); Peavy v. Judge, Div. S, Fifteenth Judicial Circuit, 454 So.2d 800, 801 (Fla. 4th DCA 1984) (juvenile charge dropped and then charged as adult; "Petitioner had a fundamental right

[2] In the interest of consistency, citations to Chapter 39 will be used rather than any recent renumbering.

to trial by jury"; remanded for discharge due to adult speedy trial violation);

- was lawfully afforded the benefit of a jury trial (II 1-143) as an **adult**, whereas as a juvenile, he would have no right to one, See McKeiver v. Penn., 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (juveniles are not constitutionally entitled to jury trial); Fla. R. Juv. P. 8.110(c); §39.052(1)(b), Fla. Stat., and,
- was lawfully housed in an adult pre-trial detention facility (See I 3: sheriff's adult arrest report; I 6: adult first appearance at which adult bail set rather than juvenile detention status determined; II 141: remanded "to the custody of the Okaloosa County Department of Corrections"), rather than assessed for, or housed in, juvenile detention. See C.S. v. Brown, 553 So.2d 317 (Fla. 1st DCA 1989) ("filing of an information removed C.S. from the jurisdiction of the juvenile division of the circuit court, at least for purposes of pretrial detention, and the trial judge's attempt to continue his stay in the juvenile detention center for another week was not proper"). Compare §39.044(4) Fla. Stat. (juveniles prosecuted as adults can be housed in adult jail) with §§39.042 - 39.044(2), Fla. Stat. (procedures, limitations regarding detention pending juvenile proceedings).

Perhaps most importantly, **Cargle exercised the right within an adult proceeding to "[d]emand[] trial by [j]ury" (I 7). He should be likewise bound by the Section 924.051**

obligation attendant to adult proceedings to provide the trial court the opportunity to correct a purported error prior to claiming it on appeal. Cf. R.L.B. v. State, 486 So.2d 588, 589 (Fla. 1986) (based on statutory interpretation, "state has no right to appeal an adverse order in a juvenile **proceeding**") and D.A.E. v. State, 478 So.2d 815, 815 (Fla.1985) ("state had no right to appeal the circuit court's order dismissing the **delinquency petition** in the instant case").

Indeed, even here, Petitioner's usage (See, e.g., IB cover page) of "Rico Cargle," See 9.145(d), Fla. R. App. P. (delinquency appeals require reference to juvenile with initials), illustrates the status of this proceeding as adult in nature.

B. The availability of Rule 3.800 to Cargle and his failure to use it are fatal to his argument.

The adult nature of the proceedings not only afforded Cargle the right to a jury trial, it concomitantly imposed upon him the Section 924.051 obligation to bring any purported error to the attention of the trial court. Integral to these proceedings was the availability of Rule 3.800(b), Fla. R. Cr. P., as the DCA reasoned: Cargle

> had the opportunity pursuant to Rule 3.800(b) to preserve error on appeal here, but he did not. As a result, this issue is not subject to appellate review.

Cargle v. State, 701 So.2d 359, 361 (Fla. 1st DCA 1997). Compare J.M.J. v. State, 22 Fla. L. Weekly D1673 (Fla. 1st DCA July 7, 1997) ("there is no procedure applicable to juvenile delinquency

proceedings which is similar to that created by the supreme court when it amended Florida Rule of Criminal Procedure 3.800(b) to permit motions to correct sentencing errors"). Rule 3.800(b), Fla. R. Cr. P., provides[3]:

> A defendant may file a motion to correct the sentence or order of probation within thirty days after the rendition of the sentence.

This Court explained the subsection (b) addition to Rule 3.800:

> Subdivision (b) was added and existing subdivision (b) was renumbered as subdivision (c) in order to authorize the filing of a motion to correct a sentence or order of probation, thereby **providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied.** A motion filed under subdivision (b) is an authorized motion which tolls the time for filing the notice of appeal.

Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374, 1375 (Fla. 1996).

Consequently, an absolutely critical difference between these proceedings and those in juvenile court is the wherewithal, through Rule 3.800, to seek redress in the trial court for alleged sentencing errors.

