IN THE SUPREME COURT OF FLORIDA

CHARLES EDWARDS,

Petitioner,

v. CASE NO. SC00-443

STATE OF FLORIDA,

Respondent.

_______________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS

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CHARLES EDWARDS,	:	
Petitioner,	:	
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	:	

REPLY BRIEF OF PETITIONER ON THE MERITS

I CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

II ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DEPARTING UPWARD FROM THE SENTENCING GUIDELINES WITHOUT ENTERING A WRITTEN DEPARTURE ORDER.

Because this court has already decided the issues which pertain to petitioner, it is possible that this case could be resolved - as the state argues (State's Brief (SB), p. 5) - by a court other than this court. However, the state doth protest too much that petitioner should forego this court's jurisdiction in order to seek some other remedy, with concomitant delays, and most likely without counsel.[1] While it seems

[1]Because the state makes certain arguments about what counsel should have done in this case, which are unjustifiable given the chronology of this case and this court's pertinent decisions, petitioner sets out the chronology: This case was decided by the

likely that the district court and the trial court would follow this court's decisions in Maddox v. State, 760 So.2d 89 (Fla. 2000) and Heggs v. State, 759 So.2d 620 (Fla. 2000), it is not as certain as a favorable decision with directions from this court would be.

In Leonard v. State, 760 So.2d 114, 116 (Fla. 2000), where sentencing errors were clear, the state conceded error and this court "commend[ed] the State for its candor" for doing so. While the state concedes error here also, undersigned counsel candidly hopes this court will not find its method commendable, given the state's lengthy and unnecessary complaints, including attacks on the courts and on petitioner's counsel.

The state complains that counsel for petitioner included the facts of the case, although only a sentencing issue is before the court. The summary of facts was one page long. While it is possible this court is satisfied to consider the sentencing issue in a context devoid of any of the facts of the substantive charge, it seemed reasonable to give the court a

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First District on January 31, 2000. Edwards v. State, 748 So.2d 1106 (Fla. 1st DCA 2000). Heggs was decided February 17, 2000 but remained on rehearing until May 4, when it was revised somewhat, and again until July 10, 2000, when this court denied a defense rehearing motion on the revised opinion. Heggs v. State, 759 So.2d 620 (Fla. 2000). The jurisdictional brief in the instant case was filed March 3 on a Maddox-type issue, while Heggs was pending the state's rehearing motion. Maddox was decided May 11, while the instant case was pending a decision on this court's jurisdiction. Maddox v. State, 760 So.2d 89 (Fla. 2000). This court accepted jurisdiction July 13. At what point, exactly, was petitioner supposed to decide that he no longer wished to have this court review his case?

brief factual context. The state complains that counsel summarized not only the state's case, but also the defense's (SB 2). The state does not complain that this testimony was misrepresented, only that it was mentioned. Undersigned counsel is aware of no rule which prohibits a fair summary of all the evidence. Of course, the evidence will be viewed in the light most favorable to the state, but that is not in dispute.

Having complained that petitioner included facts not pertinent to the issue before this court, and perhaps lacking a sense of irony, in its statement of "facts," the state argues about the fact that the sentencing issue was first raised as a minor sentencing error in an Anders brief. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). This argument essentially attacks the procedure which this court approved in In re Anders Briefs, 581 So.2d 149 (Fla. 1991). The decision below was a "PCA cite" with no mention of Anders. It is beyond dispute that Anders procedures are not at issue in the sentencing error now before this court.

Instead, this appears to be a gratuitous state attack on Anders procedure, continuing a long line of cases in which Mr. Rogers has attacked various aspects of Anders. See e.g., State v. Trowell, 739 So.2d 77 (Fla. 1999); Stone v. State, 688 So.2d 1006 (Fla. 1st DCA)(*on motion to dismiss appeal*), review denied, 697 So.2d 512 (Fla. 1997); Ford v. State, 575 So.2d 1335, 1337 n.2 (Fla. 1st DCA)(*order on motion to dismiss*), review denied, 581 So.2d 1310 (Fla. 1991). This is especially

pointless because it seems likely that the need for the In re Anders Briefs procedure will be far more limited in the future, in light of this court's creation of the more efficient Rule 3.800(b)(2) procedure for correcting sentencing errors in the trial court before the initial brief is filed. Amendments to Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600, 761 So.2d 1015 (Fla. 1999). Presumably, most sentencing errors would be corrected in a 3.800(b)(2) motion. Perhaps some will remain for appeal, for example, where a trial court denies a 3.800 motion.

