IN THE SUPREME COURT OF FLORIDA

RICO CARGLE, :

Petitioner, :

v. : CASE NO. 92,031

STATE OF FLORIDA, :

Respondent. :

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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I ARGUMENT

ISSUE I

DOES THIS COURT'S HOLDING IN STATE V. RHOEN, 448 SO.2D 1013 (FLA. 1984) - THAT THE TRIAL COURT'S FAILURE TO ENTER A WRITTEN ORDER UNDER CHAPTER 39, FLORIDA STATUTES, WHEN SENTENCING A JUVENILE AS AN ADULT - SURVIVE THE CRIMINAL APPEAL REFORM ACT OF 1996?

The state spends several pages of its answer brief telling the court that petitioner, Rico Cargle, was charged, tried and convicted in adult court. Since neither the procedures nor the facts of the case are in dispute, it is hard to see the point of this.

It is also undisputed that no motion to correct sentence was filed under Rule 3.800(b), Florida Rules of Criminal Procedure, although no court but for the First District in the instant case has held that a 3.800(b) motion is an appropriate vehicle for entering a written order, after sentence has been imposed, sentencing a juvenile as an adult.

The state argues as though defense counsel's acknowledgement that Cargle met the criteria to be sentenced as an adult and his request for a guidelines or youthful offender sentence is some kind of concession (State's Brief (SB), p.16). As an officer of the court, defense counsel was required to be candid about whether Cargle met the criteria for adult sentencing. It was hardly a concession, however, that he **should be** sentenced as an adult. Rather, it was an acknowledgment that the judge had made it clear he was going to impose an adult sentence, and would not consider a juvenile sentence. Nor could this comment be construed as waiving the statutory due process provisions for sentencing a juvenile as an adult.

On the Rhoden issue, the state argues that the Criminal Appeal Reform Act of 1996 (the "Act"), codified as section 924.051, Florida Statutes has abrogated the contemporaneous objection rule, thus Rhoden is no longer applicable (SB-19). State v. Rhoden, 448 So.2d 1013 (Fla. 1984). This argument begs the question of whether there remains fundamental sentencing errors which the courts will address on direct appeal, even without a contemporaneous objection. Even if the court thinks that question can be avoided in the instant case, it will soon be upon the court. Compare Maddox v. State, 23 Fla.L. Weekly D720 (Fla. 5th DCA March 13, 1998)(en banc)[1] (holding it will no longer find any sentencing errors to be

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[1]Undersigned believes that notice to invoke has already been filed in Maddox, but was unable to verify that fact before filing this brief.

fundamental) and Harriel v. State, 23 Fla.L. Weekly D967 (Fla. 4th DCA April 15, 1998) (en banc) and Mason v. State, 23 Fla.L. Weekly D944 (Fla. 1st DCA April 9, 1998), both of which disagree with Maddox.

Undersigned believes the question for the court is one of fundamental fairness. There is arguably not a due process problem, assuming arguendo Rule 3.800(b)'s process can be applied to the issue here. The rule provides a process; whether it provides **due** process remains debatable.

For the next portion of the argument, undersigned counsel assumes arguendo that despite petitioner's hybrid sentencing - his adult sentence requires compliance with a juvenile statute as a predicate - his is just another common adult sentencing error as far the Act is concerned. It simply cannot be overlooked that a major benefit from the state's point of view is that counsel is appointed to indigent defendants only for direct appeal. So, if an indigent's trial counsel has been ineffective in failing to recognize even a facially-apparent sentencing error, and his appellate counsel can be prohibited from raising it, or the appellate court will refuse to address it, this leaves the hapless uneducated, pro se, indigent defendant to fend for himself to 1) recognize an error his attorney failed to, and 2) try to raise it without the assistance of counsel on a motion for post-conviction relief. If this "procedure" does not deny **due** process, it is fundamentally unfair, or perhaps it denies the right to counsel, since it prevents

appointed counsel from representing the indigent defendant effectively on direct appeal,[2] and wholly prevents representation on post-conviction motions in non-capital cases.

This leads to another matter to which the state alluded. While Rhoden involved the trial court's failure to enter a written order in sentencing a juvenile as an adult, its holding on the contemporaneous objection rule has been applied to cover any type of facially-apparent sentencing error. The state called Rhoden's pronouncement a "general sentencing principle" (SB-20-21). The parties in the instant case have made little attempt in their briefs to discuss whether Rhoden's contemporaneous objection rule in general survives the Reform Act, as opposed to whether its specific holding about sentencing juveniles as adults survives the Act. Undersigned frankly believes the issues are potentially too different between the instant issue and other sentencing errors which may arise for this case to be an appropriate vehicle for a broad statement concerning what sentencing errors can still be raised absent a contemporaneous objection.

