IN THE SUPREME COURT OF FLORIDA

CURTIS HARVEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC01-1139

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 325791

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414 3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts but adds the following chronology.

1. Harvey filed his initial merits brief in the district court on 8 March 2000 with a motion to accept and to withdraw an earlier Anders brief. The district court granted the motion on 22 March 2000.

2. The state filed an answer brief on 14 April 2000 acknowledging that under Heggs as issued on 17 February 2000 Harvey was entitled to resentencing. Harvey filed a reply brief on 10 May 2000.

3. This Court issued its final decision in Heggs on 4 May 2000 adopting the urging of the state that Heggs claimants be required to show prejudice. This Court also issued relevant decisions in Maddox on 11 May 2000, in Salters on 11 May 2001 and in Trapp on 1 June 2001.

SUMMARY OF ARGUMENT

Both certified questions are grounded on an apparent misunderstanding of this Court's decision in Maddox and related case law. Question one is ambiguous in that Maddox held that fundamental sentencing error could be raised for the first time on appeal **until** such time as amended rule 3.800(b) went into effect on 12 November 1999. Harvey's initial brief was filed well after amended rule 3.800(b) went into effect so the state reads Maddox as requiring that he raise **any**

sentencing claim in the trial court. So read, the answer to both questions is an obvious yes but neither question has any significant import to future cases because of the limited facts and the narrow circumstances of the case under which the district court conducted review. This case cannot recur because of definitive case law which has issued since its briefing in March/April 2000.

Question one is unclear but it appears to erroneously assume that this Court's Maddox decision either eliminated the concept of fundamental sentencing error or created some new form of fundamental sentencing error. It did neither. Grounded on the analysis of Chief Judge Griffin in the Fifth district's Maddox decision, this Court simply recognized that it was difficult to consistently identify fundamental sentencing error, and pointlessness to try to do so when **all** sentencing errors could be easily addressed in the trial court using the rules adopted on 12 November 1999 by Amendments. This Court simply held that after 12 November 1999, when amended rule 3.800(b) and companion rules became effective, **all** claims of sentencing error, whether fundamental or otherwise, must be raised in the trial court by either (1) contemporaneous objection, or (2) motion filed pursuant to Florida Rule of Criminal Procedure 3.800(b) prior to the filing of the initial brief. This can be see more clearly if the Fifth District decision in Maddox is read **in para materia**. Judge Griffin would have enforced this requirement from the initial

promulgation of rule 3.800(b) in 1996 whereas this Court held that the requirement should not become effective until amended rule 3.800(b) went into effect on 12 November 1999.

The Maddox holding was reiterated in Salters where this Court held that even claims that a statute violated the single subject rule, which had formerly been cognizable on appeal for the first time, henceforth had to be first raised in the trial court. Thus, question one has already been answered yes in Maddox and Salters and countless other cases.

Question two has two components. First, was the appellant obligated to raise his single subject challenge in the trial court despite contrary controlling case law from the First District rejecting such claims? The answer to that question is again yes. Salters. Moreover, given the conflicting district court decisional law with review pending in this Court, it would be professionally incompetent not to fully preserve such claims. Indeed, the office of opposing counsel routinely does so under these circumstances. The failure to do so here was an apparent aberration or, perhaps, simply stubborn resistance to obeying rules requiring preservation of issues in the trial court. Second, did the failure to raise the single subject challenge in the trial court preclude appellate review based on Heggs, Maddox and Salters? The answer is an unequivocal and obvious yes based on the explicit holdings of these cases. Harvey was under notice by the promulgation of amended rule 3.800(b) in Amendments in November 1999 that **all** claims of

sentencing error should be raised in the trial court by the amended rule 3.800(b) prior to the filing of the initial brief. This was well before briefing in this case and there is no ground for simply refusing to follow procedural rules.

ARGUMENT

ISSUE I

CERTIFIED QUESTION: WHETHER THE CONCEPT OF FUNDAMENTAL SENTENCING ERROR, AS DISCUSSED IN MADDOX V. STATE, 760 SO.2D 89 (FLA. 2000), APPLIES TO DEFENDANTS WHO COULD HAVE AVAILED THEMSELVES OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA 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)?

ISSUE II

CERTIFIED QUESTION: WHETHER AN APPELLANT IN THE FIRST DISTRICT COURT OF APPEAL, WHO COULD HAVE AVAILED HIMSELF OF THE PROCEDURAL MECHANISM OF THE MOST RECENT AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) SET FORTH IN AMENDMENTS TO FLORIDA 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), HAD AN OBLIGATION TO RAISE HIS SINGLE SUBJECT CHALLENGE TO THE 1995 SENTENCING GUIDELINES IN THE TRIAL COURT, DESPITE THE EXISTENCE OF ADVERSE PRECEDENT IN TRAPP V. STATE, 736 SO.2D 736 (FLA. 1ST DCA 1999), IN ORDER TO LATER OBTAIN APPELLATE RELIEF BASED ON HEGGS V. STATE, 759 SO.2D 620 (FLA. 2000)?

The decision below is Harvey v. State, 26 Fla. L. Weekly D554 (Fla. 1st DCA 20 February 2001), opinion on rehearing with certified questions at 26 Fla. L. Weekly D1151 (Fla. 1st DCA 1 May 2001). The state presents both certified questions together for convenience and clarity.

