IN THE SUPREME COURT OF FLORIDA

BERTHA JACKSON,

Petitioner,

v. **Case No. SC07-659**

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by Polk County criminal information 53-204-CF-006534-01XX-XX with the offense of aggravated battery with a deadly weapon/firearm, causing great bodily harm, permanent disability or permanent disfigurement. The offense date was September 7, 2004 (V1/R36). Trial was held on May 19, 2005, before Circuit Judge Michael Raiden. Attorney Glenn Anderson represented Petitioner and Assistant State Attorney Heather Chapman represented the State of Florida (V1/T1-110; 3).

At trial, the State called Officer Jeremy Davis, the Investigating Officer, as a witness. Using photographs, Davis described the victim's injuries:

> This one here was the first injury observed when I came on the scene. **It was the lacerations** [sic] **to the left side of the victim's face, approximately five inches long**. I observed the victim also had **a laceration above the left eye, which is approximately two inches long**. This is **one to the victim's right bicep, approximately two inches long**. The victim also has **two lacerations to the back of her neck, both approximately two inches long**.

(V1/T25).

The victim, Shiauntee Ross, testified that on the date of the incident, she was at her mother's place around 9:00 pm, and her mother asked her to go to the store. As she walked about a block from her mother's house, she noticed Petitioner and two

men in a vehicle; a male driver, Petitioner's boyfriend as the front passenger, and Petitioner seated in the back, behind the driver (V1/T33). Ross heard Petitioner yelling obscenities from the car, and saying "There that bitch right there; I'm going to get that bitch." (V1/T33-34).

After Ross purchased a soda in the store she exited the store and observed the white vehicle pulling in and the occupants jumping out. Once outside, the two men were standing next to Petitioner, at her sides (V1/T36-37). Ross said she could not run because these individuals were blocking her. Ross did not want to run through the men for fear she would be hit by them. Once Petitioner and Ross were physically engaged, the men started to tell Petitioner to keep hitting Ross, and "slam" her to the ground (V1/T38). Ross did not know how the fight finally broke off, but thought that Petitioner had scratched her eye. When Ross took her shirt and reached up to her face she saw a lot of blood on her shirt (V1/T38-39).

After getting away from Petitioner, Ross re-entered the store to get someone to call for help. When she again left the store she saw that Petitioner was still there with the men. Petitioner was looking at Ross with a smile; the guy who was with her and her boyfriend said to Ross, "You're leaking," meaning bleeding, or cut open (V1/T39).

Ross testified she started to walk back toward her mother's house but only made it past the ice cooler at the store, when Petitioner ran up behind her and grabbed her in a choke hold. She felt Petitioner's hands on her face. Ross said at this moment, she just did not want to fight anymore. However, Petitioner's boyfriend also grabbed Ross by the wrist and said, "Look what you did." Apparently, Petitioner, in the process of cutting the victim, had gotten blood all over her boyfriend's white sweat pants. Ross said "Let me go," and kept walking (V1/T40-41).

When Ross returned to her mother's house, she was still in shock. She had blood running down her face, neck and arms. Her family helped her with calling the police, and Ross received medical treatment at the hospital for her injuries later on (V1/T41-42). When asked to describe her injuries, the following colloquy took place:

> Q. ...And what type of injuries did you have?
>
> A. I had lacerations to the face.
>
> Q. Okay. Where else?
>
> A. Above the eye, under my ear, a couple in my -- around my neck, I have a cut in my head, where my ponytail ends back there.
>
> Q. Did you have a cut on your arm, as well?
>
> A. Yes, on my arm too.

> Q. Do you still -- do have a scar from that?
>
> A. Yes.

[Ross was showing her scars to the jury with the court's permission}

> A. On my face. I have stitches on my face right there. Under my ear.
>
> * * * *
>
> A. On my arm, my right eye there, and my neck. And I have a scar here.

(V1/T42-43)

Ross explained that her medical treatment consisted of getting stitches to her eye, the left side of her face, under her ear, and on her arm (V1/T43). These wounds had to have been inflicted with a sharp object (V1/T43-44). The prosecutor asked Ross to clarify, as the attack was done in two separate phases, how the different injuries were inflicted:

> A. Well, I think the first altercation in front of the store, I got over my eye. That's when she swung at me first. And on my neck when we was wrapped up [sic].
>
> And I think when she ran behind me, again she cut my face right there.
>
> Q. Okay. You mean the second fight when she ran behind you over here.
>
> A. Yes. Yes.

> I think -- she was locked up with me like that. She kept hitting me with her hand while she was holding me with the other. When she ran up behind me and dragged, they had to put stitches from here, my ear, and the rest on the bottom.

(V1/T43-45)

Regarding any other damage from the attacks other than the scars, the victim responded:

> A. Yes. I went and applied for the Army and they told me that my eyesight in the one I got cut, it's going bad. Eventually, it will go bad.
>
> Q. Did you have perfect vision before this occurred?
>
> A. Yes.
>
> Q. Is your other eye --
>
> A. Yes, it's good, 20/20.

(V1/T45)

The victim identified Petitioner in court and affirmed that the attacks took place in Polk County (V1/T45-46).

Petitioner did not testify. The defense presented no witnesses (V1/T57).

The jury retired to deliberate at 11:03 a.m. (V1/T91). It returned with a verdict at 12:25 p.m. The jury found Petitioner guilty of the charge of aggravated battery, where she used a deadly weapon (V1/T92-93; 39).

The judge adjudicated the Petitioner guilty, revoked bail, remanded her to the custody of the Sheriff pending sentencing, and dismissed the jury. The judge announced sentencing would be in four weeks (V1/T94).

