

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-659

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BERTHA JACKSON,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

---

ON DISCRETIONARY REVIEW FROM THE  
SECOND DISTRICT COURT OF APPEAL

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BRIEF OF PETITIONER ON JURISDICTION

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**PRELIMINARY STATEMENT**

Petitioner, Bertha Jackson, was the defendant in the Circuit Court of the Tenth Judicial Circuit In and For Polk County, and the Appellant in the Second District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief, the parties will be referred to as they appear before this Court.

The decision of the lower court, Bertha Jackson v. State, 2D05-4095 (March 30, 2007), is attached as an appendix.

Citations in this brief to designate references to the record, followed by the appropriate page number, are as follows:

"R. \_\_\_" - Record of pleadings and orders filed with the clerk of the circuit court. Included here is the sentencing proceeding of July 27, 2005 and the supplemental record on appeal, beginning on R. 74.

"T. \_\_\_" - Transcription of in-court proceedings in the circuit court.

**STATEMENT OF FONT**

This brief is typed using 12 point New Courier font not proportionally spaced.

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**STATEMENT OF THE CASE AND FACTS**

Petitioner sought review in the Second District Court of Appeal arguing that the trial court committed reversible error when the victim testified at a sentencing proceeding without defense counsel present. Petitioner argued this was a critical stage of the proceedings and the *ex parte* hearing violated her Sixth Amendment due process rights.

After the jury returned a verdict of guilty of aggravated battery with a weapon (T. 93-96), the judge adjudicated Ms. Jackson guilty, revoked her bail and ordered a pre-sentence investigation report (T. 93-96).

The prosecutor said that the victim, Ms. Ross, was currently available to testify for sentencing purposes. The judge said he would not make her come back from North Carolina for sentencing. By this time, however, defense counsel had left the courtroom (T. 95). After a short recess, the judge reconvened, but noticed that defense counsel was still absent and his whereabouts unknown. The judge said,

If I didn't think it would be reversible error, I would let the lady tell her side of the story and be gone, but I would be reversed if I did that. (T. 95).

The prosecutor explained that Ms. Ross was not leaving Florida until the next day, but the judge said he had business

elsewhere the next day and added:

She's sitting right here, if I could hear from her. I'm tempted to just do it. Those are the kinds of decisions you make coming out of the seat of your chair. This is basically her opinion. I don't know what he [defense counsel] could do about it. (T. 95).

The judge recessed for lunch and kept Ms. Jackson in the holding cell, saying "I can't let her [Ms. Ross] talk without her lawyer being here. I would like to hear what you have to say, but I can't do it without him. All right. I'll go downstairs and will probably be gone for a half hour or so." (T. 96).

After a lunch recess, the judge returned, but defense counsel still was not present. The judge said under the victim's rights amendment to the Florida Constitution, the victim had a right to speak in court about the impact of criminal behavior on her life and the expenses she incurred.

The judge said he was reluctant to take Ms. Ross's testimony without defense counsel present, but saw no reason to delay her testimony. While he acknowledged that he could not legally impose sentence that day, he saw no impediment to having Ms. Ross testify so she did not need to return another time.

The judge announced on the record that he would take Ms.

Ross's statement that day and added:

I don't believe I could have made that more plain. For reasons still unknown to me, the defense counsel exited the courtroom, the courthouse, and was observed by a member of the local bar supposedly leaving the premises. Calls to his office can't raise him. He was not given permission to leave this courthouse. I'm going to proceed without him.

For the benefit of Ms. Jackson, I'm not imposing sentence today. You will have the right to tell me anything you want to tell me at the date of sentencing. You have the right to bring in any witnesses that you want on your behalf. (T. 97-98).

Ms. Ross came forward and the judge began to question her. After the judge's questioning was nearly completed, defense counsel was contacted by telephone in his office in Winter Haven and was placed on speaker phone. He said that he did not know that the judge intended to take the victim's statement. The judge said he thought he made it clear, and added that he had already heard from Ms. Ross. "You can listen to the rest. I will go further and tell you what I have gotten so far." (T. 105). The judge then told defense counsel what had transpired thus far.

The Petitioner argued that this was a critical stage of the proceedings and that she had a right to counsel. She argued that this was fundamental error even though trial counsel failed to make a contemporaneous objection.