There are several points which apply to both questions. First, as the district court and the parties agree, Harvey committed these offenses on 29 October 1995. Thus, the offenses and the subsequent sentence fall within the period of unconstitutionality set forth in this Court's initial decision on 17 February 2000 of Heggs v. State, 759 So.2d 620 (Fla. 2000), as subsequently amended on 4 May 2000 and as amplified by Trapp v. State, 760 So.2d 924 (Fla. 2000), issued 1 June 2000. Second, Harvey was sentenced to nine years imprisonment (108 months) under the 1995 guidelines range of 69-115 months. The questions has not been addressed by either the trial or district courts, but it appears that Harvey's guidelines range under the 1993/94 sentencing guidelines should be 58.5 to 97.5 months. Thus, at some point, Harvey is entitled to resentencing under Heggs as it was modified by this Court on 4 May 2000 because the 9 year/108 months sentence is above the 1993/94 guidelines range[1].

---

[1]In this connection, it should be noted that the state's answer brief in the district court was filed on 14 April 2000. At that time it did not have the benefit of this Court's final decision in Heggs of 4 May 2000 or of this Court's subsequent decisions in Maddox v. State, 760 So.2d 89 (Fla. 89 (Fla. 2000), opinion issued 11 May 2000 and in Salters v. State, 758 So.2d 667, 668 n.4 (Fla. 2000), issued 11 May 2000. The state conceded that Harvey was entitled to resentencing under Heggs as it existed on 17 February 2000, and noted that the full applicability of Heggs was not known at the time of filing the initial brief. At that point, the state did know that its petition for rehearing in Heggs argued that all claimants were required to show prejudice but it appeared that Harvey would in fact be able to show prejudice. This Court subsequently

The two certified questions are grounded on a misunderstanding of this Court's decision in Maddox v. State, 760 So.2d 89 (Fla. 2000) where this Court approved in large part the decision of the Fifth District in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998). This Court did not eliminate or materially change the concept of fundamental sentencing error. Adopting in large part the analysis of Chief Judge Griffin in the district court, this Court held that in future cases where briefing occurred after this Court's adoption of amended appellate and criminal rules in Amendments to Florida 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. 2000), that **all** claims of sentencing errors must be first raised in the trial court, either contemporaneously or by amended rule 3.800(b). This holding did not eliminate the concept of fundamental error, it simply

---

accepted the state's position on prejudice. Neither party at the time of briefing had the benefit of Maddox and its definitive analysis of window periods for the raising of fundamental sentencing error for the first time on appeal or its explicit holding that after the promulgation of Florida Rule of Criminal Procedure 3.800(b) on 12 November 1999 that appellants were required to raise **all** sentencing errors, fundamental or otherwise, by either contemporaneous objection or by rule 3.800(b). Further, neither party had the benefit of Salters and its explicit holding that single subject claims had to be first raised in the trial court after the promulgation of rule 3.800(b) and its companions. Under these circumstances, the state suggests that the district court would have been well advised in April 2000 to have simply accepted the state's concession and to have remanded for resentencing under Heggs.

provided a fail safe remedy under which all sentencing errors had to be first raised in the trial court. This was an appropriate exercise of this Court's authority to promulgate rules of procedure for judicial proceedings.

The Maddox holding was reiterated by the subsequent decision in Salters v. State, 758 So.2d 667, 668 fn 4 (Fla. 2000) where this Court held that defendant/appellants "who have available the procedural mechanism of our recently amended rule 3.800(b) [are required] in the future [to] raise a single subject rule challenge in the trial court prior to filing the first appellate brief."

Accordingly, the answer to the first certified question is that Harvey was required to first raise his claim of fundamental sentencing error in the trial court.

The above analysis and conclusion is also applicable to the second certified question. Both the rules and the case law mandate that rule 3.800(b) be used to raise issues in the trial court where appropriate. The state adds that is well settled that failure to raise a claim of error may waive such claims. This was particularly true where, as here, there was conflict in decisions between the district courts and the issue was pending in this Court at the time Harvey filed his initial brief on the merits.

The state respectfully suggests that failure to fully preserve a claim, as required by the rules and case law under these circumstances, is professionally unacceptable in that it

does not serve the interests of the client or of the judicial system. The state further points out that the office of opposing counsel routinely files rule 3.800(b) motions raising claims in the trial court which have been explicitly rejected by the First District Court. This is simply good appellate practice particularly where, as in Heggs claims, the trial court might well choose to fashion a sentence which complies with both the 1995 and 1993/94 guidelines and would not be subject to challenge under either.

It should also be noted that controlling case law from this Court severely restricts the ability to raise claims based on future decisions where the claims have not been properly preserved at time of trial or appeal. See, Witt v. Wainwright, 387 So.2d 922 (Fla. 1980)(Retroactive application of changes in law are limited to fundamental and constitutional changes which cast serious doubt on the integrity of the judicial process); Ragsdale v. State, 609 So.2d 10 (Fla. 1992)(Postconviction claim based on admittedly unconstitutional jury instruction will be not be entertained where the issue was unpreserved at trial). Thus, Harvey and his counsel were obligated to raise the claim in the trial court as mandated by rule 3.800(b), Maddox, and Salters.

Both certified question should be answered yes and the district court affirmed without prejudice to Harvey's right to seek resentencing pursuant to either rules 3.800(a) or 3.850.

CONCLUSION

The certified questions should be answered yes and the district court affirmed for the reasons set forth above.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on 25 June 2001.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
Assistant Attorney General
Florida Bar No. 325791

Attorney for State of Florida
Office of the Attorney General
The Capitol
Tallahassee, Fl 32399-1050
(850) 414 3300
(850) 922-6674 (Fax)

[AGO# L01-1-8090]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
James W. Rogers
Attorney for State of Florida

[A:\01-1139_ans.wpd --- 6/29/01,3:17 PM]

IN THE SUPREME COURT OF FLORIDA

CURTIS HARVEY, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. DCA 1D99-04629

INDEX TO APPENDIX