Still in the "facts," the state criticizes petitioner for not raising the Heggs issue in the district court - this would have been long before this court's decision in Heggs - and criticizes the First District Court which "also overlooked this critical issue" (State's Brief, p.5). The state is silent on its own failure to bring this "critical issue" to the district court's attention.

The state again attacks the courts in its argument:

> The simple, unpreserved arithmetic error.. .has required, or is requiring the atten-tion or **inattention** of eleven judges, six counsel, and an unknown number of law clerks and other support personnel, but could have been immediately resolved by the filing of a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.800(a) in the trial court pursuant to the principles set out in Maddox. . .(emphasis added)

(SB 5). Then the state makes something that sounds like an ad

hominem[2] attack on petitioner's counsel:

> . . .assuming the primary responsibility of a competent and professional counsel[3] is to protect the interests of the client, appel-lant's [sic] counsel below should not have sought discretionary review in this court but should have returned to the trial court for the filing of a rule 3.800(a) motion...

(SB 6-7).

One substantive answer to these "arguments" is that the 3.800(b)(2) procedure is designed expressly to eliminate such problems, but the instant case predates 3.800(b)(2). As a practical matter, as explained in note 1, supra, this "very simple" procedure could not have been invoked until Maddox became final June 1, almost three months after the jurisdictional brief was filed below. Before that, the First District was ruling against defendants with Maddox-type claims. Heggs did not become final until July, another two months later. Before that, the First District was ruling against defendants with Heggs claims. Trapp v. State, 736 So.2d 736 (Fla. 1st DCA 1999), quashed, 760 So.2d 924 (Fla. 2000). This leaves the state without a leg to stand on, in its claim that petitioner should not have sought discretionary review.

Further, this argument ignores the state's own role in causing this case to arrive at this court. The state is not

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[2]Or in this case, ad feminam (with apologies if the Latin grammar is incorrect)...

[3]The insinuation being that petitioner's counsel is neither... Personal attacks on defense counsel by the attorney general's office have become commonplace in the briefs filed in the First District Court.

necessarily blameworthy for propounding a position which was ultimately rejected by the court, except that its position would deny relief on direct appeal for a facially-apparent sentencing error. Counsel does not deny that this error arose from an arithmetic error, which was unpreserved because it was unrecognized. Presumably, the state attorney did not recognize it, either, or why did he not bring the error to the trial court's attention? The state hardly has clean hands. When it complains about the number of judges who have reviewed this case, it neglects to mention that it could have conceded error, and thus avoided further proceedings, but did not.

Finally, this argument overlooks the fact that the merit brief was the first pleading filed in the instant case after Maddox was decided and Heggs became final. The state's argument begs the question of what, exactly, a pipeline petitioner in this position is supposed to do.

ISSUE II

PETITIONER IS ENTITLED TO BE RESENTENCED UNDER HEGGS V. STATE.

The state concedes the point, albeit again offering its opinion that this case is pointless. The state rants, but fails to acknowledge that this is a pipeline case as to both Heggs and Maddox, and predates the 3.800(b)(2) procedure. As this scenario is unlikely to be repeated often, it is not necessary to develop a procedure for handling such cases.

The state fails to acknowledge that petitioner is entitled to counsel for this appeal and the resentencing which it concedes is necessary, but whether he would be entitled to representation on a 3.800(a) motion - the state's proposed solution - is far less clear. Petitioner believes this court was cognizant of the question of whether an indigent inmate would be entitled to counsel on motions to correct sentencing errors when it created the Rule 3.800(b)(2) procedure and included a right to counsel.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse petitioner's sentence and remand for resentencing to a guidelines sentence in accordance with Maddox and Heggs.

Respectfully submitted,

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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, this ____ day of September, 2000.

____
KATHLEEN STOVER