In his demand for a jury trial, Cargle found the adult vehicle of trying the case, yet he failed to find the adult vehicle to bring an alleged sentencing error to the timely attention of the trial court.

Cargle had the "vehicle to correct [a] sentencing error[] in the trial court and to preserve the issue should the motion be

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[3] At the time of Cargle's sentencing, Rule 3.800(b) required the motion to be filed within 10 days.

denied," but he failed to avail himself of it. Rule 3.800(b) was available, and its rationale indicates that Cargle failed "to preserve the issue."

C. Cargle's failure to preserve is especially egregious.

Cargle concludes his brief by arguing (IB 20) that he "may not ... waive[] silently" the written order requirements of Chapter 39, Fla. Stat. In addition to this argument overlooking the availability of Rule 3.800(b), Fla. R. Cr. P., the State disputes the implication that Cargle simply acquiesced to his treatment as an adult. To the contrary, his active participation, through counsel, in the criminal proceedings, qua adult proceedings, continued at the sentencing hearing, when defense counsel affirmatively stated:

> ... Mr. Cargle was a juvenile at the time of this offense. He was seventeen years of age. The predisposition report prepared in connection with this case **indicates that he meets the criteria to be sentenced as an adult**.

(I 59)

Although defense counsel opined that "juvenile programs" would adequately serve the protection of the public and reasonable rehabilitation, he argued for a guidelines or youthful offender sentence (I 59) rather than an appropriate "restrictiveness level," as would be required for juvenile proceedings. Compare §§39.052(4)(e)2,3, 39.054, Fla. Stat. (juvenile restrictiveness levels) with §958.04(1), Fla. Stat. (youthful offender sentence limited to those over 18 or those "transferred to the criminal division"), §958.04(2)(b), Fla. Stat. (youthful offender sentence

can include incarceration), Fla. R. Cr. P. 3.702(d)(16) (1995) ("state prison or nonstate prison sanction"), §921.001, Fla. Stat. (guidelines refer to incarceration). Compare §921.001(4)(a)2, Fla. Stat. ("primary purpose of sentencing is to punish the offender") with P.W.G. v. State, 702 So.2d 488, 491 (Fla. 1997) ("juvenile delinquency ... system['s] ... emphasis on rehabilitation as ..."; "Juvenile delinquency proceedings are neither wholly criminal nor civil in nature"). See Crain v. State, 653 So.2d 442(Fla.2d DCA 1995)(youthful offender sentence, an adult sanction). Accordingly, T.M.B. v. State, 23 Fla. L. Weekly S180 (Fla. April 2, 1998), succinctly put it:

> [I]n the juvenile delinquency system rehabilitation is the principal focus, while in the adult criminal system punishment is the principal focus.

The only level of "restrictiveness" discussed at sentencing was the **adult** sanction of incarceration, as defense counsel continued by arguing for the **adult** sentence of the three-year minimum mandatory (I 60). Compare §39.053(4), Fla. Stat. ("an adjudication of delinquency by a court with respect to any child who has committed a delinquent act or violation of law shall **not** be deemed a **conviction**") with §775.087(2), Fla. Stat. ("Any person who is **convicted** of a felony or an attempt to commit a felony and the **conviction** was for *** shall be sentenced to a minimum term of imprisonment of 3 years"). See M. W. B. v. State, 335 So.2d 10, 11 (Fla. 1st DCA 1976) (minimum mandatory applies "only to persons convicted of any one of certain specified crimes"; "juvenile who is adjudicated a delinquent child cannot be considered to have been convicted of a crime").

Thus, defense counsel below was fighting over the adult-system's "principal focus" of how much punishment should be imposed on Cargle.

