IN THE SUPREME COURT OF FLORIDA

GARY ENGESETH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,003

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent 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, Gary Engeseth, 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. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "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.

CERTIFICATE OF FONT AND TYPE SIZE

This brief was prepared using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner’s statement of the case and facts.

It should be noted that this is the most recent of a series of cases based on the certified question in Locke v. State, 714 So.2d 1249 (Fla. 1st DCA 1998), (**en banc**), which is on review

here under case no. 94,396. Other cases presenting the same certified question include Heird v. State, case no. 94,348, McCray v. State, case no. 94,460. Burch v. State, case no. 94,956, and Sassnett v. State, case no. 94,812. Presumably, this Court's decision in Locke will control the disposition of this and the other cases on which review is based on the Locke certified question.

A copy of the decision below is in appendix A.

SUMMARY OF ARGUMENT

The district court's analysis of the legal issue in Locke v. State, copy appended, is adopted by the state with additional comments.

The district court decision should be approved and a negative answer given to the certified question. Claims of sentencing error which are not preserved in the trial court either contemporaneously by objection or by motion pursuant to Florida Rule of Criminal Procedure 3.800 are not cognizable on direct appeal pursuant to Florida Rule of Appellate Procedure 9.140(d), section 924.051(3), Florida Statutes (Supp 1996), Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)(**en banc**), review pending, case no. 92,805, and Hyden v. State, 715 So.2d 960 (Fla. 4th DCA 1998) (**en banc**), review pending, case no. 93,966.

Moreover, given the number of comprehensive remedies provided in the trial court to challenge sentencing errors, it cannot be seriously suggested that **any** claims of sentencing error should be first raised in the appellate courts as either fundamental or non-fundamental error. This Court's prohibition in rule 9.140(d) against raising **any** sentencing issue for the first time on appeal is solidly grounded on the ready availability of other remedies in the trial court which this Court has provided through its rules of criminal and appellate procedure.

ARGUMENT

ISSUE I

LOCKE CERTIFIED QUESTION: DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

The state adopts the district court's analysis of the legal issue in Locke v. State and readopts its answer brief in State v. Locke, case no. 94,396. For convenience of the reader, a copy of the Locke decision is in appendix B.

The district court decision should be approved and a negative answer given to the certified question. Claims of sentencing error which are not preserved in the trial court either contemporaneously by objection or by motion pursuant to Florida Rule of Criminal Procedure 3.800 are not cognizable on direct appeal pursuant to Florida Rule of Appellate Procedure 9.140(d), section 924.051(3), Florida Statutes (Supp 1996), Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), Maddox, and Hyden.

The state urges the Court to adopt the reasoning in Maddox that claims of fundamental sentencing error are no longer cognizable on appeal because the provisions of rules 3.800, 3.850, and 9.140(d) provide comprehensive, fail-safe remedies in the trial court which obviate any need to address such claims for the first time on appeal.

There is no certain definition of fundamental error, this Court has described it in Archer v. State, 673 So.2d 17, 20 (Fla.

1996) as "'error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So.2d 481, 484 (Fla. 1960)" and in J. B. v. State, 705 So.2d 1376, 1378 (Fla. 1998) as error "which goes to the foundation of the case or the merits of the cause of action and is equivalent to the denial of due process. Johnson 616 So.2d [1] at 3." It cannot be plausibly maintained that not pronouncing routine statutory costs and fees invalidates the sentencing proceeding or denies due process when such costs and fees are set forth in the written sentencing order which can be challenged in the trial court pursuant to rule 3.800(b) and is itself the actual basis of any appeal.

The wisdom of Maddox is that it eliminates the need to struggle with the uncertain meaning of fundamental error by holding that there are now remedies for **all** prejudicial sentencing errors, not merely fundamental, through contemporaneous objection, or motion pursuant to rule 3.800(b) to correct sentence[1], and/or motion pursuant to Florida Rule of

[1]It deserves noting that rule 3.800 now contains three methods of challenging or modifying sentences in the trial court: 3.800(a) provides for challenging an illegal sentence at any time; rule 3.800(b) permits challenging any sentence within thirty days of rendition; and rule 3.800(c) permits reduction and modification of a legal sentence within sixty days of rendition or within sixty days of judgment becoming final. Significantly, these remedies must be initiated in the sentencing court with the right to appeal rule 3.800(a) and (b) orders.