Petitioner urges this court not to ignore this question: While Rule 3.800(b)'s 30-day window is useful, its utility is limited, in that it assumes that an attorney who missed an

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[2]The chances that appellate counsel will ever receive a record and be in a position to act in less than 30 days after sentencing are extremely remote, since the notice of appeal need not be filed for 30 days, and the court reporter and the clerk's office then have 50 days thereafter to transmit the record on appeal. See Rules 9.140(b)(3) and (e), Fla.R.App.P.

error when sentence was imposed would recognize it within the following 30 days, an assumption that experience has failed to bear out,[3] but what is to be done for the indigent defendant whose facially-apparent sentencing error passes unnoticed for more than 30 days? It appears that the Fifth District is content that the answer be "nothing." Maddox. It is abundantly clear that the state agrees with this position. The First District's only limitation on "nothing" is for illegal sentences. Mason.

It is reasonable that sentencing errors should be raised first in the court that can correct them directly, and save the back and forth and record preparation that appeal requires. That goal can be accomplished without the misguided time limit of Rule 3.800(b). In 1996, the Appellate Rules Committee of the Florida Bar proposed a rule which would have permitted appellate counsel to raise sentencing errors in the circuit court before the initial brief was filed.[4] This court rejected

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[3]The typical criminal defendant, like petitioner, will be represented by an assistant public defender, who is likely to be immersed in representing dozens, if not hundreds, of other clients in the 30 days following a sentencing.

[4]As part of a revision in 1996, the Appellate Rules Committee of the Florida Bar proposed the following amendment to Rule 9.140:

(d) **Sentencing Errors.**

(1) A party may not raise a sentencing error on appeal unless the alleged error has first been brought to the attention of the lower tribunal:

(A) at the time of sentencing; or

that suggestion and adopted Rule 3.800(b) instead. Amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800, 675 So.2d 1374 (Fla.1996); see also Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996) (noting time for filing motion extended from 10 to 30 days).

If sentencing errors should be raised first in the circuit court, then let the circuit court have concurrent jurisdiction during the pendency of direct appeal, as the court presently

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> (B) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b); or
>
> (C) pursuant to the procedure set forth in rule 9.140(e)
>
> (e) **Notice of Sentencing Error.** Any sentencing error not previously brought to the attention of the trial court may be raised on appeal in the following manner:
>
> (1) At any time prior to filing their initial brief, parties may file a notice of sentencing error with the court. The notice shall state that the error has not been previously brought to the attention of the trial court and shall specify with particularity the alleged error and the grounds therefor. A copy of relevant portions of the record shall be appended to the notice. Copies of the notice shall be served on the state attorney, the Attorney General, and trial and appellate counsel for defendants.
>
> (2) When such notice has been filed, the court shall enter an order directing the lower tribunal to consider the alleged error. The court's order shall specify a time limit for the lower tribunal to act which shall not exceed 60 days from the date of the order.
>
> (3) The lower tribunal's order on the alleged error shall be reviewable in the pending direct appeal.

does for motions under Rule 3.800(a). Rule 9.600, Fla.R.App.P. Moreover, conserving scarce resources, if as the state argued that is the goal (SB-22-23), cannot override a criminal defendant's right to procedural due process. Further, it would conserve judicial resources only if one assumes that post-conviction motions will not be filed. Unfortunately, since the typical defendant will be pro se, that assumption may be correct, but the result would be unfair and unjust.

Petitioner asks this court to affirm its decision in State v. T.M.B., 23 Fla.L. Weekly S180 (Fla. April 2, 1998), as it applies to Chapter 39. Petitioner asks this court to hold that, where the trial court has failed to comply with the requirements of Chapter 39 in sentencing a juvenile as an adult, the issue is cognizable on appeal, without regard to preservation under section 924.051, Florida Statutes.

ISSUE II

BECAUSE AGGRAVATED BATTERY IS A SECOND-DEGREE FELONY, THE 30-YEAR SENTENCE IMPOSED IS ILLEGAL AND MUST BE REDUCED. WHEN A FIREARM IS AN ESSENTIAL ELEMENT OF THE CRIME, AS IT WAS HERE, THE CRIME CANNOT BE RECLASSIFIED UNDER SECTION 775.087, FLORIDA STATUTES.

The state argues that by raising this issue for the first time in this court, petitioner is seeking to bypass the role of the district courts as the final arbiter of most appeals and "undermine the 'speedy and efficient administration of justice. . . which the [DCA] system was designed to remedy'" (SB-23-24). Undersigned counsel hopes it is self-evident that no one has any intention of undermining the efficient administration of justice.