As Cargle ambushed the Marshalls at 2:30 in the morning, on appeal Cargle ambushed the trial court with an argument never presented to it. Cargle, through counsel, had explicitly consented to his adult treatment. The First DCA correctly rejected such a tactic, thereby holding Cargle to the requirements of Section 924.051, Fla. Stat. See also Norton v. State, slip op. 88,803 revised opinion (Fla. April 30, 1998) ("a party may not invite error during the trial and then attempt to raise that error on appeal") citing Terry v. State, 668 So. 2d 954, 962 (Fla. 1996); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983).[4]

D. Cargle's arguments illustrate the applicability of Section 924.051 to the circuit-court proceedings.

In the face of the record indicating defense counsel's explicit concession of Cargle's qualification for adult sentencing and full participation, throughout the adult criminal proceedings, in treating Cargle as an adult, Cargle now argues:

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[4] On this basis alone, this case is distinguishable from State v. Rhoden, 448 So.2d 1013, 1017 (Fla. 1984), where there was "absolutely nothing in this record to show that the respondent waived his rights to these matters." The State will address Rhoden vis-a-vis Section 924.051 infra. However, at this juncture, it is important to note that Rhoden's discussion of the inapplicability of the contemporaneous objection rule was in general terms of that rule and prior to the existence of Section 924.051.

(1) Record-apparent sentencing errors are generally an exception to Section 924.051 (IB 8-10, 12-13);

(2) He cannot be expected to raise with the trial court a matter that has no time limit for the trial court to comply (IB 12-13); and

(3) The authorization of Section 39.059(7), Fla. Stat., for the appeal of an adult sentence indicates legislative intent to restrict appellate procedural requirements to those pertinent to juveniles, not adults (IB 11, 13).

Cargle is incorrect on all three points.

The DCA's reasoning, quoted above, identified the basic flaw in the first, and therefore, all three of Cargle's arguments: Cargle failed to use "Rule 3.800(b) to preserve error on appeal here." There are no longer exceptions for "sentencing errors apparent on the face of the record."

Cargle argues (IB 8) that State v. Rhoden, 448 So.2d 1013, 1017 (Fla. 1984), is "virtually identical" to the issue here. He overlooks two dispositive differences: the existence of Section 924.051 and Rule 3.800(b). When Rhoden was decided, they did not exist. However, there remains a critical similarity between this case and Rhoden: Just as Rhoden applied the general principle that, at that time, exempted sentencing proceedings from the contemporaneous objection rule, the general principle now requires a contemporaneous objection or Rule 3.800(b) motion to preserve non-fundamental sentencing errors. Indeed, as discussed infra, Rule 3.800(b)'s post-sentencing window addresses Rhoden's concern that the requirement of an objection contemporaneous with

the sentence would leave improperly sentenced defendants with no redress whatsoever.

Thus, although Rhoden and this case concern the writing requirement for juveniles sentenced as adults, the writing requirement was simply a sentencing right to which, at that time, the contemporaneous objection was held inapplicable.

Cargle seems to suggest (at IB 9) that State v. Montague, 682 So.2d 1085 (Fla. 1996), maintained the viability of the pre-Section 924.051/Rule 3.800(b) case law because it was decided in October 1996 whereas the statute and rule took effect July 1, 1996, See Ch. 96-248 Section 9 ("take effect July 1, 1996"); Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374, 1375 (Fla. 1996) (3.800(b) effective "effective on July 1, 1996"). However, Cargle overlooks the critical fact that Montague was sentenced on a date prior to May 12, 1995, i.e., well-before July 1, 1996, See Montague v. State, 656 So.2d 508 (Fla. 2d DCA 1995) (DCA decision dated May 12, 1995, thereby indicating that sentence it reviewed was prior to that date). Therefore, a Rule 3.800(b) motion was unavailable to Montague, unlike Cargle.

Cargle's citation to this Court's Montague's opinion is especially interesting because the issue there concerned an aspect of awarding points on a "sentencing guidelines scoresheet," 682 So.2d at 1086, that is, a **general sentencing principle**, not a juvenile disposition. Montague's citations to Rhoden illustrate further that the language on which Cargle relies in Rhoden indicates that it adopted **general sentencing**

principles for juveniles within adult proceedings. Consequently, Montague and Rhoden support the position that the current general sentencing principles embodied in Section 924.051 and Rule 3.800(b) apply to juveniles within adult proceedings, that is, to Cargle.

