

IN THE SUPREME COURT OF FLORIDA

BERTHA JACKSON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

Case No. SC07-659

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal, a copy of which is appended to Petitioner's Brief on Jurisdiction, outlines the relevant facts at this stage of the proceedings¹.

¹To the extent that petitioner's brief on jurisdiction refers to factual matters not set forth in the opinion of Second District Court of Appeal and argues the legal merits of the matters as opposed to just the jurisdictional authority of this Court, the petitioner's brief fails to comply with the rules of appellate procedure. Fla. R. App. Pro. 9.120(d) (2007) "Petitioner's brief, limited solely to the issue of the supreme court's jurisdiction..." Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986) (bold emphasis added):

This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. **The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict....we are not permitted to base our conflict jurisdiction on review of the record or on facts recited only in dissenting points. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.**

SUMMARY OF THE ARGUMENT

Respondent acknowledges that this Court has discretionary jurisdiction based upon the Second District Court of Appeal's decision in Jackson v. State, 952 So. 2d 613 (Fla. 2d DCA 2007) certifying direct conflict with the decision of the First District Court of Appeals in Gonzalez v. State, 838 So. 2d 1242 (Fla. 1st DCA 2003).

ARGUMENT

WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION OF THE SECOND DISTRICT IN JACKSON V. STATE, 952 So. 2d 613 (Fla. 2d DCA 2007) AND THE DECISION OF THE FIRST DISTRICT IN GONZALEZ V. STATE, 838 So. 2d 1242 (Fla. 1st DCA 2003) ON THE ISSUE OF WHETHER THE FAILURE TO REPRESENTED BY COUNSEL DURING A PORTION OF THE VICTIM'S TESTIMONY TAKEN TO PRESERVE HER TESTIMONY FOR SENTENCING PURPOSES CAN BE RAISED FOR THE FIRST TIME DIRECT APPEAL WHEN IT WAS NOT PRESERVED AT THE TRIAL LEVEL BY OBJECTION AT THE TIME OR BY A TIMELY FILED RULE 3.800(B) MOTION TO CORRECT SENTENCING ERROR.

The Second District Court of Appeals in Jackson v. State, 952 So. 2d 613, at 614-615 (Fla. 2d DCA 2007) held that a claim of constitutional error [in the instant case, the failure to be represented by counsel during part the victim's testimony taken to preserve testimony fo for sentencing purposes] affecting a sentencing proceeding is a sentencing error which must be preserved in order to be raised on appeal. The First District Court of Appeals in Gonzalez v. State, 838 So. 2d 1242 (Fla. 1st DCA 2003) held that lack of representation during a re-sentencing hearing. although not properly preserved for purposes of appeal constituted fundamental error and constitutes a due process error not a sentencing error and may properly be raised on appeal. *Id.* at 1243.

Respondent acknowledges that there exists express and direct conflict between the Second District in Jackson, *supra*, and the First District in Gonzalez, *supra*. and that this Court therefore has discretionary jurisdiction in the instant proceeding pursuant

to Fla. R. App. P. 9.030(a)(2)(vi) (2007).

Nevertheless, respondent submits that this Court should decline to exercise its discretionary jurisdiction in this case because of the different factual circumstances regarding the two cases. In Gonzalez, *supra*, the defendant was denied counsel at a Heggs resentencing hearing when the trial court failed to appoint counsel for the re-sentencing hearing. In the instant case, as was pointed out by the Second District in its opinion:

The record indicates that the trial court conducted part of the sentencing hearing without defense counsel present by hearing the victim's testimony as it related to sentencing. After the victim testified, the trial court contacted defense counsel by telephone in open court and informed counsel of the victim's testimony. Defense counsel did not object on the basis that the trial court erred in hearing the victim's testimony in defense counsel's absence. In addition, defense counsel did not object at the second sentencing hearing held two months later. Further more, Jackson's appellate counsel did not raise this issue in Jackson's motion to correct sentencing error filed pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).

Jackson, *supra* at 614.

In the instant case, respondent submits that defense's counsel's absence from a portion of the victim's testimony taken for sentencing purposes does not constitute "fundamental error". "The doctrine of fundamental error should be applied only in rare cases where jurisdictional error appears or where the interests of justice present a compelling demand for its application." Smith v.

State, 521 So. 2d 1372, 1373 (Fla. 1988). There is no compelling reason to apply the doctrine of fundamental error in this case in view of the fact that: (1) defense counsel was not absent for the entirety of the victim's testimony, as was the factual situation Gonzalez, *supra*, but only for a portion of the victim's testimony (2) defense counsel was informed by the court of the victim's testimony when contacted by phone during the taking of her testimony for preservation purposes and did not object and (3) counsel did not object at the time of the sentencing hearing two months later nor did counsel raise the matter in timely filed 3.800(b)(2) motion while the appeal was pending.

CONCLUSION

Respondent respectfully requests this Court deny review in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. mail to Pamela H. Izakowitz, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000, this 23rd day of May 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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