The prosecutor at this time advised the court that since Ms. Ross was from North Carolina, the victim might want to say something for sentencing purposes rather than wait four weeks necessitating additional travel expenses and impacting her personal schedule. Apparently, when this occurred, the victim was not in the courtroom because the judge asked the State to bring her into the courtroom, and announced: "Everybody stay [sic] put until we get her the girl back up here (V1/T94-95). The record on appeal reflects, inexplicably, that Mr. Anderson, defense counsel, left the courtroom (V1/95).

After a brief recess, the court reconvened, however, only the judge, the prosecutor, the victim, and Petitioner were present (V1/T95). Although the trial judge made inquiries, defense counsel's whereabouts were unknown (V1/T95). The following colloquy took place concerning the judge's desire to take a victim impact statement from Ms. Ross in consideration of her being from out of state:

> THE COURT: 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.

MS. CHIPMAN: We do have Ms. Ross here until tomorrow afternoon, and then she's flying out.

THE COURT: I've got business elsewhere tomorrow. I have other trials. She's sitting right here, if I could hear from her. I'm tempted to do just that. There are some kinds of decisions you make coming out of the seat of your chair. This is basically her opinion. I don't know what he could do about it.

THE CLERK: Judge, could I have the law office page him?

MS. CHIPMAN: He probably has a cell phone on him. I do have a law office phone number. 299-7348.

THE COURT: Is it possible to reconvene at any time this afternoon? I'll go eat. Come back and keep the defendant in the holding cell. I can't have her 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 half an hour or so.

(There was a recess for lunch and the parties returned at 1:15 p.m. defense counsel, Mr. Anderson was still not present.)

THE COURT: Have a seat in the jury box. **For the record, under the victim's right amendment of the Florida Constitution, the victim of a crime has the right to speak to the court regarding the impact of criminal behavior upon their lives, the expenses that they might have incurred. Basically, they are permitted to give the court their opinion of what sentence may be imposed in this case**.

The court is reluctant to take this testimony without the presence of the defendant's attorney. However, I'm going to put the following facts in the record. The jury in this case returned a verdict of guilty at approximately 12:30 p.m.. **At which time the State Attorney requested the court leave to take the victim's statement today, insofar as the victim resides in North Carolina and had to be flown here at public expense and, apparently, is a student, and I assume to some disruption to her routine, as well.**

The court saw no purpose served in delaying this testimony, although the defendant had the right to a presentence investigation. I legally cannot impose sentence today. I see absolutely no impediment to taking this girl's statement today, so she doesn't have to come back.

I advised the parties that when advised that Ms. Ross was downstairs, I said go down there and get her and I'll take her statement. 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 going to impose sentence today. You will have the right to tell me everything 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.

(V1/T95-98)

The judge then inquired about the nature of Victim Ross's relationship with the Petitioner (V1/T98-101). The judge asked about the victim's family status, medical bills, health insurance, and out-of-pocket expenses, and whether there were collections effort directed at the victim as a result of these medical bills (V1/T102-03). The judge asked Ross if she had time loss from work or any other losses related to the injuries, and she responded in the negative (V1/T103). The judge also wanted to see the facial scars that the victim has suffered and she clarified for him:

> THE COURT:...I'm looking at a little nick over one eye?
>
> A. No, it's right here.
>
> Q. Across the eyelid?
>
> A. My face.
>
> Q. Down the face.
>
> A. My ear.
>
> Q. I see one on your back.
>
> A. I got one like here, and one on my arm.

(V1/T101-102)

When asked if there was any other financial impact, Ms. Ross stated:

> A. Well, yes, sir. Well not really. I tried to go out for the military, and my eyesight is going bad in this eye, my left

> eye. And I'm figuring it went bad in the six months since I got cut. Maybe in the next two years I might be blind in this eye.
>
> Q. Anybody told you that you are going blind?
>
> A. I went to the military and got all the testing and everything and this eye is going bad. If I close it -- I can barely see if I close my right eye.
>
> Q. Are you satisfied that that's from the fight or possibly some disease or other cause?
>
> A. No. I was perfectly healthy. I had 20/20 vision prior to this incident.
>
> Q. In both eyes?
>
> A. Yes, sir.
>
> Q. The other eye is okay?
>
> A. Yes, sir.

(V1/T103-104)

The prosecutor responded to the judge's inquiry, regarding the total medical costs, by indicating that she had the information in another file and that it was at least a couple of thousand dollars. The prosecutor's guess was: "Yes, sir, about five or six thousand dollars maybe." (V1/T102-03).

The trial judge asked victim Ross about her schooling and she advised she was a part-time student in a business school and will graduate in about two and a half years (V1/T104). She also explained about her effort to join the military:

> Q. The military told you they wouldn't take you?
>
> A. No, they wouldn't. They just told me I just need to really get some glasses or something before I go back there. I need to get my eyes checked.
>
> Q. They might still accept you?
>
> A. Yes.