Cargle complains that, because there is no time limit on the entry of the written adult-sanctions order, he should not be expected to **contemporaneously** object to its absence.[5] He overlooks his ability to file his 3.800(b) motion **after** the

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[5] Therefore, at most for Cargle, if the merits are eventually reached, Cargle is entitled to remand for the trial court to enter the writing. This remedy is all-the-more appropriate, where, as here, the trial court's Written Reasons for Departure (I 76-77) necessarily included the decision to treat Cargle as an adult for three reasons. First, it was the culmination of a sentencing hearing in which the trial court heard defense counsel agree that Cargle qualified for adult sentencing and argue about how much of an **adult** sentence Cargle should receive, See supra. Second, the trial court's Written Reasons for Departure reduced to writing its reasons for a guidelines departure, which, as an adult sentence, See supra, necessarily meant that the trial court had decided to treat Cargle as an adult. Third, the trial court's extensive reasoning at the sentencing hearing (I 60-63) demonstrated that it, in effect, had found the same predicate facts that would justify sentencing Cargle as an adult, substantially satisfying the criteria listed in Section 39.059(7)(c), Fla. Stat. (1995), which, in turn, had been detailed in the PDR, which the trial court had ordered (II 142) and which defense counsel had referenced in agreeing with its conclusion (I 59). Moreover, the written Judgment and Sentence (I 66-75) specifically indicated the trial court's decision to sentence Cargle to the "Department of Corrections" (I 69); in light of the foregoing facts, this **written** order satisfies the gravamen of the writing requirement.

The State does not address the merits any further because Cargle, other than concluding that the trial court did not satisfy the writing requirement of "Chapter 39," (IB 4, 7) does not present any argument on the merits.

sentencing and bring the absence of the writing to the attention of the trial court. If the trial court then denied the 3.800 motion, Cargle could have appealed the denial, just as easily as he appealed here, where he skipped the 3.800 motion.

Specifically, here Cargle filed his Notice of Appeal on July 3, 1996, well-within the then-10 day requirement for filing a 3.800(b) motion. The same "insight" Cargle used to appeal should have been applied to notifying the trial court of the absent writing and allowing the trial court time to remedy the matter.

Contrary to Cargle's contention (IB 13) that there is a "no way to make a principled distinction" between the appeals in juvenile proceedings and those in adult proceedings involving juveniles, the "way" was recognized by everyone below, as the case was tried and otherwise processed as an adult proceeding. As an adult proceeding, Rule 3.800(b) provided a "way" for Cargle to bring his claim to the attention of the trial court pursuant to Section 924.051.

Accordingly, T.M.B. v. State, 23 Fla. L. Weekly S180 (Fla. April 2, 1998), was limited to juvenile **proceedings**:

> DOES SECTION 924.051(4), FLORIDA STATUTES (SUPP. 1996), APPLY IN JUVENILE DELINQUENCY **PROCEEDINGS**?
> ***
> We hold that section 924.051 is inapplicable to juvenile **proceedings**.

In sum, the wisdom of Section 924.051 and Rule 3.800(b) is illustrated by the facts of this case. Cargle should have brought this claim to the attention of the trial court, where it could have been easily and effectively handled, resulting in the efficient use of scarce judicial resources. See Amendments to the

Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) (conserving "scarce resources" as a rationale for Rule 3.800, ..., "requir[ing] that sentencing issues first be raised in the trial court").

ISSUE II

SHOULD THIS COURT ADDRESS AN ISSUE THAT WAS NOT PRESENTED TO THE TRIAL COURT OR THE FIRST DCA? (Restated)

Cargle now claims that Aggravated Battery was improperly reclassified as a First Degree Felony based upon his use of a firearm because a firearm is an essential element of the offense. He correctly admits (IB 19) that he has not raised this issue with either the trial court or the DCA. Therefore, he is attempting to by-pass a fundamental principle of Florida appellate review:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958). By attempting to by-pass Florida's system in which this Court, in very narrowly selected cases, reviews the decisions of the DCAs, Cargle seeks

to undermine the "speedy and efficient administration of justice ... which the [DCA] system was designed to remedy," Id.

Moreover, Cargle, in essence, is imploring the exercise of discretionary review, thereby indicating that the claim should be reviewed. In arguing for this review, he overlooks the underlying facts, where he not only shot Joe Marshall, III, but also pistol-whipped him, as well as his father, during an attempted home-invasion robbery. Cargle deserves no special treatment.