Rather, petitioner relies on two principles. First, that once this court accepts jurisdiction over a case, it has jurisdiction over all issues in the case. Feller v. State, 637 So.2d 911, 914 (Fla. 1994). Second, that facially apparent sentencing errors can be raised at any time. Forehand v. State, 537 So.2d 103, 104 (Fla.1989)("absent a contemporaneous objection ... sentencing errors must be apparent on the face of the record to be cognizable on appeal"); State v. Whitfield, 487 So.2d 1045 (Fla. 1986). In State v. Montague, 682 So.2d 1085 (Fla. 1996), this court said:

> We have repeatedly held that absent an illegal sentence or an unauthorized departure from the sentencing guidelines, only sentencing "*apparent on the face of the record* do not require a contemporaneous objection in order to be preserved for

review." (emphasis added in Montague; footnote omitted)

The fact this error was not raised previously is the result of an unfortunate omission by previous counsel, nothing more, which present counsel must either raise at the first opportunity or ignore.

The issue here is a legal argument, and inasmuch as it depends on any "facts," they are undisputed: How was the offense charged in the information? How was the jury instructed? Of what was Cargle convicted? As a legal argument involving no disputed facts, the issue may be decided now by this court, if it chooses, rather than presented first to the trial court. A little ironically, while the state was so greatly concerned in Issue I with the conservation of judicial resources, its suggestion as to this issue is that, instead of being decided here, it be presented to potentially three courts: The state it says can be raised in a Rule 3.800(a) motion in the circuit court, and if relief is not granted, then petitioner may appeal to the district court, and then possibly to this court (SB-24, n.6).

On the substantive issue, the state's response is essentially to recategorize the question as a jury instruction issue. Having recategorized it as a jury instruction error, the state then argues the error was not preserved for appeal. Petitioner agrees that the jury instructions were in error, but they led not merely to an instruction error, but to a verdict error. And the verdict is the verdict. Assuming arguendo that

any instruction errors contributed to the verdict error, any such error could not be corrected in favor of the state without violating the constitutional prohibitions against double jeopardy.

The state argued the crime was properly charged in the information to justify reclassification (SB-24-25). Even if this is true, a correct information nevertheless cannot save an incorrect verdict.

Contrary to the state's argument, the jury did not find Cargle "guilty as charged" of aggravated battery (SB-26). Rather, on the count of "aggravated battery with a firearm," the jury found Cargle guilty of "aggravated battery" and also made a separate firearm finding (R 22). "Aggravated battery" was the highest offense option of which they could convict him, but the jury did not have the option of convicting him "as charged." That was a small but crucial omission, for it made it possible for the jury to convict Cargle of a crime of which a firearm was an essential element.

Petitioner's conviction could be reclassified only if a firearm were not an essential element of the crime charged (the arguments in the initial brief will not be repeated here). Since the jury was instructed that they could convict Cargle of aggravated battery for **either** great bodily harm **or** a firearm, and the verdict form failed to distinguish whether the firearm was an element of the crime, or a non-elemental special finding solely for reclassification, the conviction cannot lawfully be

reclassified. Further, the state failed to distinguish any of the several cases petitioner cited in his initial merit brief which hold that a crime cannot be reclassified where the jury is instructed that a firearm is an essential element.

> Even if the jury's question -
>
> Does selection of the highest or first option indicate guilty as charged in Count I?

(T 136, SB-6) - could have saved the verdict, Count I was the attempted robbery charge, not the aggravated battery at issue here.

Nor, as the state seems to argue, is the question sufficiency of the evidence. Rather, the question is sufficiency of the verdict, and as the cases cited in the initial brief demonstrate, the verdict was insufficient as a matter of law to prove that the jury did not convict Cargle of an offense of which a firearm was an essential element. Because a firearm was an essential element, or the verdict did not make clear otherwise, the conviction cannot be reclassified.

The error is apparent on the face of the record, as the information, the verdict, and the judgment and sentence provide all the information this court needs to find the 30-year sentence to be illegal.

II CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court 1) hold the requirements of chapter 39, Florida Statutes, for sentencing a juvenile as an adult are mandatory, may not be waived silently, and are not subject to the state's preservation claims under section 924.051; 2) quash the contrary opinion of the First District Court of Appeal below, and 3) reverse his illegal sentence for aggravated battery, and order it reduced to 15 years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Stephen R. White, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Rico Cargle, inmate no. 142378, Mayo Correctional Institution, P.O. Box 448, Mayo, Florida, 32066, this 1st day of June, 1998.

KATHLEEN STOVER