(V1/T104)

At this time, the court clerk then announced to the judge that the defense counsel had been located at his Winter Haven law office and was available over the phone. Counsel then was connected to the judge's via telephone in the courtroom:

> THE CLERK: Mr. Anderson is on the speaker phone.
>
> THE COURT: Mr. Anderson?
>
> Mr. ANDERSON: Yes.
>
> THE COURT: **Did you not understand that I was going to take the victim's statement so that she wouldn't have to come back from North Carolina**?
>
> MR. Anderson: **No, I'm sorry. I certainly didn't**.
>
> THE COURT: **I thought I made it clear. I've taken part of her statement. You can listen to the rest. I will go further and tell you what I have gotten so far**.
>
> MR. Anderson: **Okay**.
>
> THE COURT: She estimated five to six thousand dollars in medical bills. The

> State is offering to substantiate that at some point. She had Medicaid at the time. It did not pay any of the bills. I looked at the scars. She's losing sight in one eye, which she believes is attributable to the injury. She found that out thought the military. We are just establishing that she may still be able to enter the military. I'm getting the picture that she would like to do that.
>
> Q. (By the Court) So, as far as you know, it did not prevent you from going into the military?
>
> A. No. Just in a couple of years, sooner or later, I'll lose probably the rest of it.
>
> THE COURT: **I had also asked her for some history between her and the defendant. I think it's reasonably consistent with what she testified to at trial**.
>
> MR. ANDERSON: **We'll accept that at trial. The other things she testified, I believe that was more in the nature of uncertainty if she's going to lose her eyesight**.
>
> THE COURT: Well, she seems pretty sure about it right now. We won't know until it happens.

(V1/T104-106)

The prosecutor advised the court that Petitioner scored to out to 34.9 months (V1/T107). The court explained to Ms. Ross that the minimum would be about three years and asked her what she felt the Petitioner should get.

The victim told the judge that she did not think three years was sufficient as punishment. She explained that

Petitioner had time to think about her actions. Ms. Ross further indicated her confidence was shattered and that she had to walk with her head down. Even the victim's young daughter asked why she has a "booboo" on her face. According to Ms. Ross' testimony, these scars are permanent and she will have them for the rest of her life. (V1/T107).

The judge told Ms. Ross that the goals of sentencing are deterrence, punishment and rehabilitation but that he was not a big believer in rehabilitation. **Ms. Ross replied to the judge, when asked how much time she thought Petitioner should serve, that she did not believe Petitioner deserved 30 years or even 15 years**. Ross explained, however, that since she has to wear the scars for the rest of her life and she is only twenty years old, three years prison term just did not seem enough (V1/T109). The judge asked if the victim was requesting restitution and she said, "No." (V1/T108).

At this time, the court thanked Mr. Anderson for his participation and concluded the session (V1/T109).

The remainder of the sentencing hearing took place on July 27, 2005. Petitioner was again represented by Glenn Anderson; the State by Assistant State Attorney Kelly McCabe (Supp.1/83).

At the hearing, the prosecutor argued that given the victim's claim of permanent disfigurement and permanent vision

impairment, the bottom of the guidelines, 34.9 months would not be appropriate. Rather, a sentence around 5 years imprisonment followed by 2 years probation to pay restitution of $1,300.00, would be appropriate (Supp.1/85).

Defense counsel argued that the PSI report reflected that the Petitioner has a 5 year-old child and a mother with a tumor and that while the Petitioner is "kind of a text [book] bad girl", a sentence toward the [lower] end of guidelines would be appropriate (Supp.1/85).

Petitioner expressed to the court that she needed to be home to take care of her child. She stated she knew she was wrong for fighting with the victim and she was sorry (Supp.1/86)

Defense counsel indicated, among other arguments he made to the judge for leniency:

> . . . After all, **my understanding is that the victim was opposed to a draconian sentence** and I really think that a 5 years is kind of a draconian sentence without minimizing the significance or importance of what happened.

(Supp.1/86)

The judge noted three factors about the case: (1) the attack was "utterly unprovoked, totally without any legal or moral justification, and until this last moment, the defendant showed not even the pretense of remorse about it," (2) Petitioner's action was the intentional facial disfigurement of

another, and (3) the victim has suffered permanent damage as to her sight in the right eye. **The judge indicated that his reaction was to impose the maximum of 30 years** (Supp.1/86-87). **The judge expressed he had taken into account the defense counsel's argument, the state's recommendation, and the victim's statements which were not vindictive** (Supp.1/87).

T**he trial judge then sentenced Petitioner to 5 years imprisonment followed by 7 years probation** with probation conditions of no possession of weapons, no contact with the victim, and to seek and maintain gainful employment, and a curfew (Supp.1/87-88). The trial court rendered its written judgment and sentencing documents (V1/R42-43; 62-66). The Notice of Appeal was timely filed (V1/R57).

While the appeal was pending, **Petitioner, through appellate counsel, filed a rule 3.800(b)(2) motion to correct sentencing error** alleging that she was orally sentenced to a second-degree felony while the written documents reflect a first degree felony even though the jury found her guilty of aggravated battery with a weapon not a firearm (Supp.1/78-97). The State filed a response, acknowledging that Petitioner was found guilty of aggravated battery with a weapon/not a firearm, but that the court intended, did, and legally could determine that the offense in question was a first degree felony. In the

alternative, the State argued that even if it was a second degree felony, the sentence is still a legal sentence because the total sentence does not exceed 15 years, which is the maximum term for a second degree felony (Supp.1/101-102).

The trial court entered an order finding that Petitioner was convicted of a second degree felony of aggravated battery with a deadly weapon, and added that the sentence of 5 years imprisonment followed by 7 years probation was within the statutory maximum for a second degree felony, and left the terms undisturbed. The court instructed the clerk to correct the judgment and sentencing documents to reflect a conviction for aggravated battery with a deadly weapon as a second degree felony (Supp.1/R106-107).

SUMMARY OF THE ARGUMENT

The State agrees with the Second District Court of Appeal's holding in *Jackson v. State*, 952 So.2d 613 (Fla. 2nd DCA 2007), in which the court held: "because Jackson did not preserve the issue for appeal as required by *Florida Rules of Appellate Procedure* 9.140(e)." In reaching it's holding in *Jackson*, the court relied on this Court's reasoning in *Brannon v. State*, 850 So.2d 452 (Fla. 2003); "the failure to preserve a fundamental sentencing error by motion under rule 3.800(b) or by objection during the sentencing hearing forecloses [an appellant] from raising the error on direct appeal."