In the event Issue II is addressed, the State contends that, under the facts of this case, the gravamen of the Issue II claim pertains to the jury instructions.[6] As such, Issue II was unpreserved, and, if there was any error, it was non-prejudicial and harmless. The State addresses these matters.

Aggravated Battery was expressly charged as "a first degree felony" (I 2). The information alleged, in Section 784.045(1)(a)1's language, that Cargle committed a battery

> **and** in the commission of said battery did intentionally or knowingly cause great bodily harm, permanent disability or permanent disfigurement to Joe Marshall, III ... .

(I 2) The information continued with the language charging the firearm in the reclassification language of Section 775.087(1),

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[6] Arguendo, even if Issue II concerned an illegal sentence, Cargle should present it to the trial court in a Rule 3.800(a), Fla. R. Cr. P., motion, rather than raise this claim for the first time now. Rule 3.800(a) affords the trial court the opportunity to "at any time correct an illegal sentence imposed by it." Cargle would then have the opportunity to appeal to the DCA and thereafter seek review in this Court if he fails to prevail in the trial court and DCA. See also Rule 3.850, Fla. R. Cr. P.

Fla. Stat., **not** the "[u]ses a deadly weapon" language of Section 784.045(1)(a)2, Fla. Stat.:

> and in the commission of said crime did carry and possess a firearm ... .

(I 2) Therefore, Cargle's arguments (at IB 14-17) based upon the information's general citations to the respective statutes are misplaced. Cargle was clearly charged with Aggravated Battery with "[u]ses a deadly weapon" not an element. See Leeman v. State, 357 So.2d 703, 705 (Fla. 1978) (information tracking language of statute, sufficient; "purpose of an information is to fairly apprise defendant of the offense with which he is charged").

Indeed, the information's correct citation to Section 784.045(1)(a), while not descending to the next statutory subsection, was inconsequential. See Fla. R. Cr. P. 3.140(d)(1) ("Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice").

Here, everyone below understood Cargle to be lawfully charged with a first-degree felony in the Aggravated Battery count: The trial court (I 78-80. See I 63-64, 72), State Attorney's Office (I 2, 60), Dept. of Juvenile Justice's PDR (I 26), the Florida Dept. of Corrections PSI (I 39), and, most importantly, defense counsel (See I 60: in response to prosecutor's statement regarding first degree felony and eight-year minimum mandatory, defense counsel contested only the eight-year minimum; I 63: no

objection to 30-year sentence; I 1-82: no motion contesting information's classification of Count 2 as First Degree Felony).

Indeed, the trial court asked defense counsel whether he had reviewed the PSI, which explicitly designated the Aggravated Battery as a First Degree felony (I 39), and whether he had "any additions or corrections" to it, to which defense counsel responded that he had reviewed it, and he had no objections (I 58-59).

Accordingly, the jury was provided a copy of the information (II 131. See II 4-5), and it found Cargle guilty, **as charged**, of Aggravated Battery with a Firearm. It expressly found that he "carried, displayed, used, threatened to use a firearm," the precise language of reclassification; and, it expressly found that he "did personally possess a firearm during the commission of the crime," the precise language of the minimum mandatory. (I 21-22)

As Cargle argues (IB 18), the trial court instructed the jury on "great bodily harm to Joe Marshall, III," and "deadly weapon" as alternatives (II 124). Nevertheless, the trial court subsequently instructed the jury regarding the individual findings on the verdict form (II 131-33), and it had told the jury that the State bore the burden of "proving its [sic] accusation beyond a reasonable doubt" (II 4), an accusation that did not contain a firearm as an element of Aggravated Battery.

Thus, Issue II distills to a complaint that the trial court's jury instructions were confusing, yet, in the context of everyone knowing the nature of the charges, no dispute as to the

information's first-degree-felony language or the PSI's designation of the Aggravated Battery as a First Degree Felony, defense counsel also had no objection to the jury instructions (II 136), thereby failing to preserve any such claim. See Fla. R. Cr. P. Rule 3.390 ("No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection"); §924.051(1)(b),(2),(3),(8),(9), Fla. Stat. ("legal argument ... was timely raised before, and ruled on by, the trial court, and that the issue, legal argument ... was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor ***"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings "procedurally barred because defense counsel failed to object with the requisite specificity in the trial court"); Archer v. State, 613 So.2d 446, 447-48 (Fla. 1993)("specific argument or ground to be argued on appeal"); Hill v. State, 549 So. 2d 179, 181-82 (Fla. 1989) ("The constitutional argument grounded on due process and Chambers was not presented to the trial court. Failure to present the ground below procedurally bars appellant from presenting the argument on appeal.").