The Second District affirmed the judgment and sentence,

holding that this error affecting a sentencing proceeding should have been preserved for appeal either at trial or in a Rule 3.800 (b) motion. Bertha Jackson v. State, 2D05-4095 (Fla. 2d DCA March 30, 2007) (Appendix).

The Second District certified a conflict with the First District Court of Appeal in Gonzalez v. State, 838 So. 2d 1242 (Fla. 1st DCA 2003), which held that a defendant's lack of representation during resentencing was not properly preserved for appeal but the denial of access to counsel was fundamental error, not harmless error under the Sixth Amendment and not a sentencing error under Rule 3.800.

The Petitioner timely filed a notice to invoke this Court's jurisdiction based on express and direct conflict with an opinion from another district court of appeals.

#### **SUMMARY OF THE ARGUMENT**

The opinion of the Second District Court of Appeal in Jackson v. State, (Fla. 2d DCA March 30, 2007) is in express and direct conflict with the opinion of Gonzalez v. State, 838 So. 2d 1242 (Fla. 1st DCA 2003). The Second District's opinion held that a claim of constitutional error affecting a sentencing proceeding must be preserved for appeal either at the sentencing or by a Rule 3.800 (b) motion. The First District ruled in Gonzalez that lack of representation at



sentencing is not a sentencing error, but a Sixth Amendment due process error and may be raised on direct appeal.

The opinion below mischaracterizes the absence of counsel at a critical stage as a sentencing error, when in fact it is not an error in the sentence imposed. It is a Sixth Amendment due process violation that is of fundamental proportions and should not be subject to the contemporaneous rule. By definition, the absence of counsel precludes the making of a contemporaneous objection when the omission occurs. By the time counsel was present, the testimony had already been taken. This Court should recognize the express and direct conflict, exercise its discretionary jurisdiction and quash the decision below.

#### ARGUMENT I

**THE SECOND DISTRICT'S DECISION IN JACKSON V. STATE, 2D05-4095 (FLA. 2D MARCH 30, 2007), WHICH MAKES ABSENCE OF COUNSEL AT SENTENCING A RULE 3.800 SENTENCING ERROR AND REQUIRES A CONTEMPORANEOUS OBJECTION AT TRIAL, EXPRESSLY AND DIRECTLY CONFLICTS WITH GONZALEZ V. STATE, 838 SO. 2D 1242 (FLA. 1ST DCA 2003), WHICH HOLDS THAT ABSENCE OF COUNSEL IS A SIXTH AMENDMENT DUE PROCESS VIOLATION AND PER SE REVERSIBLE ERROR.**

On appeal to the Second District Court of Appeal, Ms. Jackson presented a case of a Sixth Amendment due process

violation and fundamental error when the trial court took sentencing testimony from the victim of the crime without the defendant's counsel being present.

The judge's conduct was reversible error, and he knew it, yet he proceeded forward anyway. He knew that if he took testimony from the victim without defense counsel's presence, it would be an *ex parte* hearing and reversible error.

This absence of representation at a sentencing hearing is not a sentencing error contemplated under Rule 3.800, but an error in the trial process itself and Ms. Jackson's right to counsel. So said the First District Court of appeal in Gonzalez v. State, 838 So. 2d 1242 (Fla. 1st DCA 2003).

In Gonzalez, the defendant challenged his lack of representation at resentencing. The First District said the issue was not preserved, but that it constituted fundamental error. The court held that the lack of representation was not a sentencing error under rule 3.800 but a due process violation under the Sixth Amendment. The Gonzalez court held that such error was never harmless. The court vacated Gonzalez's sentence and remanded for resentencing.

The Second District Court of Appeals, however, found that going through a sentencing proceeding without counsel's presence must be raised at the time of sentencing or by a

Rule 3.800 (b) motion. Yet, this by definition is impossible to achieve since the testimony of the victim was taken before counsel was even contacted.

The Second District's majority opinion in Jackson held that the sentencing error should have raised the error in a Rule 3.800 (b)(2) motion. One judge, however, while concurring with the majority, disagreed on how this error should have been preserved. Judge Stringer said that Jackson's lack of representation was a due process violation that was subjected to the contemporaneous objection rule and should not have been raised in a Rule 3.800 (b) motion. Thus, the conflict is not only within the district courts, but within the panel of judges themselves.

