ORIGINAL

IN THE SUPREME COURT OF FLORIDA

GARY A. ENGESETH,

Petitioner,

v. CASE NO. 95,003

STATE OF FLORIDA,

Respondent.

/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0513253
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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ARGUMENT

ISSUE PRESENTED

WHETHER THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHOR-IZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTES FUNDAMENTAL ERROR.

The state's answer brief consists heavily of an argument against the right to appeal fundamental sentencing errors, combined with an ad hominem attack on defense attorneys generally. As to fundamental errors, the state argues that, because there is no precise definition of fundamental error (Answer Brief (AB), pp.4-5), the court should find no error to be fundamental. In response, petitioner argues as to the latter point that, while even in the sentencing context it might not be possible to adopt a comprehensive definition of fundamental

error, it is probably an easier project than in the trial error context.

As to the state's first point, particularly with respect to *discretionary* costs and fees, the failure to give a criminal defendant notice and opportunity to be heard violates state and federal constitutional principles of due process, and is thus fundamental error, addressable for the first time on direct appeal.

Further, the state doth protest too much ("in the most emphatic terms" (AB-6)) that defendants do not need to raise facially apparent sentencing errors on direct appeal because they are already overflowing with due process to correct such errors. The state notes the "rights" to contemporaneous objection, to file a 3.800(b) motion within 30 days to correct a sentence, and to file a 3.850 motion claiming ineffective assistance of counsel within 2 years.

The state even claims the present system provides "comprehensive, **fail-safe** remedies" (AB-4 (emphasis added)). The state seems to have no sense of irony that a supposedly "fail-safe" system has resulted in dozens and potentially hundreds or even thousands of direct appeals and appeals to this court. If only the system were failsafe, this appeal and many like it would not be before the court.

Petitioner wishes to make three points. First, as noted above, the state is disingenuous in arguing this case as though in a vacuum. The state argues as though petitioner were in a

unique position, while the state and this court know that this kind of claim has become common. This court probably has dozens or more cases on related issues. Thus, any rule that the state urges and that this court may create will have widespread consequences. Should the state's view prevail, petitioner contends the consequences could be potentially devastating.

This leads to the second and third points, which are difficult to argue discretely. Of course petitioner does not oppose contemporaneous objection or motions to correct sentence, although experience has shown that the 30-day time limit has not been successful in presenting the majority of sentencing errors to the trial courts. The problem is that a defendant such as petitioner has an attorney who missed the error at the imposition of sentence and in all likelihood never saw the written judgment and sentence within 30 days, or if he or she did, again failed to notice the error. The question then is 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 v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), review granted, no. 92,805 (Fla. July 7, 1998). At least nothing is to be done on direct appeal.

That leaves potentially a 3.800 or a 3.850 motion, assuming that some errors will not be considered waived for not having been raised on direct appeal. The third point is that

the problem with post-conviction motions, especially for indigent defendants, and undersigned believes this in fact is an ulterior motive of the state's, is that there is no right to counsel on such motions. According to the state's plan, therefor, when the defendant **does** have counsel - on direct appeal - his attorney will be prohibited from raising facially-apparent sentencing errors which can be resolved by the written record and require no evidentiary hearing. Then after direct appeal is over, the poor, uncounseled, unadvised, perhaps uneducated or even illiterate defendant will be left to his own devices to file a post-conviction motion.

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.[1] This court rejected

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[1]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

(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.

court, then let the circuit court have concurrent jurisdiction during the pendency of direct appeal, as the court presently does for motions under Rule 3.800(a). Rule 9.600, Fla.R.App.P. Moreover, conserving scarce resources, assuming arguendo that is the state's goal, 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.

Finally, ignoring or trivializing the practical problems faced by trial attorneys in identifying these errors, the state makes an unwarranted and essentially pointless attack on defense attorneys. The state argues, if defendants are not receiving the benefit of these generous "rights," it must be because trial attorneys lack competence and/or diligence (AB-7). Quotations from Hyden and Maddox, which undersigned contends were ill-considered, seemingly support the state's attack (AB-8). Counsel that lack competence and diligence should not be representing criminal defendants (AB-7, n.2).

To illustrate how easily the "rights" to correct sentencing errors may be defended by competent counsel, the state gives a two-page explanation of all the steps counsel should take if they have not received the judgment and sentence timely - calendaring, followed by corrective action, such as filing a petition for writ of mandamus to compel the trial court to

perform its duty (AB-7). The state's proposal is far from simple, and undersigned counsel contends that it unwittingly illustrates that this situation cries out for a simple solution, not more complexity, and not a solution wholly dependent on someone who has already inadvertently overlooked the error.

The "buck" has to stop somewhere, and some district courts have interpreted this to mean that **any** unpreserved sentencing errors may not be corrected on direct appeal - no matter how facially apparent, no matter how little in need of an evidentiary hearing, no matter how easily corrected by a simple remand to the trial court, no matter that the prosecutor and the trial judge - who theoretically are also in a position to know the law and correct errors - are permitted to stand by and do nothing.

Facially apparent sentencing errors - which by definition require no evidentiary hearing and which, also, by definition are probably instances of ineffective assistance of counsel - are easily correctable by either the appellate court or the trial court, but the trial court must ultimately implement the correction. This court wants a system in which facially apparent sentencing errors are presented to the trial court early in the process, thus relieving the appellate courts of the need to address many such issues. Petitioner obviously has no quarrel with this goal.

Moreover, inasmuch as the Criminal Appeal Reform Act of 1996 (CARA) affects this system theoretically by limiting

direct appeals, then presenting the issues to the trial court early is also consistent with the CARA. The state, however, and some district courts, want to implement this system by applying a draconian rule that would preclude issues from being raised on direct appeal - when the defendant has counsel - and leave him to negotiate sentence correction by uncounseled post-conviction motions. The CARA does not require this result, and such a result would be fundamentally and constitionally unfair.

CONCLUSION

Based on the facts of this case, the rules and statutes cited, the constitutional principles, case law and legal argument presented, petitioner respectfully requests that this Court answer the certified question in the affirmative, disapprove the decision of the First District Court of Appeal, and remand to that court for further consideration.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
KATHLEEN STOVER
Assistant Public Defender
Fla. Bar No. 513253
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida; and a copy has been mailed to petitioner, on this _____ day of April, 1999.

_____
KATHLEEN STOVER