Moreover, because of defense counsel's expressions of satisfactions with the PSI (I 58-59) and the jury instructions (II 135-36), **any** purported error was waived. See State v. Lucas,

645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So. 2d 734 (Fla. 1991); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979)("One who has contributed to alleged error will not be heard to complain on appeal").

Here, if the merits are reached, there was no error in the charging document's designation of Aggravated Battery as a First Degree felony because "[u]se a deadly weapon" was not charged as an element of the Aggravated Battery, See Gonzalez v. State, 569 So.2d 782, 784 (Fla. 4th DCA 1990) (then-Judge Anstead concurring and dissenting; "*when so charged* the use of a weapon is an essential element under the aggravated battery offense"; "even though use of a weapon is not a necessary element in every aggravated battery case, when it is charged that way it is not proper to enhance the conviction") adopted Gonzalez v. State, 585 So.2d 932, 933 (Fla. 1991), and because the jury was not "instructed that in order to convict, **it had to find** that the defendant had used a weapon in committing an aggravated battery on the victim," 569 So.2d at 785.

Here, the jury, without hesitation or reservation, by its verdict, had necessarily accredited testimony establishing that Cargle had pistol-whipped and, an instant later, shot the victim (as well as pistol-whipped his father), with the bullet remaining in the victim at the time of trial (II 43-44). Under these facts and this charging document, Aggravated Battery was properly

reclassified as a First Degree Felony. See Lareau v. State, 573 So.2d 813 (Fla. 1991) ("aggravated battery causing great bodily harm and involving the use of a deadly weapon is a first-degree felony").

Arguendo, under the facts of this case, any error was non-prejudicial, See §§924.051(1),(3) ("prejudicial error" required), 924.33. Fla. Stat. (no reversal unless error "injuriously affected ..."), and harmless, See Jones v. State, 690 So.2d 568, 571 (Fla. 1996) ("any error in instructing the jury on the CCP aggravator would have been harmless ... because of the extent of the evidence supporting that aggravator and the strength of the other aggravators as compared to the mitigating evidence"); Foster v. State, 654 So.2d 112 (Fla. 1995) ("CCP instruction given in this case was constitutionally impaired," but harmless because result would have been the same).

Because Cargle has not established that he was prejudiced and, alternatively, because the facts of this case affirmatively show harmlessness, the State respectfully submits that Issue II is not the "stuff" of reversal.

Thus, Cargle's crime involved essentially a home-invasion attempted robbery, two pistol-whippings, an intentional shooting of a victim in front of the victim's father, and an attempt to shoot him again, See discussion of facts Issue I supra.

The jury asked no question about the Aggravated Battery count, and one of its questions indicated its intent to find Cargle guilty of the highest offense available:

> Does selection of highest or first option indicate guilty as charged in Count I?

(II 136) The trial court answered the question affirmatively (II 137-38). The jury then returned a verdicts on both counts on the highest offenses available (See II 139, I 21-22), and, when polled, expressed no hesitation or reservation regarding the verdict (See II 140).

Under these facts, the charging document, and everyone's understanding that it viably charged a first degree felony, there was no reversible error. See Knight v. State, 394 So.2d 997, 1002 (Fla. 1981) ("where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice").

In sum, Cargle was charged with, convicted of, and properly sentenced on a First Degree Felony. In any event, the variance between the jury instructions and the charging document was inconsequential under the facts of this case.

CONCLUSION

Based on the foregoing, the State respectfully submits that the opinion and decision of the District Court of Appeal, reported at Cargle v. State, 701 So.2d 359, 361 (Fla. 1st DCA 1997), should be approved, and the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4612
COUNSEL FOR RESPONDENT
[AGO# L97-1-16173]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of May, 1998.

Stephen R. White
Attorney for State of Florida

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