The majority of the Second District relied on Harley v. State, 924 So. 2d 831, 832 (Fla. 2d DCA 2005), a vindictive sentencing case, to find that since the issue of vindictive sentence was not raised at sentencing or in a 3.800 (b) motion, it could not be considered on appeal. The court compared the vindictive sentence to lack of counsel at a sentencing proceeding. Thus, the defendant was subjected to a greater sentence because of the judge's vindictive behavior.

However, what transpired in Ms. Jackson's case was not a sentencing issue, vindictive sentence or actual sentencing

error. The issue did not involve her sentence exceeding the statutory maximum sentence, habitualization, score sheet errors affecting the length of sentence, imposing erroneous minimum mandatory sentences, differences between the written and oral judgments, improper departure sentences, imposition of costs or any procedural regularities at sentencing. Maddox v. State, 760 So. 2d 89, 101-110 (Fla. 2000).

Rather, it was Ms. Jackson's access to counsel that was at issue. The lack of an attorney to represent Ms. Jackson was a fundamental error of constitutional dimensions. The Sixth Amendment guarantees the right to counsel at critical stages. This sentencing procedure was the start of Ms. Jackson's trial and a critical stage. She was left without counsel to represent her during this critical time. The failure of trial counsel to object when he was eventually contacted should not bar Ms. Jackson from obtaining relief.

A criminal defendant facing incarceration has a right to counsel at every critical state of the proceedings against him. See, Fruetel v. State, 638 So. 2d 966, 971 (Fla. 4th DCA 1994), citing Gideon v. Wainwright, 372 U.S. 335 (1963). The presence of an attorney is essential, because the attorney is the "means through which the rights of the person on trial are secured." United States v. Cronin, 466 U.S. 648, 653 (1984).

To establish a claim of denial of the right to counsel, a defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Green v. Arn, 809 F. 2d 1257 (6th Cir. 1987).

A sentencing proceeding is a critical state in which a defendant is entitled to counsel. Smith v. State, 590 So. 2d 1078 (Fla. 2d DCA 1991)(treating right to counsel at sentencing as a critical stage). See also, Sandoval v. State, 884 So. 2d 214 (Fla. 2d DCA 2004) and Evans v. State, 163 So. 2d 520, 522 (Fla. 2d DCA 1964)(the time for sentencing is a critical stage at which the defendant should be represented by counsel. The very nature of the proceeding at sentencing makes the defendant's counsel at that time necessary if the constitutional requirement is to be met).

The trial judge questioning the victim about her version of events and asking to take a closer look at her injuries was the start of the sentencing proceeding. The fact that the judge notified Ms. Jackson that she would have an opportunity at a later time to comment on sentencing did not discount the fact that Ms. Jackson was present without counsel at her sentencing proceeding, and had no one to represent her interests while the trial court acted as judge and lawyer.

She had no one to object to the judge's questions or his request to take a closer look at the victim's injuries. She had no one to rebut the amount of damages that were not proved beyond the victim's hearsay statements. At no time did Ms. Jackson waive her counsel's presence at the sentencing hearing.

Ms. Jackson was left to the mercy of the judge who obviously was not protecting her interests. When trial counsel was contacted, he was forced to rely on the judge's recitation of the victim's testimony. He had no idea whether that recitation was accurate or not. Ms. Jackson's Sixth Amendment right to counsel was affected here, not her sentence. This was fundamental error that should be allowed to be raised on direct appeal.

Because Gonzalez is in express and direct conflict with the Second District's decision in Jackson, this Court should accept jurisdiction and quash the decision below.

**CONCLUSION**

Based on the above argument and authorities, the Second District's opinion in Jackson is in express and direct conflict with the First District's opinion in Gonzalez. This Court should accept jurisdiction to quash the opinion below.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Jurisdiction has been furnished by United States Mail, first-class postage prepaid to Ron Napolitano, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 on this 4<sup>th</sup> day of May, 2007.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the Brief of Petitioner on  
Jurisdiction satisfies the Fla. R. App. P. 9.100 (1) and  
9.210(a)(2).

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