The Second District Court of Appeal certified conflict with *Gonzalez v. State*, 838 So.2d 1242, 1243 (Fla. 1st DCA), stating:

> Based on *Harley's* treatment of the due process claim as a claim of sentencing error, we disagree with the reasoning of *Gonzalez*. We thus conclude that Jackson's claim that her lack of representation at sentencing violates due process is a claim of sentencing error and therefore should have been preserved for appeal as required by *rule 9.140(e)*. We certify pursuant to *article V, section 3(b)(4) of the Florida Constitution* and *Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi)* that this decision is in direct conflict with the First District's decision in *Gonzalez*.

952 So.2d at 615. In certifying conflict, however, the Second District noted that *Gonzalez* was issued prior to *Brannon*, and its reliance on the general holding of *Harvey v. State*, 786

So.2d 28 (Fla. 1st DCA 2001), may affect its overall status as good law.

The Petitioner's position is untenable under the facts presented below and the well-established law. Simply because a defendant raises an allegation of Sixth Amendment error under a theory of due process, that alone cannot serve to constitute "fundamental proportions." Nor, will such an unsupported claim exempt that defendant from compliance with the contemporaneous objection rule, the mandate of the Criminal Appeal Reform Act, or the Supreme Court's adoption and amendments of Rule 3.800.

ARGUMENT

ISSUE I

THE CLAIMED ERROR IS SUBJECT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.140(e), THE LEGISLATIVE MANDATE OF THE CRIMINAL APPEAL REFORM ACT, AND THE SUPREME COURT'S ADOPTION AND AMENDMENTS OF RULE 3.800, AND IS FORECLOSED FROM CONSIDERATION FOR FAILURE TO COMPLY WITH THE REQUIREMENTS THEREOF. (RESTATED)

Respondent respectfully disagrees with Petitioner's argument that a due process error resulted from the trial court's taking statements from the victim, for purpose of sentencing; while her counsel was temporarily absent from the courtroom for part of this process. Such error, urges Petitioner, is not one contemplated under rule 3.800, but "an error in the trial process itself," and warrants a reversal (Petitioner' Initial Brief, p.23).

The Second District Court of Appeal also disagreed with Petitioner's legal argument, holding that Petitioner was foreclosed from raising the claim on direct appeal, because she failed to: 1) preserve it; or 2) timely bring it to trial court's attention *via* a motion under rule 3.800(b). *Jackson v. State*, 952 So.2d 613, 614 (Fla. 2nd DCA 2007), citing to *Brannon v. State*, 850 So.2d 452, 456 (Fla. 2003). By its holding, the Second District deemed the claimed error to be the type of sentencing error contemplated by the Criminal Appeal Reform Act,

this Court's rule 3.800, its Amendments I and II, and decisional law interpreting the same.

In reaching its decision to certify conflict with *Gonzalez*, the Second District acknowledged that the *Gonzalez* opinion was issued prior to this Court's ruling in *Brannon*; *supra* and the First District's ruling in *Harvey v. State*, 786 So.2d 28 (Fla. 1st DCA 2001), establishing that unpreserved sentencing errors will not be entertained on appeal after the adoption of *rule 3.800(b)*. See also *Harvey v. State*, 848 So.2d 1060 (Fla. 2003).

The State argues, first and foremost, that based on the cautionary foot note of the Second District, about the status of *Gonzalez*, post-*Brannon* and *Harvey*, and the developing case law, there is no longer any conflict between the holdings of *Jackson* and *Gonzalez*.

Subsequent to *Jackson*, the Second District went on to decide *Nickerson v. State*, 927 So.2d 114, 115-116 (Fla. 2nd DCA 2006), and *Daly v. State*, 940 So.2d 532 (Fla. 2nd DCA 2006). These two cases involved denial of counsel for resentencing purposes. In *Nickerson,* the court reviewed the trial court's decision on a motion to correct illegal sentence pursuant to rule 3.800(a), and in *Daly*, the court reviewed the trial court's decision of a motion for postconviction relief. Both cases were reviewed on the same basis; that the trial court failed to provide counsel to correct a judicial, rather than clerical

error. In both cases, the Second District remanded for re-sentencing by the trial court, directing the trial court to accord defendants either the appointment of counsel, or the opportunity to retain private counsel.

In *Nickerson*, the Second District cited to *Gonzalez* for support of its holding that: "Once a trial court determines that a defendant's sentence is illegal and the defendant is entitled to re-sentencing, the full panoply of due process consideration attaches." *Nickerson*, 927 So.2d at 116. In *Daly v. State*, the Second District again reiterated that: "A criminal defendant has the right to assistance of counsel at a resentencing hearing when the original sentencing error was a judicial error rather than a clerical error." 940 So.2d at 532. Therefore, the Second District Court agrees with the First District Court that the right to counsel and the full panoply of due process consideration applies in sentencing, and re-sentencing, ***provided*** that the appellant complies with Florida Rule of Appellate Procedure 9.140(e), in either preserving the error, or motioning the trial court to correct the error below.

The Florida Supreme Court spent considerable time and energy in amending Rule 3.800 to comport with the legislative intent under the Criminal Appeal Reform Act of 1996, especially these primary provisions:

> (3) An appeal may not be taken from a

> judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.
>
> (4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.

§ 924.051(3)-(4), Fla. Stat. (Supp.1996).

