IN THE SUPREME COURT OF FLORIDA

DONNA MELISSA COLLINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,869

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent State of Florida was the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court. Petitioner DONNA MELISSA COLLINS was the Appellant in the DCA and the defendant in the trial court.

The record on appeal consists of three volumes. References will be as those used by the petitioner.

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

This brief was prepared using New Courier 12 point font.

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 accepts petitioner’s statement but for clarity summarizes the relevant facts as follows.

Over a period of less than a year, petitioner was charged with 32 felony offenses. In a plea bargain, She pled guilty to 18 offenses and the state nol prossed the other 14 charges. No agreement was reached on sentencing. During a plea colloquy and sentencing on 10 November 1997, petitioner indicated that she fully understood her rights and that the plea was in her best interests. The state urged that a departure sentence be imposed. The trial court agreed and imposed departure sentences without objection. No motions to withdraw the plea or to challenge the

departure sentence were filed pursuant to Florida Rules of Criminal Procedure 3.170(l) or 3.800(b). On appeal, the district court held that the absence of a written departure order was not fundamental error because it did not cause the sentences to be illegal and declined to address the challenge on appeal. The district court also held that petitioner had waived any double jeopardy claims pursuant to Novaton v. State, 634 So.2d 607 (Fla. 1994) by entering into a plea bargain and not moving to withdraw prior to appeal pursuant to Florida Rule of Criminal Procedure 3.170(l).

SUMMARY OF ARGUMENT

The district court did not err in declining to address the absence of a written departure order when the claim was not presented in the trial court by contemporaneous objection or by motion pursuant to Florida Rule of Criminal Procedure 3.800(b). The outcome here should be controlled by the decision in Butler v. State, case no. 94,614 which has been argued and is pending in this Court.

The district court did not err in holding that the plea bargain obviated any double jeopardy claim pursuant to Novaton and that, in the absence of a motion to withdraw the plea pursuant to Florida Rule of Criminal Procedure 3.170(l), the convictions would be affirmed.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT ERR IN DECLINING TO ADDRESS AN UNPRESERVED CLAIM OF NON-FUNDAMENTAL ERROR THAT THE TRIAL COURT HAD NOT ENTERED A WRITTEN DEPARTURE ORDER? (Restated)

This Court has already held that the absence of a written departure order is not fundamental error. Davis v. State, 661 So.2d 1193 (Fla. 1995). Davis issued prior to the effective date of the Criminal Appeals Reform Act and the implementing rules promulgated by this Court. See, section 924.051(3), Florida Statutes barring appeals of issues not properly preserved in the trial court, except for fundamental error, and Florida Rules of Criminal Procedure 3.800(b) authorizing the filing of a motion to correct any sentencing **error** within thirty days of the rendition of a written judgment or sentence and Florida Rule of Appellate Procedure 9.140(d) prohibiting raising **any** sentencing claim on appeal which has not been properly preserved in the trial court. The district court did not err in relying on Davis, and its own earlier case of Neal v. State, 688 So.2d 392(Fla. 1st DCA 1997, and on §924.051(3), Florida Statutes, Florida Rule of Criminal Procedure 3.800(b), and Florida Rule of Appellate Procedure 9.140(d) for the proposition that failure to preserve a claim of non-fundamental sentencing error in the trial court bars consideration of the claim on appeal. Indeed, given its plain meaning, as any rule or statute should be, rule 9.140(d) prohibits raising **any** sentencing issue on appeal, including

fundamental error, because any criminal represented by competent counsel has trial court and direct appeal remedies for any prejudicial sentencing error. For those not represented by competent counsel, as many are[1], there is an absolute, fail-safe, safety net available through a claim of ineffective assistance of counsel. See, Judge Griffin's penetrating and accurate analysis in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), review pending, case no. 92,805.

This issue is also before the Court in numerous cases including Butler v. State, case no. 94,614. The district court should be affirmed.

It should also be noted that the Criminal Punishment Code applicable to all offenses committed after 1 October 1998, §921.002, does not require written reasons for departure **above** the guidelines and a trial court may impose any sentence within the statutory maximum, and above the guidelines sentence, without explanation. Thus, the precedential value for crimes after 1 October 1998 of not entering a departure sentence is limited to departures **below** the sentencing guidelines. If the state was interested in manipulating the system to obtain prosecutorial

[1]The state confesses that the near total failure of the defense community to protect the interests of their clients by implementing rules 3.170(l) and 3.800(b) from 1 January 1997 forward is prima facie evidence of legal incompetency or neglect, even though it does not satisfy the prejudice prong of an ineffective assistance of counsel claim. Maddox; Hyden v. State, 715 So.2d 916 (Fla. 4th DCA 1998), review pending, case no. 93,966.

advantage, a “win” for the petitioner holding that the absence of a written order was fundamental error would enable the state in future cases to raise the claim without preserving it in the trial court. Criminals, on the other hand, would not benefit from such ruling because there is no future requirement to file written orders in upward departure sentences. The simple truth is, however, that no definition of fundamental can encompass the absence of a written departure order unless the word, fundamental, is stretched beyond all rational bounds.

It should be further noted that rule 3.800(b) has been modified effective 12 November 1999 to permit an appellant to raise claims, such as here, in the **trial** court at anytime prior to the filing of the initial brief. Thus, under current rules, this claim would not now be raised for the first time in the district court.

ISSUE II

DID THE DISTRICT COURT ERR IN HOLDING THAT THE PLEA BARGAIN MOOTED ANY DOUBLE JEOPARDY CLAIM PURSUANT TO NOVATON V. STATE, 634 SO.2D 607 (FLA. 1994)?(Restated)

The district court did not err in relying on Novaton to reject the double jeopardy claim. Novaton issued in 1994 and, as in claim I above, claim II must also be analyzed in light of the subsequent enactment of the Criminal Appeal Reform Act and the various rules implementing that Act. Petitioner bargained for 18 convictions and the dismissal of 14 other charges. She has not filed a motion to withdraw the plea pursuant to Florida Rule of

Criminal Procedure 3.170(l). Florida Rule of Appellate Procedure 9.140(b)(2) prohibits appeals from plea bargains where no issue has been preserved or reserved in the trial court. Petitioner has waived her claim by failing to raise the issue in the trial court pursuant to rule 3.170(l) and cannot now raise it for the first time on appeal. Indeed, because she had a rule 3.170(l) remedy available on direct appeal, she cannot now raise the claim in a Florida Rule of Criminal Procedure 3.850 proceeding[2] except by a asserting ineffective assistance of trial counsel in entering into the plea bargain.

CONCLUSION

The district court should be affirmed for the reasons set forth above.

[2]Rule 3.850(c)(6) provides in relevant part. "This rule does not authorize relief based on grounds that could have or should have been raised at trial, and, if properly preserved, on direct appeal of the judgment and sentence."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this 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 27th day of December 1999.

James W. Rogers
Attorney for the State of Florida

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