IN THE SUPREME COURT OF FLORIDA

CURTIS HARVEY,

Petitioner,

v. CASE NO. SC01-1139

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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I. PRELIMINARY STATEMENT

Petitioner will refer to the parties and the record in the same manner utilized in the *Initial Brief Of Petitioner* filed May 30, 2001. Reference to the initial brief will be by use of the symbol "IB" followed by the appropriate page number in parentheses. Reference to *Respondent's Answer Brief* dated June 25, 2001, will be by use of the symbol "RB" followed by the appropriate page number in parentheses.

II. ARGUMENT

ISSUE I:

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)?

Before discussing the state's position on the merits, petitioner wishes to point out an argument made in his initial brief that the state entirely fails to address. Specifically, based upon the "fair notice" aspects of the Due Process Clause, petitioner argued in his initial brief that if the Court in ***Maddox v. State***, 760 So. 2d 89 (Fla. 2000), truly intended to abolish the doctrine of fundamental sentencing error, such abolishment could not constitutionally occur after ***Maddox*** was decided May 11, 2000 (IB-14-16). *See* ***Rogers v. Tennessee***, ___U.S.___, 121 S.Ct. 1693, ___L.Ed.2d (2001) and ***Buie v. City Of Columbia***, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Petitioner contends the state's failure to address this issue is a tactic admission that petitioner's "fair notice"

Due Process claim is valid. Thus, at the very minimum, the Court in the instant case should hold ***Maddox*** applies prospectively only to cases where the notice of appeal was filed after May 11, 2000.

That the state, as well as petitioner, was effectively blind-sided by the district court is further illustrated by note #1 in the state's brief (RB-5-7). In its brief filed in the district court, the state entirely agreed with petitioner's position that the sentencing error in his case was fundamental and cognizable for the first time on direct appeal. The note "suggests" that, since at the time the briefs were filed in this case neither party had the benefit of ***Maddox***, "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...." (RB-6).

This "suggestion," however, cannot be squared with other arguments made by the state. In particular, the state argues that petitioner "...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' (RB-3-4). Petitioner notes, however, that if this statement is correct (which it isn't), why did not the

state confess error and agree to resentencing in its brief! If the bench and bar were under valid notice since November of 1999, the state had no business conceding error. Clearly, no lawyer in this state was on notice until ***Maddox*** was decided.

The state also makes personal attacks on undersigned counsel. Specifically, the state claims that by failing to file a Rule 3.800(b) motion, the undersigned was "professionally unacceptable" and "professionally incompetent" which was either "an aberration or perhaps, simply stubborn resistence to obeying rules requiring preservation of issues in the trial court" (RB-3, 7).

In response to these attacks, petitioner notes that, if true, counsel for the state is equally incompetent because the state conceded error and agreed to a resentencing, when in fact the state had an ironclad argument that the ***Heggs v. State***, 759 So. 2d 620 (Fla. 2000) issue was not preserved!

The reality of the situation was that, even after the amended rule 3.800(b) took effect in November of 1999 petitioner, armed with ***Heggs***, a case decided less than a month earlier, filed an amended brief raising the ***Heggs*** issue and pointing out both that petitioner was within the "window" period of ***Heggs*** and that the Court had deemed the error fundamental. Since the Appeal Reform Act permits fundamental

errors to be raised for the first time on appeal, and even the amended Rule 3.800(b) was enacted to effectuate the Appeal Reform Act, filing a motion in the trial court appeared entirely unnecessary.

It not only appeared unnecessary to petitioner, but it did to counsel for respondent as well! In its answer brief filed in the district court, the state confessed error. After the district court decided the case, the state filed a ***Motion For Clarification*** admitting its concession of error was based upon the then "controlling authority" of ***Heggs*** (A-21). And now in its answer brief, the state "suggests" the district court should have remanded for resentencing under ***Heggs***.

Thus, by faulting the professional competence of undersigned counsel, counsel for the state (seemingly unwittingly) draws his own into question. However, the truth of the matter is that, until ***Maddox*** was decided May 11, 2000, no lawyer had even a ***clue*** that a ***Heggs*** error could not be raised for the first time on appeal.

On the broader issue of whether the concept of fundamental sentencing error still exists after ***Maddox*** was decided May 11, 2000, the state in effect takes two positions. Petitioner argues both positions are wrong.

First, taking a position that would probably make even

Bill Clinton blush, the state argues that ***Maddox*** "did not eliminate or materially change the concept of fundamental sentencing error." Rather, argues respondent, ***Maddox*** "did not eliminate the concept of fundamental error, it simply provided a fail safe remedy under which all sentencing errors had to be first raised in the trial court." (RB-6).

The flaw in this argument is that the ***only*** practical reason why appellate courts ever engage in a fundamental error analysis is because only when the error is fundamental can it be corrected for the first time on appeal absent preservation in the trial court. Put differently, the ability to raise the issue for the first time on appeal is the ***sole*** practical advantage of an error being deemed fundamental. *See* ***Castor v. State***, 365 So. 2d 701, note 7 (Fla. 1978)("For error to be so fundamental that it ***may be urged for the first time on appeal, though not properly preserved below***, it must amount to a denial of due process")(emphasis supplied) and ***Clark v. State***, 363 So. 2d 331, 333 (Fla. 1978)("'Fundamental error," ***which can be considered on appeal without objection in the lower court***, is error which goes to the foundation of the case or goes to the merits of the cause of action")(emphasis supplied).

To say, on the one hand, that the concept of fundamental sentencing error has not been eliminated, but at the same time claim, on the other hand, that even fundamental sentencing errors cannot be raised for the first time on appeal is, petitioner asserts, entirely illogical and contradictory. If the sole procedural advantage arising from fundamental error, that the issue can be raised even though not preserved in the trial court, has been eliminated by ***Maddox***, for all intents and purposes the doctrine of fundamental sentencing error has been eliminated.