The adoption of Florida Rule of Criminal Procedure 3.800(b) was to accomplish two purposes: 1) to provide defendants with a mechanism to correct sentencing errors in the trial court at the earliest opportunity, especially when the error resulted from a written judgment and sentence that was entered after the oral pronouncement of sentence, and 2) to give defendants a means to preserve these errors for appellate review. The underlying policy announced by this Court is to "relieve the workload of appellate courts" and to "place correction of alleged errors in the hands of the judicial officer [the trial judge] best able to investigate and to correct any error." *Maddox v. State*, 708 So.2d 617, 621 (Fla. 5th DCA 1998)(*en banc*), *review granted*, 718 So.2d 169 (Fla. 1998). This Court has expressed plainly that:

> [T]he amended rule is intended to provide one mechanism whereby ***all sentencing errors*** may be preserved for appellate review. The comments to the proposed rule defines ***a "sentencing error" as including "harmful errors in orders entered as a result of the sentencing process***. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself. ***The amendment to rule 3.800(a) will make it clear that a rule 3.800(b) motion can be used to correct any type of sentencing error, whether we had formerly called that error erroneous, unlawful, or illegal.***

Amendment II to Florida Rules of Criminal Procedure, 761 So.2d 1015, 1019 (Fla. 1999). [Emphasis added].

This Court explained extensively in *Maddox*, the objectives of its adoption and amendments to the rule, as well as the mechanics and scope of coverage provided. There, the Court examined both classes of sentencing errors; unpreserved and fundamental. The conclusions reached by this Court were:

> . . . for those defendants who did not have the benefit of our recently promulgated amendment to rule 3.800(b) in Amendments II, during this window period the appellate courts should continue to correct unpreserved sentencing errors that constitute fundamental error. To hold otherwise would neither advance judicial efficiency nor further the interests of justice. *However, for those defendants who had available the procedural mechanism of our recently amended rule 3.800(b), we anticipate that the interests of justice*

> *should be served by the ability of appellate counsel to first raise the issue in the trial court prior to filing the first appellate brief*.

Id. at 95. [Emphasis added].

In *Maddox*, this Court was asked to determine whether unpreserved sentencing error can be corrected on direct appeal. "[I]n an effort to be predictive as well as descriptive," the court categorized those cases pending before it to come up with "the types of sentencing errors that constitute patent, serious sentencing errors that should be corrected during this window period as fundamental errors." As to fundamental error occurring in a sentencing context, the Court defined it as one "where the interests of justice present a compelling demand for its application," and that it "must be basic to the judicial decision under review":

> The first requirement for a sentencing error to be correctable on appeal continues to be that it is patent. In other words, the error must be apparent from the record.
>
> More important, however, is the second requirement: in order to be considered fundamental, an error must be serious. In determining the seriousness of an error, the inquiry must focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence.

Maddox; *supra* at 96-97, 99-100; internal citations omitted. [Emphasis added].

If there was any doubt about the broad scope of coverage of the *Maddox* decision, it was dispelled when this Court spoke again in *Brannon v. State*, 850 So.2d 452 (Fla. 2003). In *Brannon*, the defendant who was sentenced as a habitual offender, took a direct appeal and filed his initial brief after the effective date of the enactment of Rule 3.800 (b)(2), but before *Maddox*, challenging the legality of his sentence. The First District declined review holding that the issue was unpreserved. This Court affirmed:

> In this case, Brannon did not avail himself of the opportunity under rule 3.800(b)(2) to raise the unpreserved sentencing errors in the trial court before presenting them in his direct appeal. He filed the initial brief in the appeal from his judgment and sentence on February 10, 2001, more than a year after the window for raising unpreserved sentencing errors on appeal closed on November 12, 1999, with the adoption of rule 3.800(b)(2). See *Amendments* II, 761 So.2d at 1020 ("[T]he amendments ... shall become effective immediately and shall also apply to cases pending on appeal."); Maddox, 760 So.2d at 110 (defining the window period for raising serious, unpreserved, fundamental sentencing errors on appeal as "between the enactment of the *Criminal Appeal Reform Act* and this Court's recent opinion in *Amendments II* "). Thus, the intent of our adoption of rule 3.800(b)(2) and the effect of *Maddox* is to preclude litigants such as Brannon from raising these claims of sentencing error for

> the first time on appeal. Accordingly, we hold that for defendants whose initial briefs were filed after the effective date of rule 3.800(b)(2), the failure to preserve a fundamental sentencing error by motion under rule 3.800(b) or by objection during the sentencing hearing forecloses them from raising the error on direct appeal.

Brannon; *supra* at 456.

In *Harvey v. State*, 786 So.2d 28 (Fla. 1st DCA 2001), the First District held the defendant's single subject challenge of the statute under which he was sentenced must be brought in the trial court prior to raising it on appeal. *Harvey* was decided after *Maddox*, bringing the First District into accord with the Second District's holding that even a constitutional challenge of a sentencing statute, is subject to the procedural mechanism set forth in the rules of appellate procedure and of criminal procedure.

The Supreme Court reviewed the certified question posed by the First District's holding in *Harvey* and held that: "Due to the interest of justice, judicial efficiency, and the unique circumstances of this case, we permit Harvey to raise his *Heggs* error as a fundamental error for the first time on appeal." *Harvey*, 848 So.2d at 1064. Therefore, *Harvey* is unique to its facts and does not serve as controlling authority on the subject matter now before this Honorable Court for review. It is for this reason that the *Gonzalez* decision, in relying on the First District's ruling in *Harvey*, becomes questionable as good law.

