IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-115

BYRON TISDOL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, Byron Tisdol, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The Respondent, the State, was the prosecution in the trial court and the appellee in the lower court. The parties will be referred to as they stood before the trial court or as they stand before this Court. The designation "R." will refer to the record on appeal, and the designation "T." will refer to the separately bound transcript of proceedings. The transcripts in the supplemental portion of the record will be referenced as "Transcript of [DATE] at [page]."

STATEMENT OF THE CASE AND FACTS

The underlying offenses were committed on January 3, 1993 (Circuit Court Case No. 93-2188), and February 20, 1994 (Circuit Court Case No. 94-5876), respectively [R. 1-2, 237-42; Transcript of Oct. 20, 1993 at 12; Transcript of July 27, 1994 at 8-11], when the Petitioner was a juvenile. [The defendant's date of birth is March 7, 1978 (R. 2, 4, 255; Transcript of Oct. 20, 1993 at 12), so the offenses were committed when he was 14 and 15, respectively] The dispositional statute which the Petitioner contends is controlling, as will be discussed in the argument portion of this brief, is § 39.059, Florida Statutes (1991), (1993) . In the summer of 1994 the trial court, after an earlier juvenile disposition in both cases, placed the Petitioner, still a juvenile, on adult probation without complying with the statute's requirements or obtaining a valid waiver thereof from the juvenile (R. 6, 91-92, 244; Transcript of July 27, 1994 at 14-15).

Following intervening violations, in April of 1998 the defendant pled to a recent violation and in receiving community control agreed that if again found in violation he would receive a 17 year sentence and give up his right to file a motion to mitigate (R. 264-65; Transcript of April 15, 1998 at 5). On September 22, 1998, the defendant was found in violation of the adult community control for unapproved absences from his residence, and he was sentenced to a total of 17 years imprisonment (R. 15, 295-98; T. 225-27, 233-34).

On direct appeal, in which the Petitioner raised the underlying statutory noncompliance in first placing a juvenile on adult probation as invalidating the probation, the Third District Court of Appeal ruled that the 1998 plea on which the community control revocation was based occurred when the Petitioner was an adult and "could conduct his own affairs [,]" and since sentencing on revocation occurred after the July 1, 1996 effective date of the Criminal Appeals Reform Act, the error was not preserved and "not subject to appellate review." (R. 306-07, filed December 15, 1999.) The district court certified the cause to this Court to pair it for review with *Cargle v. State*, 701 So. 2d 359 (Fla. 1st DCA 1997), *review granted*, 717 So. 2d 529 (Fla. 1998), on "the question of the applicability of the Criminal Appeals Reform Act* to situations involving juveniles being sentenced as adults." (R. 307).

Notice to invoke the discretionary review jurisdiction of this Court was timely filed on January 12, 2000.

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* Ch. 96-248, § 4, Laws of Fla. See § 924.051, Fla. Stat. (Supp. 1996).

SUMMARY OF ARGUMENT

Although the trial court initially sentenced the juvenile as an adult, it thereafter entered a juvenile disposition in that case (Circuit Court Case No. 93-2188) and another case (94-5876). After entering that juvenile disposition, the trial court subsequently placed the defendant on adult probation, without any compliance with the requirements of § 39.059(7), Fla. Stat. (1991). Failure to comply with the mandatory terms of the statute was long held to be fundamental error. Recent decisions of this Court holding or suggesting otherwise fail to consider both a prior controlling decision of this Court on the point, *State v. Veach*, 637 So. 2d 1096 (Fla. 1994), approving *Veach v. State*, 614 So. 2d 680 (Fla. 1st DCA 1993), and have been followed by the more recent pronouncement in *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998), that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal."

The juvenile herein never entered a valid waiver of entitlement to § 39.059 protections mandated by such cases as *Berry v. State*, 647 So. 2d 830 (Fla. 1994), and, under *Troutman v. State*, 630 So. 2d 528 (Fla. 1993) and *State v. Griffith*, 675 So. 2d 911, 914 (Fla. 1996), the fact that the juvenile is now an adult does not diminish his entitlement to resentencing and such resentencing must be under the conditions as existing at the pertinent time, i.e., as of the summer of 1994.

Neither implicitly nor by action or omission of counsel in the trial court, either

under decisional law preservation requirements or under the provisions of the Criminal Appeals Reform Act, can there be a waiver of a right personal to the juvenile, which the trial court was required to personally apprise him of and which could only be expressly and knowingly waived by the juvenile himself, on the record in the presence of the trial court.