The state's second position is simply that the elimination of the doctrine of fundamental sentencing error and requiring that even fundamental sentencing errors must first be raised before the first appellate brief is filed under Florida Rule Of Criminal Procedure 3.800(b)(2) "...is an appropriate exercise of this Court's authority to promulgate rules of procedure for judicial proceedings" (RB-6).

Petitioner respectfully disagrees and notes that the state has tendered not a speck of legal analysis to support this argument (RB-?). The state does not address the fact that the Appeal Reform Act expressly allows fundamental error to be raised for the first time on appeal. The state does not address the fact that the statute does not distinguish between

trial and sentencing error. The state does not address the fact that even ***Maddox*** construes the Appeal Reform Act to include fundamental sentencing error. And significantly, the state fails to address the fact that the Court's constitutional authority to regulated "practice and procedure" does not allow it to abrogate or modify substantive law. ***State v. Garcia***, 229 So. 2d 236 (Fla. 1969) and ***Julian v. Lee***, 473 So. 2d 736 (Fla. 5th DCA 1985).

"The authority of the legislature to enact harmless error statutes is unquestioned" ***State v. DiGuilio***, 491 So. 2d 1129, 1133 (Fla. 1986). That being the case, petitioner contends it is also clearly within the domain of the legislature to enact, as it did in the Appeal Reform Act, a "fundamental error" statute. As, as a matter of legal doctrine or analysis, the concepts of "fundamental error" and "harmless error" appear to be flip sides of the same coin. Thus, while it is within the Court's authority to decide what is and what is not "fundamental error" or "harmless error," the Court does not have constitutional authority to unilaterally do away with the doctrine of fundamental sentencing error.

In addition to the fact that, under the state constitutional separation of powers the Court is not empowered to eliminate the doctrine of fundamental sentencing error, to

do so raises serious issues under the Due Process Clause of the federal constitution. As noted, the concept of "fundamental error" is equated with a denial of due process. ***Castor*** and ***State v. Smith***, 240 So. 2d 807 (Fla. 1970)(for an error to be considered fundamental, the asserted error must amount to a denial of due process). Petitioner therefore contends that neither the Court nor the legislature can lawfully, consistently with the Due Process Clause, totally eliminate the concept of fundamental error, sentencing or otherwise.

Petitioner lastly notes that retention of the concept of fundamental sentencing error in post-***Maddox*** appeals would not open the "floodgates" to fundamental sentencing error claims. If there is the slightest question of whether a sentencing error is or is not fundamental, the prudent course of action is to raise it in the trial court via Rule 3.800(b). However, where the error is clearly within the "patent and serious" fundamental error test of ***Maddox***, it is entirely proper to raise the issue for the first time on appeal and it is equally just and proper for the Court to correct such errors. In the instant case, for the reasons pointed out in his initial brief, the ***Heggs*** error at issue here is clearly fundamental under ***Maddox*** (IB-9-10).

ISSUE II:

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).

Under this point the state relies upon ***Salters v. State***, 758 So. 2d 667, 668 note 4 (Fla. 2000)(RB-3, 6-7). With all due respect, note 4 in ***Salters*** is mere dicta. Indeed, the ***Salters*** Court relied in part upon ***Heggs***, finding that the single subject error in that case could be corrected for the first time on direct appeal. Moreover, not all single subject issues result, like a ***Heggs*** violation, in a defacto guidelines departure. Thus, petitioner contends that note 4, interpreted correctly, does not preclude ***Heggs*** claims to be always first raised in the trial court.

It is evident that respondent does not properly ***understand*** the issue inherent in the certified question. This is so because respondent argues that even in the first

district a ***Heggs*** claim must be first raised via Rule 3.800(b) because it:

> "...is simply good appellate practice particularly where, as in Heggs claims, the trial court might well choose to fashion a sentence which complied with both the 1995 and 1993/94 guidelines and would not be subject to challenge under either.

(RA-7).

Of course, at the time the state has argued (and the first district has required) petitioner should have raised his ***Heggs*** claim in the trial court via Rule 3.800(b) (between when the notice of appeal was filed December 3 1999, and the first appellate brief filed February 10, 2000), ***Trapp v. State***, 736 So. 2d 736 (Fla. 1st DCA 1999), was the controlling authority in the first district. Any trial judge within the first district would have no choice other than to ***deny*** any such motion. ***Pardo v. State***, 596 So. 2d 665 (Fla. 1992). The state's arguments under this issue wholly fail to address this aspect of the case. In point of fact, the first district's ***Trapp*** decision is not even mentioned in the state's brief.

Thus, the discretion of trial judges to fashion a remedy to comply with ***Heggs*** mentioned by respondent was non-existent during the critical time period.

As argued in his initial brief, to require a defendant in

petitioner's position to file a motion that was required to be denied is to require the performance of useless and futile "legal churning."

Petitioner respectfully suggests that, since his case was on direct appeal at the time ***Heggs*** was decided, and he waited less than a month to raise the ***Heggs*** issue via an amended brief, the "earliest" practical time to get his sentence corrected was on direct appeal.

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, Criminal Appeals Division, Tallahassee, Florida, and a copy has been mailed to petitioner, CURTIS HARVEY, #J03161, Baker Correctional Institution, Post Office Box 500, Sanderson, Florida 32087, this ____ day of July, 2001.

CARL S. MCGINNES

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the foregoing Reply Brief of Petitioner has been prepared in Courier New 12 point type.

CARL S. MCGINNES