ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TERRY MCKNIGHT,

Respondent.

CASE NO. 94,256

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Terry McKnight, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal will be referenced as in the Initial Brief. "IB" and "AB" will designate Petitioner's Initial Brief and Respondent's Answer Brief, respectively, followed by any appropriate page number.

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

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The state reaffirms its statement contained in the initial brief.

SUMMARY OF ARGUMENT

The respondent has not shown any reason why this Court should revisit and revise Florida Rules of Appellate Procedure to permit appellants to raise claims of sentencing error for the first time on appeal. There is no good reason why the remedies provided by the legislature and this Court to raise such issues should not be required. Respondent has not shown that the use of such remedies will deny him any constitutional right.

ARGUMENT

ISSUE I

SHOULD THIS COURT ENFORCE THE PROVISIONS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b) AND FLORIDA RULE OF APPELLATE PROCEDURE 9.140(d) REQUIRING THAT CLAIMS OF SENTENCING ERROR BE FIRST RAISED IN THE TRIAL COURT, WHICH BECAME EFFECTIVE 1 JANUARY 1997, OR SHOULD IT REVISIT AND RECEDE FROM AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE, 685 SO.2D 773 (FLA. 1996) BY REVISING RULE 9.140(d) TO PERMIT CLAIMS OF SENTENCING ERROR TO BE RAISED FOR THE FIRST TIME ON APPEAL?

Respondent fails entirely to show any reason why this Court should revisit and revise Florida Rules of Criminal Procedure 3.800(b) and Florida Rule of Appellate Procedure 9.140(d) to permit appellants to raise unpreserved sentencing issues for the first time on appeal. In order to prevent the unnecessary expenditure of

scarce resources resulting from appeals taken from guilty pleas and alleged sentencing errors, the Florida Legislature and this Court, in tandem, sanctioned the Criminal Appeals Reform Act of 1996. The general thrust of this legislation was to require that parties raise claims of prejudicial error in the trial court by prohibiting such issues being raised for the first time in the appellate court. In order to implement this statute, while ensuring that parties had a full opportunity to raise such issues in the trial court, this Court adopted Florida Rule of Appellate Procedure 9.140(d) and Florida Rule of Criminal Procedure 3.800(b).

Florida Rule of Appellate Procedure 9.140(d)unequivocally prohibits raising any sentencing error for the first time on appeal:

> **Sentencing Errors.** A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:
>
> (1) at the time of sentencing; or
> (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

Florida Rule of Criminal Procedure 3.800(b) was adopted to provide an alternate remedy for such claims by authorizing that they be raised by motion in the trial court within thirty days of entry of the sentencing order.

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

Thus, as pointed out in Maddox v. State, 708 So.2d 617, (Fla. 5th DCA 1998), it is clear that the legislature and this court determined that the most efficient and legally sound means of

addressing sentencing issues is to ensure, by either preservation or a motion for post-conviction relief -- i.e., ineffective assistance of counsel claim, that the trial court address each issue to ensure a comprehensive record. Any exception would only erode and undermine the laborious endeavors expended by both branches of our State's government in sanctioning a viable solution to a once escalating problem. Contrary to respondent's contentions, there is no Constitutional right to ignore the remedies provided by the State Legislature and this Court. To accept respondent's argument would mean revisiting and amending Florida Rule of Appellate Procedure 9.140(d) which was only adopted after extensive review by this Court of arguments presented to it by all relevant parties. Respondent has a viable remedy available via a rule 3.850 motion for post-conviction relief asserting that his trial counsel was ineffective for failing to challenge an illegal sentence contemporaneously or by rule 3.800(b) motion. He should be required to exercise that remedy and to obtain relief in the trial court, if any is appropriate, pursuant to legislative and judicial mandate.

Appellant's claim that the Criminal Reform Act of 1996 violates Separation of Powers under the Florida Constitution is equally without merit. This Court recently addressed the very issue in Kalway v. Singletary, 708 So.2d (Fla. 1998):

> Separation of powers is a potent doctrine that is central to our constitutional form of state government. See Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). This does not mean, however, that two branches of state government in Florida cannot work

hand-in-hand in promoting the public good or implementing the public will, as evidenced by our recent decision in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla.1996), wherein we deferred to the legislature in limited matters relating to the constitutional right to appeal:

[W]e believe that the legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals. Id. at 774-75.

Id. at 269.

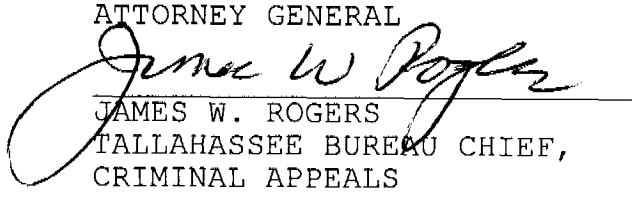
Accordingly, the State urges the Court to disapprove the district court decision below by reiterating that all claims of sentencing error must be raised in the trial court as mandated by rule 9.140(d), and to adopt the position so persuasively set out by Chief Judge Griffin in Maddox.

CONCLUSION

The State urges the Court to quash the decision below and resolve the conflict by approving the decision in Maddox.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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(850) 414-3300 Ext. 4576

COUNSEL FOR PETITIONER
[AGO# L98-1-12755]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to Laura Anstead, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of January, 1999.

Sherri Tolar Rollison
Attorney for the State of Florida

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