ARGUMENT

> WHERE THE TRIAL COURT IN PLACING THE THEN-JUVENILE ON ADULT PROBATION FAILED TO COMPLY WITH THE MANDATORY DISPOSITIONAL STATUTE (§ 39.059, Fla. Stat. (1991)) EFFECTIVE AT THE TIME OF THE UNDERLYING OFFENSES COMMITTED ON JANUARY 3, 1993 AND FEBRUARY 20, 1994, AND THERE WAS NO WAIVER BY THE JUVENILE OF THOSE REQUIREMENTS, THAT WHICH FOLLOWED WAS ILLEGAL AND THE DEFENDANT IS ENTITLED TO BE RE-SENTENCED AS OF THE PERTINENT TIME AND AS IF A JUVENILE.

For the original underlying offense (Circuit Court Case No. 93-2188), although indicted for a felony punishable by life along with a first-degree felony, the Petitioner -- then a juvenile -- pled to reduced charges [second and third degree felonies, respectively; §§ 794.011(5), 787.02(2), Fla. Stat. (1991); R. 72)] and was placed on adult felony probation. For those January 3, 1993 offenses, the applicable statute, § 39.022(4)(c)(3) provided:

> If the [indicted] child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. If the child is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he was indicted as a part of the criminal episode, the court may sentence as follows:
>
> a. Pursuant to the provisions of s. 39.059 [juvenile disposition];
>
> b. Pursuant to the provisions of chapter 958 [youthful

> offender sentencing], notwithstanding any other provisions of that chapter to the contrary; or
>
> c. As an adult, pursuant to the provisions of s. 39.059(7)(c).

In turn, section 39.059(7)(c), Florida Statutes (1991) provided a detailed procedure and specific list of factors, as well as requirement of a written order, mandatory upon the trial court before entering an adult sentence.[1] *Troutman v. State*, 630 So. 2d 528 (Fla. 1993); *State v. Rhoden*, 448 So. 2d 1013 (Fla. 1984) (construing predecessor § 39.111), decisions as to which apply equally to § 39.059, *see Sirmons v. State*, 620 So. 2d 1249, 1250 n.1 (Fla. 1993).

As recognized in *Troutman*, the Legislature itself directed that compliance with the statute was mandatory for adult sentencing, *id*. at 531, and a failure to comply, prior to the inapplicable later amendment of the statute effective October 1, 1994,[2] constituted

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[1] The entirety of § 39.059 is set forth as an appendix to this brief.

[2] § 39.059 was amended effective October 1, 1994 by chapter 94-209, which amendment is inapplicable in this case, *see Ritchie v. State*, 670 So. 2d 924, 926 n.3 (Fla. 1996).

fundamental error. *State v. Rhoden, id*. and numerous progeny.

While the trial court initially found it appropriate to impose adult sanctions, placing the defendant on probation in October of 1993, it did not properly comply with § 39.059;[3] and it thereafter *undid* that disposition and expressly entered a juvenile disposition in both this case number (93-2188) and a new case (94-5876), offense date February 20, 1994, which also constituted (and was charged as) a violation of the original adult probation in Case No. 93-2188. (R. 81, 237-42). For both cases the trial court specifically entered juvenile dispositions, finding the juvenile to have committed a delinquent act and committing him to the Department of Health and Rehabilitative Services for treatment at Glen Mills Academy in Pennsylvania (R. 6, 91-92, 244; Transcript of July 27, 1994 at 14-15).

In so doing, the trial court legally and logically negated any possible effect of a prior determination of appropriateness of adult sanctions in Case No. 93-2188, and, as a

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[3] The trial court's initial order imposing adult sanctions was clearly boilerplate at least as to paragraph 5 and more than arguably as to paragraph 6 (R. 74). Even a single finding failure would require reversal under the applicable statute. *See, e.g., Hannah v. State*, 644 So. 2d 141 (Fla. 2d DCA 1994); *Young v. State*, 630 So. 2d 671 (Fla. 4th DCA 1994). In any event, the gravamen of this case is the failure of the court to have complied with the statutory requirements after having later actually entered juvenile disposition in both cases (July 27, 1994) and *thereafter* entering adult dispositions without any compliance whatsoever with § 39.059. Further, at no point was there compliance with § 39.059 in Circuit Case No. 94-5876.

benchmark both for that case and the new one in which there had never been any such determination (94-5876), rendered applicable the mandatory terms of § 39.059 for any possible future adult disposition.

As this Court squarely held in *State v. Rhoden*, "The juvenile justice statutory scheme, as adopted by the Florida Legislature, grants to juveniles the *right* to be treated differently from adults. The legislature has emphatically mandated that trial judges not only consider the specific statutory criteria pertaining to the suitability of adult sanctions, but that they also reduce to writing their findings of fact and reasons for imposing an adult sentence on a juvenile." *Id*. at 1016-17. Further, "[e]ven when a juvenile is tried as an adult, judges must make a determination, in accordance with statutory requirements, whether to sentence the child as an adult or as a juvenile. ... *[E]ach* of the criteria must be considered by the trial court in making the decision to sentence a child as an adult. § 39.059(7)(d), Fla. Stat. (1991)." *Troutman v. State, id*. at 531.