Numerous district court opinions have now been issued in conformance with the Supreme Court's holding on the scope of rule 3.800. See: *Reese v. State*, 763 So.2d 537 (Fla. 4th DCA 2000) (A written judgment which does not conform to a trial court's oral pronouncement is subject to Fla. R. Crim. P. 3.800(b)(2)); *Capre v. State*, 773 So.2d 92 (Fla. 5th DCA 2000)(sentencing errors, including vindictive sentencing issues, arising after the effective date of amended rule 3.800(b), albeit fundamental, are barred if not raised at trial or in post-trial proceedings pursuant to rule 3.800); *Harley v. State*, 924 So.2d 831, 832 (Fla. 2d DCA 2005) (a claim of vindictive sentencing -- a due process claim -- that was not raised at sentencing or in a rule 3.800(b) motion could not be considered on appeal); *Allende v. State*, 882 So.2d 472 (Fla. 5th DCA 2004) (vindictive sentencing must also be timely raised to be preserved for appellate review); *Summerlin v. State*, 901 So.2d 997 (Fla. 2d DCA 2005) (a defendant's claim that he or she was improperly sentenced by a successor judge without a showing of necessity is also a sentencing error that must be preserved by timely objection at sentencing or by a rule 3.800(b) motion); *Hakkenberg v. State*, 889 So.2d 935 (Fla. 2d DCA 2004).

This list, together with the broad categories of sentencing errors enumerated in *Maddox*, reinforce the Supreme Court's observation that it is difficult, if not impossible, to come up

with an exhaustive list of sentencing errors correctable under rule 3.800(b).

Significantly, this Court in *Williams v. State,* 957 So.2d 600, 603 (Fla. 2007) set forth final and absolute clarification on this point, stating that even patent, serious, previously "fundamental" sentencing errors may not be corrected on direct appeal absent preservation and presentation to the trial court in accord with *Brannon.*

In *Williams*, this Court held a claim based on a discrepancy between oral and written sentence resulting in a sentence that is more severe than the sentence pronounced in court, even though a potential violation of the constitutional protection against double jeopardy, is subject to the preservation requirements of rule 3.800(a).

Previous attempts to permit direct review of unpreserved errors that were subject to the requirements of rule 3.800(a) have been readily overturned by this Court. In *Cote v. State*, 841 So.2d 488 (Fla. 2nd DCA 2003), the Second District reviewed, without proper preservation, a claim that appeared obvious and unchallenged on the face of the record. However, this Court in *State v. Cote*, 913 So.2d 544 (Fla. 2005), quashed the decision of the Second District, and referring to *Brannon* for the requirement of preservation.

In this case, it is undisputed that Petitioner chose: 1) not to object to the proceeding below when the opportunity to do so was available to her, and 2) not to include the issue in her 3.800(b)(2) motion in the trial court. She has shown no reasons why she should be exempted from the terms of the rule, its amendments, *Maddox* and *Brannon,* and their progeny. Her claim is therefore barred.

Should this Honorable Court disagree with the foregoing legal arguments, and find that preservation is not required to raise a fundamental sentencing error without compliance with rule 3.800(a), then, alternatively, Respondent argues that the alleged error below cannot be considered fundamental on the facts presented.

The decision subject to review is the trial judge's action in allowing the victim to give a partial victim impact statement when Petitioner's trial counsel had temporarily absented himself from the courtroom. This action by the trial court does not compel the fundamental error application in order to do justice. This action by the trial judge does not raise itself to the level of severity required to evoke a status of fundamental error. In reviewing the context of the alleged error, it is readily discernable that the nature of the error was not fundamental, in that, only a partial statement was taken, it conformed to the trial testimony that had been presented

unchallenged, and; most significantly, it had no effect upon the term of the sentence imposed. This is clearly demonstrated by the victim's own statements that she did not want a more severe sentence imposed and the trial court's acquiescence to her consideration on that point. Originally the trial judge was inclined to impose a maximum sentence of 30 years. However, after hearing from the victim, he imposed only 5 years, followed by 7 years probation.

Should this Honorable Court be swayed by Petitioner's assertion that the claimed error can be reviewed as a due process violation under the Sixth Amendment right, in its broadest sense, this does not support the relief sought. Petitioner expressly relied on *Gonzalez* for support of her position. As discussed in the foregoing, the holding in *Gonzalez* has been seriously eroded. Regardless of semantics, the Supreme Court's holding is quite clear, sentencing errors, fundamental or otherwise, are subject to preservation or must first be presented to the trial court for review under a rule 3.800 motion. The reason for such a holding, based on the legislative intent of Criminal Appeal Reform Act, and the historical development of the rule, is quite obvious; the trial court is the tribunal in which these errors are best addressed and corrected if necessary. Even if the court of appeal finds the error to be patent its role has never been to calculate

scoresheets, determine whether an affidavit had been authenticated to serve as a factual basis for sentencing, or assuring that the written order of judgment and sentence comply with the terms orally pronounced. *State v. Cote*, 913 So.2d 544 (Fla. 2005).

The phenomenon being observed here is reflective of a trend in law misapplying the fundamental error analysis. Petitioner, like many others, has been seduced by the misapplication of the concept of the fundamental error analysis. Petitioner believes that by calling the error “fundamental” and tying it to a “due process” violation, it would be elevated to a higher status than a “fundamental sentencing error.” Judge Altenbernd described the phenomenon best when he wrote:

> "Fundamental error" is even more difficult to explain than "illegal sentence." It is probable that "fundamental error" is used to describe more than one concept. In its narrowest functional definition, "fundamental error" describes an error that can be remedied on direct appeal, even though the appellant made no contemporaneous objection in the trial court and, thus, the trial judge had no opportunity to correct the error. "Generally, fundamental errors are those of constitutional dimension. But not all errors of constitutional dimension are fundamental."
>
> *On direct appeal, there is a healthy tendency to occasionally find a constitutional "dimension" in some errors and to declare the errors "fundamental," even though they may not rise to the level*

> *of an actual deprivation of the appellant's constitutional rights. Particularly in the case of procedural errors and trial conduct*, the case law reflects this tendency. The mere fact that an error, especially a procedural error, is fundamental for purposes of relief on direct appeal is no guaranty that the error must be corrected on postconviction motion when it was neither preserved in the trial court nor argued on direct appeal.