Criminal Procedure 3.850 to claim ineffective assistance of counsel if trial counsel overlooks any prejudicial error and fails to file a rule 3.800(b) motion within thirty days. Failure of counsel to challenge a prejudicial error, when provided with a full thirty-day period of review, would be ineffective assistance of counsel on its face and there would be, of course, a right to appeal the denial of any rule 3.850 motion.

The state urges in the most emphatic terms that no one can seriously suggest that defendants who are now provided with no less than three independent and mutually supportive due process remedies in the trial court to raise claims of sentencing error are also entitled, contrary to statutory and procedural law, to demand that the judicial system also permit the claim to be raised for the first time on direct appeal. A right to a contemporaneous objection, a right to a motion to correct sentence within thirty days of rendition, and a right to claim ineffective assistance of counsel within two years of final judgment is due process to the ultimate degree. There is no denial of fundamental due process in requiring that defendants use trial court remedies readily available to them in raising claims of sentencing error. Maddox.

Petitioner also suggests that it is too idealistic to expect trial counsel to review the trial court's final written judgment and sentence because trial counsel may not receive a timely copy of such and thus there is no "fail-safe" remedy for the client. Not so. The state suggests that trial counsel are presumed to be

competent and diligent in protecting the interests of their clients[2] and are thus capable of noting through a routine office calendaring action that they have not received a timely copy of the written judgment and of then taking whatever corrective action are appropriate. Corrective action may be as simple as calling the judge's chambers or the clerk of the court for a copy. Alternatively, it may involve filing a petition for writ of mandamus in the district court to compel the trial court to perform its non-discretionary duty of publishing a timely copy of the written judgment so that the rights of the client may be preserved under rule 3.800(b) to seek correction of the written judgment and to then seek appellate review of any claimed prejudicial error which has been properly preserved. The state again points out that this Court through its revisions of the rules has provided criminal appellants with remedies and rights in the trial court for every sentencing error and that these remedial rules have been in effect for more than two years[3]. It

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[2]If they are not competent and diligent, they should not be representing criminal defendants and we need to identify those who are incompetent or inattentive in order to either remove them from such representation or to ensure they become both competent and diligent.

[3]Rule 3.800(b) was created to give defendants and counsel a full thirty days after rendition of judgment in which to review the written judgment for any sentencing errors. Formerly, there was no such remedy. Rule 3.170(l) was created to give defendants and counsel thirty days after rendition of judgment in which to file a motion to withdraw guilty or no contest pleas. Formerly, there was no such remedy. Rule 9.020(h) has been amended to accommodate the filing of motions pursuant to rules 3.800(b) and

is now time for trial counsel to learn these rules, they have been in effect since 1 January 1997, and to start protecting the interests of their clients through the exercise of competent counsel.

The state maintains that trial counsel cannot, in good faith, withdraw as counsel of record pursuant to Florida Rule of Appellate Procedure 9.140(b)(5)(A) and file a notice of appeal and statement of judicial acts without first obtaining and reviewing a copy of the final written judgment and sentence for any action pursuant to rule 3.800(b). See, Hyden, 715 So.2d at 961:

> We use this appeal to impress upon the criminal bar of this district the essential requirement of the new Florida Rule of Appellate Procedure 9.140(d). In order for a sentencing order to be raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b). In this district, we will no longer entertain on appeal the correction of sentencing errors which are not properly preserved.

See, also, Maddox, 708 So.2d at 621:

> The legislature and the supreme court have concluded, however, that the place for such errors to be corrected is at the trial level and that any defendant who does not bring a sentencing error to the attention of the sentencing judge within a reasonable time cannot expect relief on appeal. This is a policy decision that will relieve the workload of the appellate courts and will place correction of alleged errors in the hands of the judicial officer best able to investigate and to correct any error. Eventually, trial counsel may even recognize the labor-saving and reputation-enhancing benefits of being adequately prepared for the sentencing hearing.

3.170(l) without sacrificing the ultimate right to appeal.

CONCLUSION

The decision of the district court should be affirmed and the certified question answered no.

Respectfully submitted,

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[AGO# L99-1-3660]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of April 1999.

_____

James W. Rogers
Attorney for the State of Florida

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APPENDIX TO
RESPONDENT'S ANSWER BRIEF

A. ENGESETH V. STATE, Case no. 97-03857 (Fla. 1st DCA 29 January 1999)

B. Locke v. State, (Fla. 1st. DCA, October 21, 1998)