While the statutory requirements can be waived by a juvenile, they *cannot* be waived implicitly or by default, or by anyone else on the juvenile's behalf. Even a negotiated plea contemplating imposition of adult sanctions does not constitute a waiver. *Sirmons v. State, id*. Further, a written waiver, signed by a juvenile in the presence of his attorney and guardian, by terms expressly stating that it is "freely, voluntarily, knowingly and intelligently" entered is insufficient where, during an ensuing plea

colloquy, the trial court does not "inform the juvenile of the rights provided under the statute and ensure that the juvenile understands the significance of that waiver." *Berry v. State*, 647 So. 2d 830, 832 (Fla. 1994). The court "must inform the juvenile of the rights provided by the Legislature under section 39.111 [the successor of which is § 39.059] and insure that the juvenile voluntarily, knowingly, and intelligently waives those rights." *Sirmons, id.* at 1252. *See also Pittman v. State*, 620 So. 2d 1232 (Fla. 1993); *Troutman, id.* at 531.

While, somewhat anomalously, the trial court when imposing juvenile sanctions in July of 1994 sought to obtain a waiver from the juvenile of any objection he might have had to being sentenced as a juvenile (Transcript of July 27, 1994 at 14-15), which it was not required to do, it never thereafter, either in subsequently placing the juvenile on adult probation without compliance with § 39.059 or in obtaining a waiver in April of 1998 with regard to specific rights in the event of a subsequent finding of violation, obtained or sought to obtain a waiver of the mandatory statutory requirements before sentencing as an adult would be authorized.

Where § 39.059 is not complied with, resentencing is required, *e.g., Troutman v. State*, and this is not diminished in the slightest by the fact that in the interim a juvenile has become an adult, as occurred herein. *State v. Griffith*, 675 So. 2d 911, 914 (Fla. 1996). Moreover, passage to adulthood does not alter the nature of the required

resentencing. Even for resentencing once an adult, "[t]he statutory evaluation must, of course, be made in light of conditions existing at the time of the original sentencing(,)" *Troutman, id*. at 533 and n.6. That necessarily must refer to when the Petitioner was first improperly treated as an adult, which was when, after juvenile disposition in July of 1994, he was then (again) placed on adult probation [R. 87; Transcript of July 27, 1994 at 4-18; Transcript of August 4, 1994 at 3].

Although noncompliance with § 39.059 and its predecessor was clearly held not subject to a contemporaneous objection requirement, *e.g., State v. Rhoden, id*. at 1015-16, and unquestionably constituted fundamental error, *Sanders v. State*, 638 So. 2d 569 (Fla. 3d DCA 1994); *Taylor v. State*, 573 So. 2d 173 (Fla. 5th DCA 1991); *Dixon v. State*, 451 So. 2d 485 (Fla. 3d DCA 1984), the matter more recently has been substantially clouded. For example, in *McCloud v. State*, 653 So. 2d 453 (Fla. 3d DCA 1995), the lower court held that a claim that upon revocation of probation of a juvenile prosecuted as an adult the trial court was required to comply with § 39.059 was waived because not presented to the revoking court and because not initially appealed at the time of probation. However, *McCloud* failed to consider, as to the first part of its holding, the extensive prior decisional law holding that such an error was fundamental, and, as to the second part of its holding, that the terms of the statute require compliance because on the revocation adult sentencing is occurring. *Cf., e.g., Powell v. State*, 606 So. 2d 486 (Fla.

5th DCA 1992) (recognizing that, in revoking probation of a juvenile prosecuted as an adult and upon whom juvenile sanctions had initially been imposed, trial court is not precluded from imposing adult sanctions but must comply with § 39.059).

Additionally, *McCloud* failed to consider that this Court had approved the decision of another district holding directly to the contrary. *State v. Veach*, 637 So. 2d 1096 (Fla. 1994), approving, on authority of *Sirmons* and *Troutman,* the decision in *Veach v. State*, 614 So. 2d 680 (Fla. 1st DCA 1993), in which as to one of two cases a juvenile had been prosecuted as an adult, received adult supervision without compliance with § 39.059 which was not appealed, and then appealed that initial failure upon later revocation. The first district agreed with the defendant's argument that reversal was required because of the trial court's initial imposition of sentence absent required findings or a knowing and intelligent waiver, and reversed and remanded for resentencing which in context necessarily referred to initial sentencing (placement on supervision), with reimposition of adult sanctions permissible only upon compliance with the statute. 614 So. 2d at 681. By expressly approving this decision upon the logically and specifically controlling authorities of *Sirmons* and *Troutman*, this Court appeared to have conclusively settled the matter.