Judge v. State, 596 So.2d 77, 79 at n. 3 (Fla. 2nd DCA 1991). Internal citations omitted. [Emphasis added].

In *Sampson v. State*, 903 So.2d 1055 (Fla. 2nd DCA 2005), the trial court found Sampson to be in violation of community control following a hearing, and sentenced him to a term of imprisonment. The affidavit that served as a basis of his violation, was admitted at the hearing, but could not be located subsequently. Sampson challenged the revocation order, based on the lost affidavit, claiming fundamental error. The Second District rejected that the error was fundamental, relying on *Reed v. State*, 837 So.2d 366 (Fla. 2002), for the definition of fundamental error. Judge Altenbernd, in his concurring opinion, articulated that it is the Petitioner's burden to establish the requisite harm for the relief sought:

> In a case involving a claim of unpreserved error, however, where a reversal would depend upon the existence of fundamental error, *Reed* essentially reverses the order of this decision-making process. The appellate judges first consider whether the

> alleged error is harmful. Unless the appellant establishes that the alleged error is harmful, the judges are not required to take the step of evaluating the alleged error to determine whether it actually was error under an appropriate standard of review.
>
> This shift in the decision-making process is most significant in criminal cases. In a case of preserved error, we must reverse unless the State establishes that the error was harmless beyond a reasonable doubt. *DiGuilio*, 491 So. 2d 1129. As this case demonstrates, ***in a case of unpreserved error, it is the appellant/defendant who must establish that the error was harmful***.
>
> We conclude that some attorneys have focused too narrowly on the sentence in *Reed* that states: "By its very nature, fundamental error has to be considered harmful." *Reed,* 837 So. 2d at 369. Read outside its context, this sentence appears to suggest that fundamental error is a form of per se error that must be regarded or deemed harmful without a review of the record. Read in context, we are convinced that the supreme court announced exactly the opposite rule. ***The "nature" of fundamental error can only be evaluated from the record.*** The record must demonstrate the harm before the error can be considered fundamental.
>
> I write this concurrence, in part, to acknowledge that if this court is mis-interpreting *Reed,* then it seems to me that our decision today expressly and directly conflicts with *Reed* because ***we are not treating fundamental error as inherently harmful but are placing a burden of persuasion upon the appellant to establish that the alleged error is harmful before we declare the error to be fundamental***.

Sampson, 903 So.2d at 1058-1059. [Emphasis added].

Petitioner's claimed error was not preserved, and she has not met her burden to show any harm resulting from the trial court's action. Petitioner's case is classic under Judge Altenbernd's description of a procedural error that: ". . . may not rise to the level of an actual deprivation of the appellant's constitutional rights" despite its nature of being a constitutional due process right. *Judge*, 596 So.2d at 79 n.3. Since Petitioner has shown no harm, a declaration of fundamental error by the court of appeal was not made and no further analysis is needed.

It is noteworthy that Petitioner does not request re-sentencing as her relief. She is requesting a reversal of the judgment and sentence. This is not supported by the record. Any error, due to the facts below, is limited to the sentencing process. The trial itself had concluded. Because the alleged error occurred after the verdict had been rendered, any relief sought must be limited to the nature of the error.

Respondent further argues an additional basis for finding Petitioner's claim without merit has been expressed by Judge Stringer, in his concurring opinion in *Jackson*. Judge Stringer opined that the error in Petitioner's case is, in point of fact, a due process error that was subject to the rule of contemporaneous objection:

> . . . rule 3.800(b) (2) "was not intended to circumvent rules requiring contemporaneous objections or enforcing principles of waiver." Instead, it was intended to address the problems that arise from sentencing errors that "are not immediately apparent at sentencing. I do not believe that by adopting rule 3.800(b)(2), the supreme court intended to give a criminal defendant the right to stand mute in the face of obvious procedural irregularities at a sentencing hearing secured in the knowledge that if he or she is dissatisfied with the resulting sentence, he or she could resurrect objections to those procedural deficiencies in a subsequent 3.800(b)(2) motion."

Jackson; *supra* at 615-616. Under Judge Stringer's analysis, Petitioner could have interjected an objection contemporaneous with defense counsel's joining the court in the session *via* telephone. Counsel could have asked the court to suspend questioning and wait for him, or to set the hearing at another time. The Petitioner could have requested that another judge act as the sentencing judge pursuant to rule 3.700(c)(1), depending on the perceived harm or prejudice that the situation might have caused.

Waiver would also apply in light of counsel's expressed acceptance that the victim's statements made to the court in his absence were the same testimony rendered at trial, as well as the fact that counsel actually used the victim's statements in support of his argument for leniency (Supp.1/86). See generally

Griffin v. State, 946 So.2d 610, 613-14 (Fla. 2nd DCA 2007) (failure to object to authenticity of evidentiary items; to-wit, a letter prepared by DOC that was presented at sentencing hearing, waived same).

If the trial judge's conduct was in fact erroneous, the trial court would have been the best forum to correct the error when it was most efficient to do so. *Castor v. State*, 365 So.2d 701 (Fla. 1978) (the requirement of a contemporaneous objection places the trial judge on notice that error may have been committed and provides him the opportunity to correct it at an early stage of the proceedings); *F.B. v. State*, 852 So.2d 226, 228 (Fla. 2003) ("The sole exception to the contemporaneous objection rule applies where the error is fundamental.")