However, subsequent to both *Veach* and *McCloud*, this Court held, as the Petitioner must acknowledge, that a § 39.059 (1991) violation is "sentencing" error, not

fundamental error, which must be raised on direct appeal. *Summers v. State*, 684 So. 2d 729 (Fla. 1996). The following year, again treating the matter as similar to a commonplace guidelines violation, the Court held that where a defendant had been as a juvenile placed on adult supervision without statutory compliance, which he did not appeal, and thereafter on revocation he did appeal but did not raise the issue, the matter was not thereafter collaterally cognizable. *Evans v. State*, 693 So. 2d 553 (Fla. 1997). Neither *Summers* nor *Evans* discussed nor even manifested awareness of *Veach*, nor did they discuss or even consider the logical impossibility of a "waiver" on an implicit basis by the conduct of one not the juvenile, where *Sirmons* and *Berry* had established specific requirements of knowing intelligent waiver by the juvenile himself before the trial court. *See, e.g., Harris v. State*, 633 So. 2d 562 (Fla. 4th DCA 1994) (only defendant, and not defense attorney, may waive defendant's right to be sentenced as a juvenile).

Moreover, in *Wright v. State*, 707 So. 2d 385 (Fla. 2d DCA 1998), the court construed *Evans* to permit, on a defendant's appeal from a revocation, scoresheet error apparent on the face of the record (legal error) which occurred at the time of placement on initial supervision (which had been originally not appealed) to be addressed and remedied. Similarly, the instant case arises on direct appeal from the revocation of probation, and therefore the factual context is materially distinguishable from both *Summers* and *Evans*. Additionally, both of those cases precede the more recent

pronouncement of this Court that "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition illegal." *State v. Mancino*, 714 So. 2d 429, 433 (Fla. 1998). Particularly in light of the clear, compelling, and consistent case law under both § 39.059 (as comprised prior to amendment effective Oct. 1, 1994) and predecessor § 39.011, it is difficult to conceive of a more patent statutory compliance failure. *Mancino* when viewed through the lens of *Sirmons* and *Berry* should surely displace, or at the least profoundly call into question, the viability or scope of *Summers* and *Evans*, and, moreover, *Veach* has never been overruled and is specifically on point. It should control, along with well-established underlying case law, to require reversal and remand for resentencing as of July and August of 1994.

The conclusion of the lower court that the claim raised herein is subject to preservation requirements of the Criminal Appeals Reform Act, as well as the superficial and dismissive observation that "[the] defendant was twenty years old when he freely and voluntarily entered into the community control agreement, and everyone at the sentencing hearing, including defense counsel, believed that the juvenile now turned adult could conduct his own affairs" (R. 307), ignores or misconstrues the essence of the Petitioner's claim. The claim is not that as an adult the Petitioner could not, if validly on probation as an adult, enter into a plea agreement regarding future possible violations. The claim is that the Petitioner, *as a juvenile,* could *not validly* be placed on adult probation

without either (a) trial court compliance with the mandatory provisions of the statute or (b) a valid, personal, on-the-record waiver by the juvenile of such compliance within the demanding requirements of *Sirmons* and *Berry.* Failure to satisfy either of these disjunctive requirements constituted fundamental error and nothing which occurred later in the case obviated that error. Without a valid adult disposition occurring in the first instance, nothing should have subjected the Petitioner, then a juvenile in fact, to the later enactment of the Criminal Appeals Reform Act, *see State v. T.M..B.*, 716 So. 2d 269 (Fla. 1998) (Act inapplicable to juvenile appeals), and particularly is this so given the importance of the entitlement to juvenile treatment as manifested by § 39.059 and *Rhoden, Sirmons, and Berry.*

CONCLUSION

Based on the foregoing, the decision of the lower court should be quashed, the Criminal Appeals Reform Act should be held inapplicable to the type of crucial and fundamental error which occurred, and the cause remanded for resentencing in conformity with the requirements of § 39.059(7), Fla. Stat. (1991), which resentencing, consistent with *Troutman v. State*, must be conducted as of the circumstances existing at the time of the summer 1994 sentencing (adult probation) order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Jan E. Vair, Assistant Attorney General, Office of the Attorney General, Appellate Division, 110 SE 6th Street, Ft. Lauderdale, Florida 33301, on February 3, 2000.

____

BRUCE A. ROSENTHAL
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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

____
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