The record clearly reflects that the victim did not seek retribution in the form of a harsher sentence; rather, she simply wanted to be assured that the punishment would be proportional to the crime committed and the injuries she suffered. The record further reflects that the trial judge tempered his original intention to impose the maximum penalty under the law; 30 years. This temperance was based, in large part, upon the compassion of the victim toward the Petitioner:

> Let me make one observation to you. I'm not going to twist your arm, and frankly, I'm not disagreeing with anything you say, frankly. But one of the things, one of the goals of sentencing – there are several

> goals of sentencing. One is for the general protection of the public. One is deterrence, not just to the defendant herself but to other people as well. When words get out that this guy over here got twenty years for doing something, that would make you less inclined to do it. Punishment, rehabilitation. And when I say rehabilitation, I'm not a big believer in it. I'm not a big believer in thinking people bend their ways when they get as old as the defendant.

(V1/108-109) Later, at sentencing, the judge expressed:

> My first reaction is to give this defendant 30 years in the State Prison. Mr. Anderson's correct about one thing. You have to step back, take a breath, look at it dispassionately. … I've taken into account the remarks made by the victim at the end of the trial, who was certainly not in a vindictive frame of mind.

(Supp.1/87) These facts proved conclusively that no prejudice occurred and the claimed error, even though relating to due process, was unpreserved and therefore inappropriate for a direct review.

Similarly, Petitioner's reliance on *Dorsett v. State*, 873 So.2d 424 (Fla. 3rd DCA 2004) as one which is akin to her case, is misplaced. *Dorsett* sought to attack the conviction; not the incidental sentence. The *Dorsett* court correctly observed that the erroneous conviction was not a result of something that occurred during the sentencing process, as well as the fact that the amendments of rule 3.800(b) were not intended to alter the

substantive law of the State concerning the constitutional prohibition against double jeopardy. *Amendment to Florida Rules of Criminal Procedure*, 761 So.2d 1015 (Fla. 1999).

Petitioner has articulated no harm or prejudice. The victim's statements were basically a reiteration of the same facts that she testified to during the trial, to which Petitioner's trial counsel acquiesced, including her prior history with the Petitioner, and the court's observation of the scars caused by the Petitioner's attack which had also been shown and explained to the jury without objection or comment during the trial; the effect of the attack on the eyesight of her left eye. Only questions concerning estimated hospital bills were not presented to the jury and the trial court did not award restitution based upon the estimates given at that time.

Additionally, defense counsel called the court during the questioning process and was informed of the questioning that had gone on in his absence and did not object to the court questioning the victim in his absence. The only inquiry made by counsel, of record, during this session was his comment on the victim's claim of reduced eyesight. It is important to remember that a second, more full-blown sentencing hearing was held on a separate date, allowing the defense the opportunity to fully prepare any defenses or bases for mitigation.

As to the restitution award, as stated earlier, the trial court did not rely upon the estimates made during the victim's statements to the trial court right after trial, but required substantiation by the state at the subsequent hearing. Under these facts, the trial judge did not overreach in his capacity as sentencing judge and absolutely no prejudice was suffered by the Petitioner.

The judge announced, and the State similarly argued below, that *Florida Statute* 921.143 (2004) authorized the receipt by the trial court, of a victim impact statement. In pertinent part § 921.143 reads:

> Appearance of victim, next of kin, or law enforcement, correctional, or correctional probation officer to make statement at sentencing hearing; submission of written statement.
>
> (1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted on any felony....the sentencing court shall permit the victim of the crime for which the defendant is being sentenced...to:
>
> (a) Appear before the sentencing court for the purpose of making a statement under oath for the record, and
>
> (b) Submit a statement written statement under oath to the office of the State Attorney, which statement shall be filed with the sentencing court.

> (2) The state attorney or any assistant state attorney shall advise all the victims ...that statements, whether oral or written, shall relate to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced, and any matter relevant to an appropriate disposition and sentence.

A victim is permitted under the statute to submit a statement which may be considered by the court; that statement is not subject to cross-examination. Such a statement "shall relate to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced, and any matter relevant to an appropriate disposition and sentence." The facts of this case reflect that although counsel had voluntarily, temporarily absented himself during the taking of the victim impact statement, Petitioner was not deprived of her constitutional right to counsel.

As to Petitioner's last argument, it appears that there is a clear misapprehension of the law under *Farretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This claim is irrelevant because Petitioner never requested self-representation during the brief period that she was without

counsel. Unless the defendant requests self-representation, a *Farretta* hearing is unnecessary. Fla. R. Crim. P. 3.111(d), *Farretta*; *supra*, *Wilson v. State,* 947 So.2d 1225 (Fla. 4th DCA 2007).

In summary, the outstanding flaw of Petitioner's claim is the lack of harm resulting from the judge's action. While counsel's brief absence from the sentencing proceeding was irregular; it must be deemed invited error which resulted in no harm. Subsequently, defense counsel actually relied on the victim's representations to the judge to argue leniency; the end result, the sentence itself was more lenient and was neither excessive, nor vindictive. Petitioner's expectation for a *per se* reversal is unrealistic, given the law and particularly the evolution of the fundamental error analysis. This Court should find that no conflict exists between *Jackson* and *Gonzalez.* Alternatively, Petitioner's conviction and sentence should be affirmed in all respects.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests this Court to deny the relief requested by the Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to Pamela H. Izakowitz, Assistant Public Defender, Public Defender's Office, PO Box 9000-Drawer PD, Bartow, FL 33831, this 20th day of August, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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